

REPUBLIC OF KENYA

High Court at Kakamega

Civil Case 69 of 2009

KENYA ANTI CORRUPTION COMMISSION PLAINTIFF

V E R S U S

CAROLINE ROTICH 1ST DEFENDANT

SAMMY SILAS KOMEN MWATIA 2ND DEFENDANT

J U D G E M E N T

In the plaint dated 27.5.2009 the plaintiff is seeking a declaration that land parcel number **KAKAMEGA TOWN/BLOCK III/277** was irregularly and fraudulently acquired, that the registration of the 1st defendant as the proprietor of the plot did not confer to her any estate, interest or right and the same is null and void and that the defendants be restrained from ever dealing with the suit property in any manner and the Land Registrar cancel the registration of the 1st defendant as the proprietor of the suit land.

The defendants were served but only the 2nd defendant entered appearance and filed his defence on 22.7.2009. The defendants were served for the hearing of the case and an affidavit of service was duly filed but did not appear and the matter proceeded for hearing ex-parte. **PW1, BARNABAS WAKHUNGU NYONGESA**, testified that he is an estate officer working with the Ministry of Housing. According to his evidence plot number **KAKAMEGA TOWN/BLOCK III/277** is located within the land where Government houses are built. The plot was specifically created out of Government house number High Grade (HG) 40. The witness produced the register for government houses dating back to 1968. It is his evidence that the suit land was excised from government land and lies in between government houses. The plot is not developed and has no beacons. A government officer resides on house number HG 40. The Ministry of Housing was not aware that part of the land had been carved out. It is his further evidence that the government houses are fenced with barbed wire and clearly marked. The government never used to create title deeds for its property but is now in the process of doing so.

PW2, KOSSY BOR, testified that he is an advocate working with the plaintiff and was involved in investigating the matter. The witness testified that she was able to retrieve the letter of allotment dated 8.11.2001. After investigations it was discovered that the postal address “482 Kakamega” indicated in the allotment letter belongs to the Kakamega Lands office. The witness found that a new survey map was created and a series of plots running from 274 to 279 were created within government houses located along Khasakhala Road in Kakamega. PW2 conducted a search at the Kakamega lands office and discovered that the plot was registered in the names of **CAROLINE ROTICH**, the 1st defendant on 9.10.2007. The original land was a lease to the County Council of Kakamega and the Council was never involved in the creation of plot number 277. According to PW2 the suit land was created within the locality of government house number **HG 40**.

Counsel for the plaintiff filed written submissions together with his list of authorities. The main issue for determination is whether the allocation of the suit land to the 1st defendant by the 2nd defendant was lawful and whether the 2nd defendant had the powers to allocate the suit land. I have gone through the submissions by the plaintiff’s counsel together with all the authorities provided by the counsel, I do find

that everything revolves around the provisions of **section 3** of the now repealed Government Land Act Chapter **280** Laws of Kenya. I do not wish to belabor so much on the authorities but the common ground is that the Commissioner of Lands has only delegated authority from the President to allocate land that has not been alienated. **Section 3** of the Government Land Act 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:”

According to the above section it is clear that the power to make grants or dispositions of any interest in land is limited to unalienated government land. From the evidence on record it is established that the government built several houses along Khasakhala Road. According to PW1 the suit land is sandwiched between two lines of government houses namely house numbers Medium Grade (**MG**) **53, 54** and **55** on the lower side and house numbers **HG 36, 37, 38, 39** and **40** on the upper side. It is established that the suit property was created out of land that had already been alienated by the government and government houses erected thereon. The land was therefore not available for alienation. The fact that the government had not created any title deeds does not mean that the land was available for alienation. This was land which had not only been alienated but also developed. The act of the 2nd defendant to create fresh title deeds within government houses cannot be left to stand.

I have read the defence of the 2nd defendant filed on the 27.7.2009 and it mainly denies that the 2nd defendant did not make the allocation to the 1st defendant and if he did then the allocation was done within the executive powers of the President. As indicated herein above the executive powers of the President have to be exercised within the law. Those powers cannot be exercised to alienate land which has already been reserved by the government for its own houses. The empty spaces lying within those houses were already alienated land. Further the County Council of Kakamega was never involved in the allocation of the suit land yet it was the leasee of the original plot. Plot number **KAKAMEGA TOWN/BLOCK III/277** is approximately 0.84 Hectares and was created within government houses. The land was not available for alienation and I do find that the allocation of the suit land to the 1st defendant was fraudulent, unlawful, null and void.

In the end, I am satisfied that the plaintiff has proved its case on a balance of probabilities. The suit land had already been alienated. The act by the 2nd defendant to allocate the land to the 1st defendant was an exercise in futility. I do grant the plaintiff's prayers as prayed. The suit herein was not time barred as **section 42 (1) (k)** of Act No. 7 of 2007 amended the provisions of the Limitation of Actions Act Cap 22 Laws of Kenya. The suit herein is aimed at repossessing public land which had been unlawfully allocated to the 1st defendant. I hereby declare that the alienation of plot number **KAKAMEGA TOWN/BLOCK III/277** and subsequent allocation to the 1st defendant was irregular, fraudulent and illegal. The Kakamega Land Registrar is hereby directed to rectify the register and cancel the certificate of lease and all entries relating to plot number **KAKAMEGA TOWN/BLOCK III/277**. The 1st defendant, her servants or agents or assignees is hereby restrained from leasing, transferring, charging, taking possession or claiming ownership of land reference number **KAKAMEGA TOWN/BLOCK III/277**. I do order that the suit land is part of government land which has already been alienated and is not available for any future alienation. Since the defendant did not defend the suit I will not give any costs to the plaintiff.

DELIVERED, DATED AND SIGNED AT KAKAMEGA THIS 29TH DAY OF MAY 2013

SAID J. CHITEMBWE
J U D G E