



Ethics and Anti-Corruption Commission v Chepkole & 4 others (Environment & Land Case 242 of 2018) [2023] KEELC 19926 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19926 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 242 OF 2018
FM NJOROGE, J
SEPTEMBER 22, 2023**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

SALEH CHEPKOLE 1ST DEFENDANT

TITUS KIPKEMBOI 2ND DEFENDANT

PEMBENI LIMITED 3RD DEFENDANT

LIBERTY ASSURANCE COMPANY LIMITED (UNDER RECEIVERSHIP) 4TH DEFENDANT

WILSON GACANJA 5TH DEFENDANT

JUDGMENT

1. By the Plaint filed on 29/06/2018, amended on 13/11/2018 and further amended on 20/05/2019, the plaintiff averred that the government of Kenya set aside land parcel No. Nakuru Municipality Block 5 for purposes of establishment of residential houses for civil servants; that land parcel No. Nakuru Municipality Block 5/221 along Maasai Road had been planned and reserved for government residential quarters popularly known as St Xavier Estate; that on 5/08/1994 the suit parcel of land was illegally alienated to the 1st and 2nd defendants; that the 5th defendant issued a letter of allotment on 5/08/1994 despite the fact that the suit property was reserved for government housing; that the said letter of offer had conditions that included acceptance and payment of various costs by way of bankers cheque within thirty days; that on 17/11/1998, the 1st and 2nd defendants entered into an agreement with Beatrice Kosgei and Jim Choge (Pembeni Limited) to take over their purported interest in the said letter of allotment; that on 14/11/2003, the 3rd defendant entered into an agreement with the 4th defendant to take over its purported interest in land parcel No. Nakuru Municipality Block 5/221; that on 20/11/1998, the 5th defendant caused to be issued a lease over the suit property



measuring 1.86 Ha while knowing that it comprised of twenty government houses numbers NKU/HOU/MG/4,5,6,7,8,39A,39B,40A,40B,41A,41B,42A,42B,43A,43B,44A,44B,48,49A and 49B that were built in the year 1964; that the suit property was registered in favor of Pembeni Limited on 20/11/1998 pursuant to the letter of allotment for land parcel No. Nakuru Municipality Block 5/221 measuring 1.86 Hectares despite the fact that the suit property was reserved for government housing; that the suit property was registered in the name of the 3rd defendant four days after the lease was issued and registered in the 1st and 2nd defendants favour; that at the time the suit property was registered in the names of the 1st and 2nd defendants and subsequently the 3rd and 4th defendants, the houses on the suit property were occupied by government officers who are still in occupation to date; that the suit property was not available for alienation and the allocation and the issuance of the certificate of lease was fraudulent, illegal, null and void; that on 24/01/2007 the Ministry of Housing purported to provide for validation of illegally acquired government houses through a circular that was invalidated vide another circular dated 28/07/2008 issued by the said ministry; that during the said exercise, the 4th defendant did not make any deposits for validation of the illegally acquired government property; that by a valuation dated 29/06/2018, the property was valued at Kshs.300 million and the plaintiff prayed for judgement against the defendants as follows:

- a. A declaration that the allocation and issuance of lease over land parcel number Nakuru Municipality Block 5/221 by the 5th Defendant and subsequent transfers to the 3rd and 4th defendants is null and void ab initio and incapable of conferring any estate, interest or right.
 - b. An order that the registration of lease over land parcel number Nakuru Municipality Block 5/221 and all entries subsequent thereto be and is hereby cancelled.
 - c. An order that the registration of the 1st defendant as lessee of land parcel number Nakuru Municipality Block 5/221 be and is hereby cancelled.
 - d. A permanent injunction to restrain the 4th defendant by itself, his agents, servants, assigns or any other person whatsoever from charging, transferring, leasing, wasting, entering, developing, sub-dividing, occupying and/or dealing in any manner dealing with land parcel number Nakuru Municipality Block 5/221.
 - e. Costs of this suit.
2. The 1st and 2nd defendants did not enter appearance while the 3rd defendant entered appearance but did not participate in the hearing of the suit. The 4th defendant is under liquidation and the official receiver was appointed as the liquidator.
 3. The 5th defendant filed his statement of defence on 19/09/2013. He averred that he is a former Commissioner of Lands and that during his tenure which was between the years 1989-1999, he discharged his duties in accordance with Section 8 of the Government Land Act (repealed). He also averred that the present proceedings have been commenced twenty years after he ceased to hold the said office and are therefore frivolous, vexatious and in contravention of Article 25, 27, 47 and 50 of the Constitution of Kenya. He further averred that Nakuru Municipality Block 5 was unalienated government land and denied that it was ever alienated for establishment of government houses. It was his averment that Nakuru Municipality Block 5 /221 was government land available for alienation under the provisions of the Government Land Act. He denied the other contents of the plaint and averred that the alienation of the suit property was as a result of several stages and processes undertaken, processed and approved by different cadres of officers in the then Ministry of Lands who are not parties to this suit and that his sole role was to issue titles based on their recommendations. The 5th defendant then sought that the suit against him be dismissed with costs.



4. The 4th defendant filed its statement of defence and counterclaim on 24/10/2018 but it was struck out by the court on 16/09/2021 as the 4th defendant was under liquidation at the time of filing of the suit and the official receiver had been appointed its provisional liquidator on 21/01/2005. The Official receiver did not file any pleadings.

Plaintiff's Evidence

5. Beatrice Osicho testified as PW1. It was her evidence that she is the Deputy Official Receiver, stationed at Business Registration Services Office; that the office of the official receiver was to supervise the insolvency of the 4th defendant; that Liberty Assurance was the owner of the suit property and it is under liquidation; that the estate of the late Jim Choge also claimed to be the owner of the suit property; that the late Jim Choge was a director of Liberty Assurance; that Jim Choge's estate claimed that he owned the land; that they discovered that even though Jim Choge was a director of the 4th defendant, he had no shareholdings; that his estate does not therefore have a claim over the suit property; that there was a receiving order on the estate of Jim Choge while there was a winding up order against the 4th defendant which are two separate entities; that their duty as the liquidator was to preserve Liberty assets pending winding up of the 4th defendant. The title to the suit land that was issued on 22/3/2016 was produced as PExh.1, a copy of a court order issued on 21/01/2005 in Milimani Commercial Cause Winding up No. 29/2004 was produced as PExh.2, a search showing the directors of the 4th defendant was produced as PExh.3, a report of the Statutory Manager to help preserve the assets which was at page 49 of the plaintiff's bundle was produced as PExh.4. She testified that page 65 of the said report indicated that the suit property was owned by the 4th defendant.
6. It was her evidence that the suit property was registered in the name of the 4th defendant but was acknowledged to belong to the Ministry of Housing. She adopted her witness statement dated 5/06/2018 as part of her evidence-in-chief.
7. Upon cross-examination, she confirmed that the official receiver was an interim liquidator of the 4th defendant who was the holder of the suit property; that the certificate of lease was issued by the Land Registrar Nakuru; that the certificate of lease does not indicate allocation by the Commissioner of Lands; that they did not encounter the name of the 5th defendant while they were doing investigations and that she agreed that the title should be cancelled.
8. Henry Ondieki testified as PW2. It was his evidence that he was the County Director of Housing in Nakuru and that he was in charge of Management of Government housing, keeping an inventory, safeguarding rent collection, maintenance and leasing of government offices to officers who have no offices and leasing of government housing; that in 1951, the government built houses on land parcel No. Nakuru Municipality Block 5/221; that there were twenty houses on the suit properties that were MG 4, 5, 6, 7, 8, 39A, 39B, 40A, 40B, 41A, 41B, 42A, 42B, 43A, 43B, 44A, 44B, 49A, 49B and MG 48; that the Directorate of Housing have an inventory of the said houses; that civil servants from various government departments occupy the said houses at a rate of Kshs.4,500/= per month; that the houses are of Asian type, made of stone, cement and tile roof; that the houses are 2664 square feet with a 552 square foot servant quarters each and he then produced the inventory of the houses as PExh.5; that the government officers in occupation of the said houses pay rent through a check off system. He produced a bundle of their pay slips as PExh.6. He stated that there is a copy of an allocation letter/certificate which is presented to the ministry which is used to deduct rent from the officer's salary; that the deductions are visible in the pay slip. He pointed out a house allocation letter issued to one Thomas Ondora Omboti of the Office of the President for House No. MG5 dated 12/8/2013; it bore his personal number and the effective date of his occupation of the house was 01/07/2013. The allocation



letter is signed by the Director of Housing. The next document he pointed out is a pay slip for Thomas Ondora showing the deduction of Kshs.4,500 being house rent for February 2018. He stated that he had the Building Register with the Specifications and the house number that indicated the building materials, the type of house and the year they were constructed for example the house known as G4 on page I of the inventory was constructed in 1953; that the walls are made of stone, cement floor and the roof of tiles. It is installed with water, sanitation and electricity. He reiterated that the size is given as 2664 square feet for the main house and 552 square feet for the servants' quarter which is the size of each of the twenty houses on the suit property; that a copy of building register was produced as PExh.7; that the Ministry of Housing has not sold the said houses and there are civil servants currently in occupation; that the parcel of land is 4.6Ha; that the said property is near St Xavier Primary School; that the government should continue providing services on the said parcel of land and that he objects to any private entity claiming ownership of the said property.

9. Upon cross-examination, he confirmed that he was aware of the process of allocation of Government Property and that involved several departments including Ministry of Lands, the Chairman of the Committee that sits at the County Commissioner's office, Chair of Board of Survey and Director of Physical Planning; that page 78 of the bundle filed by plaintiff on 13/7/2018 is a letter of allotment signed by P. Amiani; that at page 80 is a certificate of lease of the suit property signed by the District Land Registrar; that the Ministry of Housing should have consented first before the land was alienated; that the 5th defendant is a former Commissioner of Lands; that his office was a department at the then Ministry of Lands and that he was not aware of any charges brought against him in respect of the alienation of the suit property.
10. Upon re-examination, he stated that there was no evidence that a board of survey was constituted with respect to the alienation of the suit property.
11. Jacinta Chemengich Bungei testified as PW3. She testified that she was an investigation officer of the plaintiff and adopted her witness statement at page 118 of the plaintiff's bundle filed on 13/7/2018 as part of her evidence; that the plaintiff received a report that the suit property was irregularly acquired; that the plaintiff then investigated the report and wrote to the Ministry of Lands; that they discovered that the suit property is government land with twenty government houses on it; that the suit property has always been occupied by civil servants; that the administrators of the estate of Jim Choge were claiming the suit property through a certificate of lease that was fraudulently acquired; that their claim prompted the commencement of the present proceedings; that according to the white card Saleh Chepkole and Titus Kipkemboi were first registered as lessees of the suit property before it was transferred to Liberty Assurance Limited; that there is a letter of allotment dated 5/8/1994 naming Saleh and Titus as allottees; that the white card is at page 48 of the bundle filed on 13/11/2018; that there is a certificate of lease of the suit property at page 80 of the same bundle which shows that it is registered in the name of Liberty Assurance Co. Ltd; that there has been no change of ownership of the suit property to date; that the 4th defendant is under receivership; PW3 also testified that Pembeni Limited was also investigated; she produced a letter dated 1/11/2018 from Business Registration Service as PExh.8; she stated that the plaintiff wrote the letter Ref. EACC/6/4/5 dated 13/10/2017 to the Director of Surveys requesting for documents for the land parcel in question; that they obtained a Registry Index Map for Block 5 and which includes parcel 221; that the RIM has markings in respect of the land which indicate that it is un-surveyed as there was no amendment on the Amendment Box; she then produced the letter and the Registry Index Map as PExh.9(a) and PExh.9(b); she averred that the Ministry of Lands & Physical Planning wrote to the plaintiff the letter dated 2/11/2017 which indicated that there was no evidence of any Development Plan prepared and approved by the Director of Physical Planning to inform Survey and establishment of the land parcel and the said letter was produced as PExh.10; that they found that there was an attempt to sell government land



vide the letter dated 24/1/2007 (Non-strategic government owned houses) (PEXh.11) addressed to various government offices; that the terms and conditions of sale were given at page 3 paragraph (F) thereof; that only civil servants qualified for the sale; that the said Chepkole and Titus Kipkemboi were not in occupation and so the sale to them was not done to completion; that later on the Ministry of Housing through the press (Daily Nation) of 30/7/2008 (PEXh.12) notified the public that the proposed sale advertised in the said Circular dated 24/1/2007 and 2/3/2007 had been cancelled. The letter of allotment dated 5/8/1994 in favour of Saleh Chepkole and Titus Kipkemboi was produced as PEXh.13; that on 16/11/1998 a lease signed by Wilson Gachanja the 5th defendant was issued to Saleh Chepkole and Titus Kipkemboi; that a certificate of lease (PEXh.14) was then issued on 14/2/2003 to Liberty Assurance Co. Ltd; that the suit property is still registered in the name of the 4th defendant; that there are twenty houses on the suit property which are occupied by civil servants; that the suit property is 1.68 Ha which is about 4.6 acres; that it is adjacent to St. Xaviers Primary School; that the land was preserved by the Ministry of Housing for houses for civil servants and was irregularly allocated.

12. Upon cross-examination, she confirmed that the lease produced as PEXh.14 was signed by the 5th defendant purportedly by order of the President; she did not know of any criminal case against the 5th defendant for abuse of office regarding the suit property. Upon re-examination, she stated that the Land Registrar is involved at the tail end of the processing of the lease. The Plaintiff's case was then marked as closed.
13. The 5th defendant opted not to call any witness and also closed his case.

Submissions

14. The plaintiff filed its submissions on 11/04/2023 while the 5th defendant filed his submissions on 2/05/2023.
15. The plaintiff in its submissions gave a summary of its claim and submitted that there are some issues that it raised that were not disputed by the defendants. The issues were that the suit property was reserved for the construction of houses to be used by civil servants; that the government had constructed twenty, two-bed roomed houses on the suit property; that civil servants are in occupation of the said houses; that the government or the Department of Housing has never sold the houses on the suit property to the defendants.
16. The plaintiff submitted that since the suit property was alienated for the construction of government houses, it was not available for alienation to the 1st and 2nd defendants and the subsequent transfer to the 3rd and 4th defendants. The plaintiff relied on the case of Nairobi Misc. Civil Application No. 158 of 2005; John Peter Mureithi & another vs The Republic [2006] eKLR and submitted that the issuance of the lease to the 1st and 2nd defendants and the subsequent transfer to the 3rd and 4th defendants violated the doctrine of public interest and was therefore null and void.
17. The plaintiff then submitted on the process of alienation of land as follows: that a letter of allotment is first issued then a letter of acceptance of the offer, receipts for payment of the allotment charges are given, the Director of Surveys confirms that a survey has been done and a survey number issued which becomes the parcel number. The plaintiff further submitted that the Director of Surveys issued an amended registry index map (RIM) to include the new land parcel before a lease was prepared and executed by the Commissioner of Lands. The lease is thereafter forwarded to the relevant registry which results in the certificate of lease. The plaintiff further submitted that as per the evidence of PW2, from the registry index map for Nakuru Block 5, plot No. 221 was identifiable but it was indicated as unsurveyed. This would therefore mean that the letter of allotment was obtained without ascertaining the survey records and so the lease was issued without following the due process.



18. The plaintiff submitted that it had the locus to bring the present suit and relied on the cases of *Njau vs City Council of Nairobi* KLR [1983], *Kenya Anti-Corruption Commission vs Asis Limited & Others* Miscellaneous Application No. 386 of 2003 among other cases and Section 7(1)(h) of the *Anti-corruption and Economic Crimes Act*, 2003, Section 2 of the *Anti-corruption and Economic Crimes Act*, 2003.
19. On whether the 4th defendant's title was absolute and indefeasible, the plaintiff reiterated that since the suit property has twenty government houses that are occupied by government employees, it was not available for alienation. The plaintiff also submits that the 5th defendant did not have the authority to issue a lease to the 1st and 2nd defendants and so his actions were ultra vires, null and void. The plaintiff relied on Section 3 of the Government Lands Act and submitted that if the suit property was available for alienation, then the due process ought to have been followed. The plaintiff also relied on Section 9 of the Government Lands Act and submitted that the Commissioner of Lands is empowered to dispose of any town plots for public purposes and in the prescribed manner. The plaintiff further submitted that the 5th defendant did not alienate the suit property as provided for under the law and the same was therefore a nullity. The plaintiff relied on among other cases the cases of *The Town Council of Ol'Kalou vs Ng'ang'a General Hardware*, Nairobi Civil Appeal No. 269 of 1977, *African Line Co. Ltd vs The Attorney General*, Mombasa HCC No. 276 of 2003 [2007] eKLR, *Champakalal Ramn Shah vs The Attorney General & another* Mombasa HCC No. 145 of 1997 and *Shiva Mombasa Limited vs Kenya Revenue Authority & another* Mombasa HCC No. 171 of 2004 eKLR.
20. The plaintiff also submitted that since the 5th defendant's actions in issuing the certificate of lease was ultra vires, he cannot be said to have acted in his official capacity as the Commissioner of Lands. The plaintiff further submitted that since he acted contrary to his statutory duties, he is personally liable. The plaintiff relied on the cases of *Rhyl Urban Amusement Limited (1959)* ALL ER, *Kenya Anti-Corruption Commission vs Bhangra Limited & another* Civil Application No. 185 of 2009 [eKLR], *Pashito Holdings & another vs Paul Nderitu Ndungu and others* Civil Appeal No. 138 of 1997 among other cases in support of its submissions.
21. The plaintiff also submitted on the tort of misfeasance in office and relied on the cases of *Reg vs Deputy Governor of Parkhurst Prison & another* [1992] AC58, *Three Rivers District Council & other vs Governor & Company of the Bank of England* No. 3 [2000] 3ALL ER 1 among other cases; that since the 5th defendant was acting beyond his scope as the Commissioner of Lands, the liability falls on his shoulders and not the government; that the doctrine of estoppel is not applicable in this case since the actions of the 5th defendant were a nullity and so the certificate of title issued to the 1st and 2nd defendants and subsequently the 3rd and 4th defendants was null and void. The plaintiff relied on the case of *African Line Co Ltd vs The Attorney General* Mombasa HCC No. 276 of 2003 among other cases in support of its arguments.
22. Finally, the plaintiff also submitted that its suit was not time barred since it seeks to recover government land and so Section 7 of the Limitations of Actions Act does not apply in this case. The plaintiff concluded its submissions by seeking that its claim be allowed as prayed.
23. The 5th defendant in his submissions gave a summary of the pleadings, a summary of the plaintiff's evidence and identified four issues for determination; whether the plaintiff discharged its burden of proof against the 5th defendant, whether the present suit is discriminative and unconstitutional against the 5th defendant, whether the 5th defendant should be held liable for the alleged improper allocation and whether the plaintiff is entitled to the costs of this suit.



24. On the first issue, the 5th defendant submitted that the plaintiff failed to substantiate the particulars of fraud and illegalities against him as it merely alleged that he irregularly issued the letter of allotment; that the letter of allotment dated 5/08/1994 was signed by one P. Amiani for the Commissioner of Lands and yet the plaintiff did not sue her; that the Certificate of Lease was signed by the Land Registrar and yet he was also not sued by the plaintiff herein; that he issued the grant upon confirmation of other officers on the ground that the land was available for alienation and that there is no evidence that he acted fraudulently. The 5th defendant relied on Sections 107 and 108 of the [Evidence Act](#), the cases of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR and EACC vs Alexander Kipngetich Sitienei & another ELC 53B of 2021 in support of his arguments.
25. On the second issue, the 5th defendant submitted that the suit against him was an abuse of the court process and reiterated that the process of alienation of land is as a result of several stages with different officers before he could issue a certificate of lease. He relied on the case of Joshua Okungu and another vs the Chief Magistrate's Court ACC Nairobi and another [2014] eKLR in support of his arguments.
26. With regard to the third issue, the 5th defendant submitted that he issued the grant with instructions from the President and so the proper party the plaintiff ought to have sued was the Attorney General. He relied on Section 8 of the Government [Land Act](#) in support of his argument.
27. The Plaintiff concluded his submissions by seeking that the plaintiff's suit be dismissed with costs to him.

Analysis and determination

28. After considering the pleadings, the evidence and the submissions, the following issues arise for determination:
 - a. Whether land parcel No. Nakuru Municipality Block 5/221 was unlawfully alienated.
 - b. Who should bear costs of the suit.
- a. Whether land parcel No. Nakuru Municipality Block 5/221 was unlawfully alienated.
29. The plaintiff's case is that land parcel No. Nakuru Municipality Block 5/221 was set aside for government housing. It was also the plaintiff's case that the 5th defendant fraudulently issued an allotment letter to the 1st and 2nd defendants who in turn transferred it to the 3rd and 4th defendants. The plaintiff argues that the proper procedure was not followed in the alienation of the suit property and so it seeks that the registration of a lease over the suit property be cancelled and a permanent injunction be issued stopping the 4th defendant from dealing with the land in any manner.
30. In support of its case, the plaintiff produced the following documents; the Certificate of Lease for land parcel No. Nakuru Municipality Block 5/221 issued to the 4th defendant, Liberty Assurance Company Limited on 22/3/2016. An order issued by the High Court in Winding up cause No. 29 of 2004 in the matter of Liberty Assurance that appointed the official receiver as liquidator of the 4th defendant on 21/01/2005. A search done at the Business Registration Service on 1/11/2018 was produced that indicated that Pembeni Limited did not appear in their database and that the 4th defendant, Liberty Assurance Company Limited was under Statutory Management and its directors included Pembeni Limited that held 40000 ordinary shares and Jim Choge who did not hold any shares. A copy of the Statutory Manager's Report was produced that was compiled by Titus O. Osero and presented to the Commissioner of Insurance that recommended the immediate liquidation of the 4th defendant.



31. An inventory of the houses on the suit property was produced which showed that there are twenty government houses that are occupied by civil servants from various government departments. A bundle that included allocation certificates and pay slips of various civil servants said to be in occupation of the said houses was also produced. A copy of the building register sheet was produced for the houses alleged to be on the suit property. A letter written by the plaintiff dated 13/10/2017 addressed to the Director of Surveys was produced which requested for survey maps and computation maps for various parcels of land that included the suit property.
32. The letter dated 2/11/2017 written by Augustine K. Masinde the Director of Physical Planning was produced and it stated as follows:
- “We have no evidence of any development plan which may have been prepared and approved by this office to inform survey and establishment of the land parcels contained in Nakuru Municipality Block 5 which include plots 144,147, 147, 149, 150 and 221”
33. A copy of the Registry Index Map for Nakuru Municipality Block 5 was produced. A letter dated 24/01/2007 written by the Ministry of Housing that was titled Sale of non-strategic government owned houses was produced together with a notice issued on 30/07/2008 in The Standard newspaper which indicated that the earlier notice of sale of the government houses had been cancelled. During hearing, PW3, Jacinta Bungei indicated that the notice cancelling the sale of non-strategic government houses was issued in the Daily Nation. That assertion must have been in error, for I have noted that the copy was issued in the Standard newspaper. A copy of the lease issued to Saleh Chepkole and Titus Kipkemboi for land parcel No. Nakuru Municipality Block 5/221 dated 16/11/1998 was produced. It had been signed by Wilson Gacanja in the presence of an unnamed Land Registrar. The letter of allotment issued to the 1st and 2nd defendants dated 5/08/1994 and signed by P. Amiani (Mrs) for the Commissioner of Lands was produced.
34. The Official Receiver gave evidence in support of the plaintiff’s case through one of his officers. The 5th defendant’s case is that he issued the certificate of lease upon receiving orders from the president and following recommendations by various government officers who were not sued by the plaintiff herein. The 5th defendant argues that the suit property was unalienated government land and that the process of allocation to the 1st and 2nd defendant and eventually the 3rd and 4th defendants was procedural.
35. As indicated before, the plaintiff’s case is that the suit property was government land that was set aside for the construction of government houses. The plaintiff led evidence that indicated that there are twenty government houses on the suit property that are occupied by civil servants who pay rent through the check off system on their pay slips. As evidence of unlawful allocation of the suit property, the plaintiff produced the Registry Index Map which showed that the suit property was unsurveyed and indicated that it was not able to get any Part Development Plan or survey plan for the suit property which are essential documents for the preparation of the lease.
36. The court in the case of Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR held as follows:
- “
- “130. It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any unalienated Government land could



be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Ltd Vs The Hon. AG, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”

132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed.” (Emphasis Mine)

37. Unlike the plaintiff which produced evidence in support of its allegations, the 5th defendant merely claimed that the suit property was available for alienation without producing any evidence to that effect. It is my view that in the absence of a part development plan and owing to the indication that the suit property is unsurveyed, the plaintiff has demonstrated that the suit property was illegally alienated and so the issuance of the lease in favour of the 1st and 2nd defendants was unlawful. Also, the 5th defendant had no power to allocate for a private purpose land which had been alienated and had government buildings reserved for the public purpose of housing public servants.
38. The next issue for determination is whether the 5th defendant should be held personally liable for the said illegal alienation. The plaintiff alleged that the 5th defendant illegally issued the 1st and 2nd defendants with a letter of allotment while knowing that the suit property was government land. The plaintiff argued that since the said alienation was illegal, the 5th defendant should be held personally liable. In response the 5th defendant argued that he was acting on the instructions of the President and upon the confirmation by various officers on the ground that indicated that the land was available for alienation. It was further the argument of the 5th defendant that he did not sign the letter of allotment and so he could not be personally held liable.
39. The letter of allotment indicates that it was issued on 5/08/1994 to Sale Chepkole and Titus Kipkemboi and was signed by P. Amiani (Mrs) for the Commissioner of Lands. The only document that was signed by the 5th defendant was the Lease issued to the 1st and 2nd defendant.
40. Even though the 5th defendant was sued in his personal capacity, no specific relief has been sought against him. It is clear from the record that the 5th defendant only signed the Lease in his capacity as the Commissioner of Lands. It is my view that even though the plaintiff established that the suit property was illegally alienated to the 1st and 2nd defendants, it failed to call any evidence to prove that the 5th defendant should be held personally liable for the same.
41. In conclusion, the plaintiff's suit succeeds and I hereby issue the following final orders:
- a. A declaration is hereby issued that the allocation and issuance of a lease over land parcel number Nakuru Municipality Block 5/221 on 16/11/1998 by the 5th defendant to Saleh Chepkole and Titus Kipkemboi and the subsequent transfers to the Pembeni Limited and Liberty Assurance Company Limited is null and void;**



b. The registration of lease over land parcel number Nakuru Municipality Block 5/221 in favour of Saleh Chepkole and Titus Kipkemboi and all entries subsequent thereto are hereby cancelled;

c. A permanent injunction is hereby issued restraining the 4th defendant by itself, its agents, servants, assigns or any other person whatsoever from charging, transferring, leasing, wasting, entering, developing, subdividing, occupying and/or dealing in any manner with land parcel No. Nakuru Municipality Block 5/221.

d. The land parcel known as Nakuru Municipality Block 5/221 shall be registered in the name of the Permanent Secretary to the Treasury to hold in trust on behalf of the Ministry of Housing and Urban Development.

e. The costs of the present suit shall be borne by the defendants.

Dated, signed and delivered at Nakuru via electronic mail on this 22nd day of September 2023.

A photograph of a handwritten signature in blue ink on a light-colored background. The signature is cursive and appears to read 'Mwangi Njoroge'.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

NKRELC 242/18-JGMT/DF-29.6.18/FH-28.4.22/LH-8.5.23/DJ-22.9.23 Page 4 of 4

