



**Kenya Anti-Corruption Commission v Bisengi (Environment & Land
Case 48 of 2009) [2022] KEELC 3140 (KLR) (31 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 3140 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 48 OF 2009**

JM ONYANGO, J

MAY 31, 2022

BETWEEN

KENYA ANTI-CORUPTION COMMISSION PLAINTIFF

AND

HARON BISENGI DEFENDANT

JUDGMENT

1. By a Plaint dated March 3, 2009 the Plaintiff filed suit against the Defendant seeking the following orders:
 - a. A declaration that the transfer of the Certificate of Lease registered and issued on July 24, 2002 in favor of the Defendant over the parcel of land described as Kisii Block 3/456 (hereinafter referred to as the suit property) was issued *ultra vires* the statutes and fraudulently and is thus illegal, null and void *ab initio*;
 - b. An order directed to the Land Registrar, Kisii County to rectify the register by cancellation of the entries relating to the transfer of lease and Certificate of Lease registered and issued respectively on July 24, 2002 in favor of the Defendant over the suit property;
 - c. An order for the vacant possession of the suit property;
 - d. An order of permanent injunction restraining the Defendant whether by himself, servants or agents from alienating, transferring charging, leasing, entering, taking possession, or in the manner howsoever described from dealing with the suit property other than by way of surrender to the county Council of Gusii;
 - e. Costs of and incidental to this suit together with interest.



2. In his Complaint, the Plaintiff averred that by virtue of the provisions of the *Constitution*, the *Trust Land Act* and Gazette Notice No 1937 of 31/5/1966, 215.85 acres of land within Kisii town was set apart as Trust Land and vested in the County Council of Gusii (hereinafter referred to as the Council).
3. On February 6, 1995, the Council was issued with a Certificate of Lease in respect of parcel number Kisii Municipality/Block 3/332 measuring approximately 5.868 hectares (14.4 acres) which was set apart for purposes of establishing a Community Development Centre as per the Part Department Plan No KSI/37/85/10.
4. Sometime between 1998 and 2000, the Commissioner of Lands without reference to the Council approved and caused to be effected subdivision and change of user of land parcel number Kisii Municipality/Block3/332 into 47 different parcels numbered Kisii Municipality/Block3/420-467.
5. On June 4, 2002, the Council was registered as the proprietor of one of the subdivisions Kisii Municipality/Block3/456 measuring 0.045 Hectares (hereinafter referred to as the suit property). The suit property was subsequently transferred to the Defendant and he was issued with a Certificate of Lease on July 24, 2002.
6. It is the Plaintiff's case that the subdivision, change of user of Kisii Municipality Block3/332 and the transfer of the suit property to the Defendant was carried out fraudulently with the object of improperly alienating public land and is therefore invalid. The said transfer is therefore null and void and conferred no estate, interest or right in or over the suit property to the Defendant.
7. Despite being served with the Complaint and Summons to enter appearance by way of substituted service, the Defendant neither entered appearance nor filed a Defence.
8. The matter was fixed for hearing by way of Formal Proof between July 22, February 2, 2022 and the Plaintiff's witnesses testified and closed their case.

Plaintiff's Evidence

9. At the hearing of the Plaintiff's case, the Plaintiff called three witnesses to testify on its behalf.
10. Mr Wenslaus Wekesa Wanyama, who currently works with the Ministry of Lands and Physical Planning in Nairobi as a Principal Physical Planner and was formally stationed in Kisii testified as PW1. He adopted his witness statement dated January 24, 2017 as his evidence in this case. He testified that the suit property was part of the public land reserved for a Community Centre under the then County Council of Gusii. He referred the court to paragraph 2 of his witness statement where he has explained the procedure for allocation of public land. The said procedure is as follows:
 - i. That public land can only be allocated to individuals upon the Town Planning Committee sitting and coming up with a resolution proposing allocation to individuals;
 - ii. Minutes are then forwarded to the Physical Planning Office to prepare a Part Development Plan;
 - iii. After the Preparation of the PDP is completed, the Physical Planner circulates it among the relevant departments and stakeholders
 - iv. The Part Development Plan is advertised in the Kenya Gazette and two local dailies with a nationwide circulation inviting members of the public to forward their comments or objections to the Physical Planning Office;



- v. The notice also invites those who are interested to examine or inspect the PDP at the relevant office. The notice runs for 60 days;
 - vi. Upon lapse of the notice period, the Physical Planning office forwards copies of the PDP, copies of the Kenya Gazette Notice and Advertisements in the dailies to the Director, Physical Planning;
 - vii. The Director of Physical Planning can either certify the PDP or return it with comments to the District Physical Planner;
 - viii. If the Director certifies the PDP, he sends it to the Minister of Lands for approval;
 - ix. After approval by the Minister, one copy of the PDP is retained at the Physical Planning headquarters and another copy is sent to the Commissioner of Lands for issuance of the Letters of Allotment.
 - x. The Director then writes to the District Physical Planning Office informing him that the PDP has been approved and an approval number has been issued.
 - xi. Upon receipt of the letter, the Physical Planner charts the Approval number in the original PDP.
11. He told the court that the Kisii Physical Planning Officer prepared the Part Development Plan for the Community Development Centre and this is what the Commissioner of Lands used to issue a letter of allotment to Gusii County Council. He stated that once the land is reserved for public use the same cannot be allotted for private use without a change of user or another Part Development Plan being prepared. He produced PDP No KSI/37/85/10 as Plaintiff's exhibit 1.
 12. Mr Dedan Ochieng' Okwama who introduced himself as an Investigator testified as PW2 and adopted his witness statement dated June 17, 2014 as his evidence and produced the documents in the Plaintiff's Lists of Documents dated June 7, 2016 as the Plaintiff's exhibits. In his testimony Mr Okwama testified that in the course of his investigations, he together with his colleagues discovered that the suit property was reserved for public use and specifically for a Community Development Centre. He stated that they established that on the suit property there existed a Nursery School, Community Hall, Home Craft Training Centre and Staff Offices. He contended that the allocation of the suit property to the Defendant was not proper as the same was not available for private use.
 13. He further testified that the issuance of the lease certificate to the Defendant was not proper as there was no Council resolution to that effect and that the change of user was authorized without a Part Development Plan. He reiterated that once a property is reserved for public use, it is no longer available for private use unless the procedure laid down in the law is followed and that in this particular case the said procedure was not followed.
 14. Mr James Cheruiyot who is Surveyor with the Ministry of Lands and Physical Planning based in Uasin Gishu County and who previously worked in Kisii County between 2005 and 2017 testified as PW3. He adopted his witness statement dated January 24, 2017 as his evidence in this case. He told the court that he was conversant with the case because he worked in Kisii County as a Surveyor between 2005 and 2017. He stated that during his investigations he established that there was a Community Development Centre on land parcel no Kisii Municipality/Block 3/332 which has a community hall, nursery school and staff houses.
 15. He testified that there were no records in the Kisii Land Survey office authorizing the sub-division of parcel number Kisii Municipality Block 3/332 and that if there was any such subdivision then the same



must have been done by a private surveyor. He testified that during his site visit to the suit property in 2008 there was nobody in possession of the same.

16. After the close of the Plaintiff's case, the court directed the Plaintiff to file her written submissions. The Plaintiff submissions were filed on February 9, 2022.

Plaintiff's Submissions

17. In her submissions, learned counsel for the Plaintiff traced the background of the suit property which is as follows. Through a Gazette Notice No 1937 of May 31, 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County, Council within whose jurisdiction it was situated as provided for under section 115 of the repealed Constitution of Kenya.
18. Through an approved Part Department Plan No KSI/37/85/10, a portion of the land vested in trust in the County Council of Gusii was reserved for a Community Development Centre, Gusii Training Institute.
19. The County Council of Gusii was issued with a letter of allotment dated February 6, 1986 in respect of the said parcel of land although the Community Development Centre was not issued with a separate title document.
20. On or about January 31, 1995 the Land Registrar, Kisii, opened a register in respect of the aforesaid reserved land and gave it title number Kisii Municipality Block 3/332 measuring approximately 5.868 Hectares (14.4 acres). A Certificate of Lease was subsequently issued to the Council on February 6, 1995 for a term of 99 years from February 1, 1986. One of the terms in the special conditions in the Certificate of Lease was that "the land and buildings shall only be used for community development centre purposes"
21. Kisii Municipality Block3/332 was developed as a Community Centre and had the following facilities; a nursery school, community hall, a home craft training centre and staff housing for council staff.
22. On or about May 17, 1995, the then Clerk to the County Council wrote to the Defendant purporting to enclose an extract of a minute regarding subdivision of the plot. It was to be subdivided into about 15 plots.
23. On July 21, 1995 an officer purporting to be acting on behalf of the Permanent Secretary, Ministry of Local Government, wrote to the Defendant stating that the Ministry had no objection to the proposed subdivision.
24. It is counsel's submission that the suit land which was excised from Kisii Municipality/Block 332 was at all material times public land as it had been reserved in the approved Development Plan No KSI/37/85/10 of October 18, 1985 and as such, could not be re-allocated to private individuals. She cited that the case of *James Joram Nyaga & Another v A G & Another* (2007 eKLR where the court referred to Section 3 of the *Government Lands Act* and observed as follows:

"The above section clearly limits the power of the Commissioner to executing conveyances on behalf of the President and the provision to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter dated December 18, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the



Government Lands Act Cap 280 Laws of Kenya nor could he pass any registrable title under the *Registration of Titles Act* Cap 281 of the Laws of Kenya.”

25. Counsel submitted that under Section 144(3) of the Local Government Act Cap 265 (now repealed), which was in force at the material time, the Minister for local Government had to approve any change of use of land under a local authority such as Gusii County Council. This did not happen in the instant case.
26. It is counsel’s contention that the scheme to sub-divide parcel Kisii Municipality/Block 332 and re-allocate portions thereof to the Defendant among other people was marred by fraud by persons holding office in the then Gusii County Council. PW2 produced exhibit 4 which is a letter dated September 18, 1995 from the Chairman of the Council, Mr Joseph Rasugu Ntabo to the Commissioner of Lands objecting to the proposed subdivision on account of fraudulent dealings with the land. He also produced Plaintiff’s Exhibit 5 which is a letter dated September 21, 1995 from the Commissioner of Lands to the Gusii County Council stopping further processing of the request for subdivision due to the issues raised by Mr. Ntabo.
27. Counsel submitted that even though the Council obtained approval to sell more identified properties including 4.5 acres out of the land reserved for the Community Development Centre, Gusii County Council purported to hold a meeting in which they approved the subdivision of Kisii Municipality/Block 332 into 44 parcels which were given new numbers and allocated to individual beneficiaries including the Defendant, leaving the Council with only 2.755 acres.
28. It was her submission that the said subdivision was contrary to the Ministerial approval and the applicable statutes such as the Trust Land Act, *Land Planning Act*, *Physical Planning Act* and *Local Government Act*. Counsel submitted that the said alienation was conducted in a manner that constitutes corrupt conduct as envisaged under the *Anti-corruption and Economic Crimes Act*, 2003. She urged that court to adopt the reasoning in the case of *Kenya Anti-Corruption Commission v Lima Limited & 2 Others* (2019) eKLR where the Court stated as follows:

“The land in dispute was already alienated for public utilities and was fully developed with a High Court Station, district hospital, fire station and Administration Police Camp and therefore it could not be deemed unalienated. The 2nd Defendant therefore had no authority in law to make the alienation and therefore no interest could be conferred upon the 1st Defendant.”
29. Counsel submitted that the purported transfer of land to the Defendant was tantamount to a second allocation which was illegal and fraudulent. She relied on the case of *Kenya Anti-Corruption Commission v Frann Investment Limited & 6 Others* (2020) eKLR where the court was of the view that where land had been specifically assigned for a public purpose, then so long as the purpose remained, that land ought to be considered to be part of Government land that cannot be alienated to private individuals for private use regardless of whether or not an allotment letter or lease had been issued.
30. It was counsel’s contention that the procedure laid down in the law was not followed as there was no evidence of a Council resolution authorizing the Clerk and Chairman of the County Council to execute the Transfer of Lease on the strength of which a Certificate of Lease was issued to the Defendant she was of the view that any person who caused the said lease to be issued acted without authority which conduct amounts to abuse of office and fraudulent disposal of public land.
31. Furthermore, there was no Gazette Notice published by the Council inviting objections from members of the public to the proposed subdivisions or change of user nor was there any evidence that the



Defendant paid for the suit land. All these omissions point the fact that the procedure used in acquisition and transfer of the lease to the defendant was tainted with fraud and illegality. She therefore urged the court to nullify the Defendant's title.

Issues for Determination

32. The main issues for determination are:
- i. Whether the parcel of land known as Kisii Municipality/Block/3/456 constitutes land that was set apart as trust land and vested in the County Council of Gusii under the provisions of the Trust Land Act.
 - ii. Whether the Defendant acted fraudulently in the acquisition of the suit property as particularized in paragraph 10 of the Plaintiff.
 - iii. Whether the Defendant holds a good title in respect of the suit property.
 - iv. Whether the Plaintiff is entitled to the reliefs sought.

Analysis and Determination

33. The Plaintiff's case is that the subdivision and change of user, of Kisii Municipality Block3/332 and the transfer of parcel number Kisii Municipality Block3/456 to the Defendant was carried out fraudulently with the object of improperly alienating trust/public land which was reserved as a Community Development Centre. The said transfer is therefore invalid, null and void. This assertion was supported by both oral and documentary evidence.
34. PW2 testified that when he commenced investigations with regard to the suit property he established that the entire area was reserved for use as a Community Development Centre and it had several facilities. These include a Nursery School, Community Hall, Home Craft Training Centre and staff houses. All these properties were meant for public use and not private use. He produced documents to show that through a Gazette Notice No 1937 of May 31, 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County. The Community Development Centre was established pursuant to an approved Part Department Plan No KSI/37/85/10. PW1 told the court that when he visited the suit property it had a school, community hall and staff houses. This evidence was not controverted by the Defendant who through her learned counsel shifted the blame to the County Council.
35. It is therefore clear that parcel No. Kisii Municipality/Block3/456 which is a sub-division of parcel No Kisii Municipality Block3/332 constitutes land that was set apart as trust land and vested in the County Council of Gusii under the provisions of the Trust Land Act.
36. The second issue for determination is whether the Defendant acted fraudulently in acquiring the suit property.
37. In his witness statement which was adopted as his evidence PW2 gave an elaborate uncontroverted explanation of the procedure governing the alienation of public land. This procedure was aptly captured by Cheron J in the case of *Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Mubumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Absbir & 3 others* [2021] eKLR where he stated as follows:

“The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be



disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others* [2019] eKLR

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The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See *Nelson Kazungu Chai & 9 Others vs Pwani University College* (2014) eKLR

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The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include setting price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazettment of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* 182/1992 (Nyeri); and in *Dr Joseph N K Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others* C A 60/1997

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In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands* & 2 others [2014] eKLR

The allotment letter also must have attached to it a part development plan (PDP). See the decision in *African Line Transport Co Ltd Vs The Hon AG*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows:

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The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease.

38. In the instant case, it is clear that the above-mentioned procedure was not followed. In particular, the evidence of PW1 that the sub-division that was done was not proper as there was no application for



sub-division and no approval was given for the sub-division of the suit property into 48 plots was not controverted by the Defendant.

39. There is no evidence that another Part Development Plan was ever drawn and approved apart from Part Development Plan No KSI/37/85/10 nor is there any evidence of a gazette notice making the suit property available for disposal to private citizens like the Defendant via public auction. Further, the Defendant did not file any defence and the Plaintiff's evidence is therefore unchallenged. present any evidence to show she acquired the suit property through public auction as required.
40. Furthermore, there is no evidence that an allotment letter was issued to the Defendant nor is there any evidence that the Defendant made payment of the price that was expected to have been set out in the Allotment letter.
41. Additionally, there are no cadastral Survey Maps that were authenticated and approved by the Director of Surveys nor is there evidence that there was a beacon certificate issued to the Defendant.
42. PW2 produced exhibit 4 which is a letter dated September 18, 1995 from the Chairman of the Council, Mr Joseph Rasugu Ntabo to the Commissioner of Lands objecting to the proposed subdivision on account of fraudulent dealings with the land. He also produced Plaintiff's Exhibit 5 which is a letter dated September 21, 1995 from the Commissioner of Lands to the Gusii County Council stopping further processing of the request for subdivision due to the issues raised by Mr Ntabo. He told the court that he established that the original title for Kisii Municipality/ Block3/332 which was reserved for public use was never surrendered to facilitate the sub-division so the whole process was irregular.
43. As correctly submitted by counsel for the Plaintiff, even though the Council obtained approval to sell more identified properties including 4.5 acres out of the land reserved for the Community Development Centre, Gusii County Council purported to hold a meeting in which they approved the sub-division of Kisii Municipality/Block332 into 44 parcels which were given new numbers and allocated to individual beneficiaries including the Defendant, leaving the Council with only 2.755 acres.
44. It was her contention that the said sub-division was contrary to the Ministerial approval and the applicable statutes such as the Trust Land Act, Land Planning Act, Physical Planning Act and Local Government Act. Counsel submitted that the said alienation was constructed in a manner that constitutes corrupt conduct as envisaged under the *Anti-Corruption and Economic Crimes Act*, 2003.
45. In view of the foregoing, I find and hold that the Defendant acted fraudulently in alienating parcel Kisii Municipality Block 3/332.
46. The third issue for determination is whether the Defendant holds a good title in respect of the suit property.
47. Having held that the alienation of Kisii Municipality Block3/332 was fraudulent, it follows that the resultant titles including land parcel no. Kisii Minicipality/Block3/456 is tainted with fraud and it is therefore ultra vires, illegal, null and void.
48. In saying so, I am guided by the case of *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the



corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

49. I also rely on the cases of *Kenya Anti-Corruption v Online Enterprises Limited & 4 Others* and *Kenya Anti-Corruption Commission v Fran Investments Limited & 6 Others* (2020) eKLR where the court declared the Plaintiffs’ titles null and void as they had been acquired through a fraudulent process.
50. The last issue for determination is whether the Plaintiff is entitled to the reliefs sought.
51. The Plaintiff seeks various prayers in his Complaint, all of which I find that he has proved on a balance of probability. I therefore enter judgment for the Plaintiff and make the following final orders:
- a. A declaration is hereby issued that the lease made to the Defendant on July 24th July, 2002 in respect of parcel of land described as Kisii Municipality Block 3/456 was issued *ultra vires* the statutes and fraudulently and is thus null and void *ab initio*.
 - b. The Land Registrar Kisii County is hereby directed to rectify the Register by cancelling the lease and Certificate of Lease issued on July 2, 2002 in respect of Kisii Municipality Block 3/456 in favor of the Defendant.
 - c. An order of permanent injunction is hereby issued restraining the Defendant, his servants, employees, agents or assigns from trespassing upon, transferring, leasing, wasting and or dealing with the suit property that is Kisii Municipality Block 3/456 other than by way of transferring the said title to Kisii County Government as the successor to County Council of Gusii.
 - d. The costs of this suit shall be borne by the Defendant.

DATED, SIGNED AND DELIVERED AT KISII THIS 31ST DAY OF MAY, 2022.

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J.M ONYANGO

JUDGE

