

REPUBLIC OF KENYA

High Court at Kakamega

Civil Miscellaneous 71 of 2009

KENYA ANTI CORRUPTION COMMISSION PLAINTIFF

V E R S U S

PAMELA ORESIA EBOYI 1ST DEFENDANT

SAMMY SILAS KOMEN MWAITA 2ND DEFENDANT

J U D G M E N T

In its plaint dated 27.5.2009 the plaintiff is seeking revocation of the title to plot number **KAKAMEGA TOWN BLOCK III/275**. The plaintiff contends that the property was acquired irregularly and through fraudulent means and would like to have the title cancelled. The two defendants were served but only the 2nd defendant entered appearance and filed defence. The defendants were served with the hearing of the suit but they did not turn up and the matter proceeded ex-parte.

PW1, BARNABAS WAKHUNGU NYONGESA, testified that he works for the Ministry of Housing based in Kakamega. The suit property was carved out of government land along Khasakhala road. There are government houses on the plot and plot number **KAKAMEGA TOWN BLOCK III/275** was created within the compound of government houses. The plot is between government houses Medium Grade 53 to 55 and High Grade 36 to High grade 1. The plot is not developed and the government houses are leased to civil servants. There is no road on the ground leading to the plot.

PW2, KOSSY BOR, testified that she is an advocate employed as an investigator. She investigated the matter and noted that an allotment letter was issued on 8.11.2001 to one **FLORENCE MWIKALI**. Investigations noted that the address used in the allotment letter was P.O. Box 482, Kakamega and further investigations at the Post Office revealed that the said address belongs to the Kakamega Land registry. PW2 also saw two other allotment letters using the same address. She sought to know the particulars of the said Florence Mwikali from the Registrar of Persons by a letter dated 16.5.2012 and the Registrar of Persons responded on the 25.5.2012 indicating that there was no such person. PW2 further testified that the land was trust land falling under the County Council of Kakamega. She sought to get the minutes of the County Council allocating the land to Florence Mwikali but the Council responded to the effect that it was not involved in the allocation of the plot to the allottee. It is PW2's evidence that the plot was excised from within government houses as shown by a survey plan which retrieved from the Survey office. She conducted a search at the Land registry at Kakamega and noted that the 1st defendant **PAMELA ORESIA EBOYI** was registered as the proprietor on 20.9.2007. No one has taken possession of the plot and it is located within government houses which are fenced. The allotment was done by the Commissioner of Lands without involving the County Council of Kakamega.

The plaintiff's counsel filed written submissions together with his authorities. I have gone through the submissions which summaries the evidence and lists the issues for determination. Counsel submits that the 2nd defendant who was the Commissioner of Lands had no power to alienate the land since the land had already been alienated. Further that this was trust land registered in the name of the County Council of Kakamega for the benefit of the public. It is clear from the evidence on record that plot number **KAKAMEGA TOWN BLOCK III/275** was created within government houses. According to the evidence of PW1 the plot is created in-front of a government house just behind Khasakhala road. It is clear that the 2nd defendant took advantage of the empty spaces in between government houses and

created the suit property.

Section 3 of the Government Lands Act Cap 280 states as follows:-

“3. 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:

From the evidence on record I am satisfied that the land out of which the suit property was created had already been reserved for the use of the government. There are Government houses in between the plot and these houses have been there since 1968 as per the evidence of PW1. The 2nd defendant had no powers to create fresh titles out of government land as the land had already been alienated. The evidence by PW2 shows that the initial allotment letter to one Florence Mwikali was just a ploy to grab the property. I do believe that officers from the Ministry of Lands were involved in this unlawful exercise. The initial planners were kind enough to leave empty spaces in between government houses but the 2nd defendant thought he was clever enough to allocate the empty spaces to other people. I do find that the land was not available for alienation and if the 2nd defendant was to alienate it he could only have done so through the normal lawful procedures. The extract from the Land registry shows that the land was transferred to the 1st defendant on the 28.9.2007. The registered lessor is County Council of Kakamega and the 1st defendant is the lessee. The 2nd defendant had no powers to lease the property to the 1st defendant without involving the County Council of Kakamega.

In the end, I am satisfied that the plaintiff has proved his case on a balance of probabilities. The 2nd defendant's action to alienate the property and transfer it to the 1st defendant was illegal. The prayers in the plaint dated 27.5.2009 are granted as prayed. Each party shall meet his own costs.

Delivered, dated and signed at Kakamega this 29th day of May 2013

SAID J. CHITEMBWE

J U D G E