



Ethics & Anti-Corruption Commission v Victor Oceanic Viewers Limited & 2 others; Commissioner of Lands (Interested Party) (Civil Suit 53, 54 & 55 of 2013 (Consolidated)) [2022] KEELC 2924 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 53, 54 & 55 OF 2013 (CONSOLIDATED)**

M SILA, J

JUNE 23, 2022

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

VICTOR OCEANIC VIEWERS LIMITED 1ST DEFENDANT

NOVA HOLDINGS LIMITED 2ND DEFENDANT

KALLISTE LIMITED 3RD DEFENDANT

AND

COMMISSIONER OF LANDS INTERESTED PARTY

JUDGMENT

(Plaintiff filing suit to recover various properties claimed to constitute land belonging to the Government upon which houses for civil servants are located; evidence demonstrating that the suit properties constitute Hobley Estate a housing estate managed by the Government and housing civil servants; Commissioner of Lands allocating the land in the year 1997 to the 1st defendant before the 1st defendant was incorporated in the year 1998; the PDP used to allocate the land not known by the Physical Planning Department; Commissioner of Lands had no power to allocate the land and acted beyond his authority; 1st defendant's title thus null and void; 1st defendant having transferred two of the properties to the 2nd defendant who subsequently transferred the titles to the 3rd defendant; titles of all defendants cancelled; suit properties to revert back to the status before the allotment).



A. Introduction and Pleadings

1. This is a consolidated judgment in respect of the above three suits as the subject matter is related. The plaintiff in all the three suits is the Ethics and Anti-Corruption Commission and the defendants are respectively Victor Oceanic Viewers Limited, Nova Holdings Limited and Kalliste Limited. The Commissioner of Lands is joined in the suits as interested party. All suits have been filed by the plaintiff for purposes of recovering what it considers to be public property illegally acquired in the names of the defendants.
2. In the case filed as Mombasa HCCC No. 53 of 2013, the property sought to be recovered is the land registered as Mombasa Block XVII/1548. In the suit Mombasa HCCC No. 54 of 2013, the property sought to be recovered is the land parcel Mombasa Island/Block XVII/1549. In the suit Mombasa HCCC No. 55 of 2013, the property sought to be recovered is the land parcel Mombasa Island/Block XVII/1547. I will hereinafter collectively refer to them as the suit properties, or individually simply as Plots Nos. 1547, 1548, and 1549. The cause of action in all the three suits is the same.
3. It is the pleading of the plaintiff that the suit properties were illegally excised from a Government housing estate, known as Hobley Road Government Estate, which was built by the Government of Kenya and the units had been let out to civil servants through the Ministry of Housing. It is pleaded that the houses were built way back in the year 1931. Through letters of allotment dated 14 January 1997, the Commissioner of Lands caused to be allocated to the 1st defendant part of the land and houses. For the Plot No. 1547, the allocation was for an “unsurveyed residential Plot No. A” measuring 0.89 Ha. For the Plot No. 1548, the allocation was for an “unsurveyed residential Plot No. B”, measuring 0.55 Ha; and for the Plot No. 1549, the allocation was for an “unsurveyed residential Plot No. C” measuring 0.8854 Ha. All are said to have been under the Part Development Plan number 12.2.CT.64.96. The properties, save for the plot No. 1549 which is still in the name of the 1st defendant, were subsequently transferred to the 2nd defendant then to the 3rd defendant who is the current registered proprietor. The plaintiff contends that Victor Oceanic Viewers Limited, the 1st defendant, was not in existence as a legal entity and not capable of holding an interest in land as at 14 January 1997 when the allotment letters were issued. It is further pleaded that the part development plan (PDP) that accompanied the allotment letters was a forgery and fraudulent, thus null and void. It is pleaded further that the suit properties were not available for alienation by the Commissioner of Lands and the allocation of them is thus null and void ab initio. It is contended that the 1st defendant acted fraudulently in accepting the allotment of the properties, inter alia because it knew that it was offered to a non-existent entity; that it used a forged Part Development Plan No. 12.2.CT.64.96 dated 25 February 1996, to cause survey of the land; that it ought to have known that there is no ministerial approval for the lease or sale of the suit properties; that it knew or ought to have known that the decision of the Commissioner of Lands to alienate and allocate the properties was against the Government *Land Act*, Cap 280, and the Registration of Titles Act, Cap 281, Laws of Kenya; that the 1st defendant knew or ought to have known that the suit properties are vested in the Ministry of Housing and were developed to provide housing to Government employees and were therefore not available for alienation or allocation; that the 1st defendant knew or ought to have known that the Ministry of Housing and the public at large did not benefit in any way when the suit properties were illegally leased and sold; that the 1st defendant accepted the allocation while knowing that it had not applied to be allotted the same.
4. It is pleaded in the alternative that the Commissioner of Lands knew that he was acting in excess of his powers and maliciously purported to excise and alienate a portion of the road reserve; that without authority he purported to act in the name of the President of Kenya; that he failed to comply with the provisions of the Government Lands Act, the Registration of Titles Act, and the Local Government



Act and other statutes and regulations, in the alienation of the suit properties; that he acted ultra vires his powers under the Local Government Act; that he acted in reckless indifference to the illegality of his actions; that he acted with knowledge that his acts will in the ordinary course, lead to loss of a portion of a Government housing estate, to the public and the Republic of Kenya; that he breached his fiduciary position by abusing his office and failing to protect public property. It is pleaded that as a result, the suit properties have been rendered unavailable for use by the public.

5. In all the three suits, the plaintiff seeks orders for a declaration that the grants in favour of the 1st defendant and later in favour of the 2nd and 3rd defendants were issued ultra vires the powers of the interested party and thus illegal, null and void ab initio; a declaration that the grant issued were incapable of vesting interest in land to the 1st defendant; an order for rectification of the register by cancelling the entries relating to issuance of the lease in favour of the 1st defendant and all other interests created thereafter; a permanent injunction to restrain the defendants from the suit properties; general damages as against the 1st defendant; costs and interest.
6. The interested party filed a defence which in essence supports the case of the plaintiff. It is admitted that the demarcation, alienation and allocation of the suit property to the 1st defendant and subsequently to the 2nd and 3rd defendants was wrongful and illegal. It is pleaded that the land was reserved for civil servants and re-alienation to private developers was irregular and illegal as no boarding of the estate was done to facilitate its disposal, nor was any authority sought as laid down in Government regulations regarding disposal of registered government buildings. It is pleaded that the PDP NO. 12.2.CT.54.96 (correct PDP referred to in the proceedings is actually No. 12.2.CT.64.96) does not exist in their records nor was such PDP prepared or approved by the Physical Planning Department.
7. The 1st defendant appointed counsel and filed a statement of defence in each file. The defences are standard. It is averred that the 1st defendant was the lawful proprietor of the suit properties and was within its right to dispose the same to the 2nd and 3rd defendants for valuable consideration. All other issues in the plaint are traversed.
8. The 2nd and 3rd defendants also appointed counsel and filed defence in each matter. The defences are similar. It is pleaded that the 2nd defendant lawfully purchased the suit properties from the 1st defendant and later sold them to the 3rd defendant. The 3rd defendant asserts to have lawfully purchased the suit properties for valuable consideration without notice and is the lawfully registered proprietor.
9. An application dated 19 February 2015 was filed seeking to consolidate the three suits which application was allowed by consent.
10. There is confusion in both pleadings and the evidence recorded over the PDP that was used in allotting the suit properties. At times, it is referred to as PDP No. 12.2.54.96 and at other times it is referred to as PDP No. 12.2.CT.64.96. Reference was made to only one PDP and I have established that it is actually PDP No. 12.2.64.96 and not No. 12.2.54.96. I will ignore the confusion in the PDP number and will refer to it with its correct reference, which is No. 12.2.CT.64.96.

B. Evidence of the Parties

11. PW-1 was Timothy W. Mwangi, the Deputy Director of Physical Planning, Ministry of Lands and Physical Planning. He gave evidence regarding the PDP No. 12.2.CT.64.96. Their office had received a request for investigation from the plaintiff and they made a reply in a letter dated 8 November 2012. The letter states that their office has no record of approval or preparation of the said PDP. He testified that he did not see an approved development number. He added that prior to 1998, PDPs were approved by the Commissioner of Lands and that records of all approved PDPs were kept by the



Director of Physical Planning. He stated that once approved, the director gives it a number which is entered in a register. If there was no record of such number then the PDP is not authentic.

12. PW-2 was Mutembei Nyaga. He is an investigator employed by the plaintiff. He had a statement which he adopted as his evidence in chief. In it, he stated inter alia that Hobley Road Government Estate comprises of 57 bungalows. The land was subdivided into the three titles which are the subject of the proceedings herein. He added that several other smaller plots being Nos. 1452, 1509 and 1393 were also hived off. He stated that tenants therein were Government employees and that the houses are maintained by the Ministry of Works, the last maintenance being done in February 2012. He stated that the Ministry was not involved nor was its approval sought before the estate was alienated and allocated to private individuals and that no boarding of the estate was done to facilitate its disposal as laid down in Government regulations regarding disposal of Government buildings. He stated that the suit properties were excised through the PDP 12.2.CT.64.96 dated 25 February 1996 and letters of allotment dated 14 January 1997 were issued to Victor Oceanic Viewers Limited. He stated that the company was registered as a private limited company on 26 October 1998 more than two years after the allotment letters were issued to it. He averred that the allotment was thus to a non-existent entity. The company had Daniel Njoroge Kihiko and Abbas Michuki Yussuf as directors. On the PDP, he stated that it purports to have been prepared by one A.M. S Swaleh (correct name in the PDP is A.M.S Saleh, and I will consider reference to the name Swaleh as a typographical error), who served as the Mombasa Provincial Physical Planning Officer between the years 1994 and 1996, but Mr. Saleh has denied preparing the same. He added that a check at the Provincial Physical Planning Office confirmed that no such PDP exists in their records, nor is there any evidence that it was prepared by their department. He stated further that the Director of Physical Planning, Nairobi, confirmed in his letter dated 8 November 2012 that the PDP was not prepared nor approved by his office, and there is no record that it emanated from his office. He stated that the survey was done on the basis of a fraudulent PDP and was thus a nullity. The titles too he stated are nullities. He stated that the titles have been transferred to the 2nd then 3rd defendants. He elaborated that the three plots consist of the built up area of the estate and tenants pay rent to the Government through a check-off system. In court he more or less testified along the lines above. He was asked whether they subjected the PDP to a handwriting expert and he said that they did not as they did not know who had prepared it. He also added that payments for the allotment letters were made on 17 November 2002 way outside the 30 day period noted therein and the offers had thus lapsed. He testified that the plots were not vacant at the time of allocation.
13. PW-3 was Patrick Mwenda Bucha. He is the Housing Secretary, in the State Department of Housing and Urban Development. He also had a witness statement which he adopted as his evidence in chief. In it, he stated that the PDP does not indicate that the land is actually developed and sits on civil servants' houses. He added that the PDP was not circulated for their comment before its alleged approval and use to alienate the suit properties. He observed that at its time of preparation, the Plots Nos. 1502, 1393, 1509 and 1452 had already been hived off the larger Hobley Estate. He stated that the Ministry of Housing was not in any way involved in the purported disposal of the Estate. In court, he testified that in the year 2012, they carried out a refurbishment of the houses within the estate and he referred to a letter dated 12 July 2012 which enclosed the summary of works undertaken. He stated that Hobley Estate has never been disposed of in accordance with the Procurement and Disposal Act of 2004. He testified that in disposal of Government houses, a Board of Survey is appointed by the Permanent Secretary, Housing, with the authority of the Permanent Secretary, Treasury. They give directions on the manner of disposal, whether by destruction, transfer or change of user. He stated that in the instance herein, none of this happened. He testified that being the custodian of Government housing, any disposal needs to be undertaken with the in charge in the Ministry of Housing. He explained that



funding for the refurbishment was through a vote by Parliament for the refurbishment of Government houses.

14. PW-4 was Bonface Misango Amwayi. He previously worked as the District Building Surveyor for Mombasa District. He had the building inventory which has a record of the tenants and the rent inventory register. The same has the particulars of the houses including the house number, and the particulars of the tenant including the name and the Government department that he/she works at. He also had a Building Register Sheet (Form 362) which inserts any new building put in their register of Government Houses. He testified that the Government had a plan to re-develop the estate and put up high rise buildings in order to maximise on the space. They consulted the Physical Planning Department and a draft PDP was prepared for their comment. They noticed that it left out part of the Estate on the basis that it had been allocated to other persons. They raised objection. He added that one of the carved out portions, assigned Plot No. 152, is where the septic tanks for the Estate are located and any allocation would have tremendous effect on the residents. He added that Plot No. 1509 is a side access to the Estate which also included the house No. MGH3. Plot No. 1393 was already developed with a high rise building which interfered with the sewer system of the Government houses. Cross-examined, he explained that the building register has the number of the house. Once construction of Government houses is done, they take them over and register them. They then lease them out to civil servants. This was one of the estates that his Department managed, meaning that it had already been taken over by the Government.
15. PW-5 was Charles Ndiritu Wagura, who worked as the Coast Province, Provincial Estates Management Officer. He had the responsibility of managing and supervising Government estates within Coast Province. He was deployed to Mombasa in the year 2009. He had a witness statement wherein he stated that the matter of alienation of the Estate came to his attention on 21 June 2010 when an advertisement was placed in the newspaper by an auctioneer advertising “10 old terraced or semidetached Government houses, part of the large Buxton Government Quarters.” Immediately he saw the advertisement, he informed his supervisors in Nairobi, specifically the Director of Estates Department, Mr. Bucha. He also wrote to the District Land Registrar, Mombasa, requesting him to place a caveat on the property. He reported to the Kenya Anticorruption Commission who filed suit to preserve the property being Miscellaneous Application No. 259 of 2010. On 8 July 2010, he wrote a brief to the Permanent Secretary on the issue of ownership of the property. In that brief, he enclosed copies of current occupants who were serving civil servants and details of the buildings in the Estate. He stated that in 2009, there was effort to secure Government properties and a PDP No. 12.2.CT.2009 regarding Buxton/Hobley Road Estate was prepared by Mr. Amwayi, the then Building Surveyor, Mombasa. In it they raised issue that some plots, being Nos. 1509, 1393, 1502, and 1452, had been carved out of the Estate, and the built up area subdivided into the 3 plots herein. In court, he elaborated that in his report to the PS, he gave details of works undertaken in the Estate. He referred to the PDP NO. 12.12.CT.64.96 dated 25 February 1996, and pointed out that it shows no image of the Government houses. He testified that from July 2009 to August 2012 when he served, all houses were occupied by rent paying civil servants and they had an inventory. He stated that the Government used to put up houses on its land even where there was no title.
16. PW-6 was Athmani Ali Athmani. He is a Senior Land Surveyor Assistant based at the office of the Director of Surveys, Deed Plans office, Nairobi. His duties entail authentication of Deed Plans. He produced the survey computations file No. 49363 vide which the suit properties herein were surveyed. He explained that at that time, the process of alienation survey began with the preparation of a Physical Development Plan, which showed the proposed development of the larger area. This was used to prepare a Part Development Plan (PDP) for the specific land. The PDP was then forwarded to the Commissioner of Lands for preparation of alienation documents being the letter of allotment. The



Commissioner of Lands then notified all relevant parties, including the Director of Surveys of the allocation done. The letter of allotment formed the basis for carrying out a survey. Fieldwork was done based on the letter of allotment and the PDP. Once survey was done, the surveyor prepared a computation file and a survey plan. This was forwarded to the Director of Surveys who issued a registration number for the computation file, the survey plan and the surveyed parcel of land. The work was checked in various offices to ascertain consistency of the plan and the computation file. The checkers verified if the survey had been executed per the PDP and other survey regulations. If the job was found to be good it was authenticated and approved. The Director then passed this information to the Commissioner of Lands. The Commissioner of Lands requested the Director to issue a Deed Plan or amend the Registry Index Map (RIM). He testified that with regard to Hobley Estate, their records show that a survey was done on the basis of letters of allotment and PDP NO. 12.2.CT.64.96 dated 2 February 1996. He pointed out that the same shows alienation from Hobley Road/Buxton Government Estate and was not therefore available for allocation. No developments were shown in the PDP which he stated are ordinarily shown if there are any, and in this case, it was as if this was virgin land. He stated that the survey would be a nullity if not backed up by the requisite documents. He testified that based on the letter dated 8 November 2012, the survey and issue of title for the suit properties would be a nullity. He stated that if the survey office had indication that the portions had Government housing, they would first have advised the Housing Department and sought their comments before finalizing the survey.

17. PW-7 was Gordon Odeka Ochieng. He is the Director of Land Administration at the Ministry of Lands and Physical Planning. He also had a statement which he adopted as his evidence in chief. He stated that they received a request from the plaintiff seeking information on the suit properties. They availed copies of their correspondence files and he produced the copies thereof in court. He was asked whether they would issue allotment letters to companies before incorporation and he stated that they did, though in such cases they would indicate that the company is undergoing incorporation, and the allotment letter would indicate “under incorporation.” The letters of allotment issued in this instance did not have such a note. Cross-examined, he stated that the PDPs were verified and there was an acceptance of the allotment. The requisite fee was paid and instructions issued to the Land Registrar to issue leases.
18. PW-8 was Pius Nyange Maithya, a registered valuer working with the plaintiff. He has 21 years experience. He undertook a valuation of the properties in dispute in the year 2012. He prepared valuation reports which he produced in court. The Plot No. 1547 is developed with twenty six (26) one bedroomed units, and two (2), two bedroomed units each with a servants quarter. The value as at the year 2012 was Kshs 140,000,000/=. The Plot No. 1548 is developed with eleven (11) one bedroomed and four (4) two bedroomed residential units each with a servants quarter. The value as at 2012 is noted to be Kshs. 90,000,000/=. The plot No. 1549 is noted in the report as being developed with five (5), one bedroomed houses, and eight (8) two bedroomed residential units each with a servants quarter. The property was valued at Kshs 80,000,000/= as at the year 2012.
19. With the above evidence, the plaintiff closed her case.
20. The 1st defendant called Daniel Njoroge Kihiko as her witness. He identified himself as an advocate and businessman and a director of the 1st defendant. He testified that he purchased the company from its previous owners sometimes in the year 2002. He purchased it with all its assets and liabilities. Among the assets were the three properties in dispute and he was handed over the letters of allotment. In the purchase of the company, he dealt with one Shokat Aboo, who was then a director. He testified that he did due diligence and Mr. Aboo informed him that the letters of allotment were granted on the strength of a business name that he had reserved, being Victor Oceanic Viewers, and he was in



the process of registering the company. He testified that upon purchasing the company, he prepared acceptance letters for the allotment and 3 banker's cheques to pay the requisite fees. The banker's cheques were respectively for Kshs. 388,250/=, Kshs. 253,280/= and Kshs. 235,280/= for the 3 plots. After making payment the leases were forwarded by the Commissioner of Lands for registration and he was later called to collect the lease documents. In December 2002, he transferred the Plots No. 1547 and 1548 to the 2nd defendant after a sale. He testified that the 2nd and 3rd defendant companies are owned by other persons. Cross-examined by Mr. Makuto for the interested party, he acknowledged not having any proof of purchase of the company. He stated that he was not a director of Victor Oceanic Viewers Limited when the allocation was done and he did not participate in the allotment of the land to the company. He however did not have proof of documentation of the business name, nor proof that Victor Oceanic applied to be allocated the suit properties. He acknowledged that the letters of allotment came on 14 January 1997 before the company was incorporated on 16 October 1998. He also acknowledged that payment for the allotment was to be done within 30 days but it was done in the year 2002. The letter forwarding the cheques was dated 12 November 2002. He went to the land before the purchase. He noticed some dilapidated buildings. He did not write to the Commissioner of Lands to know who owned the buildings. He did not see any reason for this, as to him, the Government was allocating its own property. He stated that he obtained consent to transfer the properties to the 2nd defendant. He however did not avail the said consents. He stated that he has no relationship with the 2nd defendant nor with the 3rd defendant. He clarified that he was only in court to testify on behalf of the 1st defendant.

21. Cross-examined by Mr. Makori for the plaintiff, he acknowledged that the letters of allotment do not state the PDP number. This part of the allotment letter is blank. He did not make inquiry about this omission from the Director of Physical Planning. He did not have proof of existence of the said Shokat Aboo from whom he stated that he purchased the 1st defendant company. On the suit properties, he did observe the Government houses, which he said were unoccupied and were not fit for habitation. He never took possession of the properties. He sold two of the suit properties to the 2nd defendant and retained one in the name of the 1st defendant. He was not sure which property was still in the name of the 1st defendant but he stated that it is charged to Stanbic Bank. He explained that he used the property to guarantee another. He could not remember the name of the company that he guaranteed. I asked him a few questions and he elaborated that he had a first degree in accounting issued in the year 1988. He got employed briefly and also went into business including the real estate business. At the time he purchased the company, in the year 2002, he was in the real estate business and had bought and sold a number of properties. He re-joined university to study law and became an advocate in the year 2018.
22. The 2nd and 3rd defendants did not call any evidence. Neither did the interested party.

C. Submissions of Counsel

23. I invited counsel to file written submissions, which they did, and I have taken note of them. For the plaintiff, it was submitted that the suit properties were unlawfully alienated as they had been set aside for public use, i.e as government houses. It was submitted that the PDP that was used to alienate the suit properties was not authentic and due process with regard to the issue of the allotment letters was not followed. Counsel added that the PDP falsely indicated that there was no development on the suit properties yet there were houses in possession of tenants who were paying rent to the Government. Counsel referred to Section 42 of the Physical Planning Act, 1996, on requirement of a PDP for alienation of Government land. He also raised issue that the 1st defendant got an allotment before it was incorporated. I was referred to Sections 3 and 7 of the Government Land Act (repealed) and it was submitted that there is no evidence that the President allocated the land or that the Commissioner of



Lands had permission to allocate the land on the written instructions of the president. It was submitted that the Commissioner of Lands could not allocate the properties. Counsel submitted that there was no evidence that DW-1 purchased the company from one Shokat Aboo and pointed out that there was no evidence that there exists a person by that name. Counsel submitted that the subject titles are prone to be cancelled pursuant to Section 143 of the Registered Land Act (repealed). Counsel relied on various authorities all of which I have considered.

24. For the 1st defendant, counsel referred to Section 26 of the Land Registration Act, on indefeasibility of title and submitted that the plaintiff has not proved fraud on the part of the 1st defendant, or that the suit properties were acquired through a corrupt scheme. He submitted that the 1st defendant took all requisite steps that an allottee would normally take before being issued with a lease. Counsel submitted that the allotment letters were accepted after the company had been incorporated. He submitted that the allotment was done while the company was under incorporation which was not unusual. He submitted that there was no evidence showing that the PDP was a forgery and added that these were internal documents within government records. Counsel submitted that the suit properties were unalienated Government land pursuant to Section 2 of the Government Land Act. He submitted that there is no PDP or Registry Index Map indicating that the suit properties were set aside for Government housing. He submitted that the evidence from the 1st defendant was that the houses were dilapidated and not habitable. Counsel submitted that the power given by the President under Section 3 of the Government Land Act to allocate land was delegated to the Commissioner of Lands by virtue of Section 7 thereof. He also relied on some authorities which I have looked at.
25. For the interested party, counsel submitted that the suit properties were set aside for public use and referred to the evidence adduced that there are Government houses therein. He submitted that they were therefore not available for alienation. He also raised issue about the PDP which did not indicate that there was housing on the suit properties and added that there was no evidence of approval of the said PDP. He further submitted that power to exercise functions of a company only take place upon incorporation and thus the 1st defendant was not capable of making any application to be allotted the land as it was not in existence at the time, and that it was in fact an offence to use the name of the plaintiff before the date of incorporation pursuant to Section 394 of the Companies Act (repealed).

D. Disposition

26. I have considered all the above. I believe that the following issues will dispose of this suit :-

- (i) Whether the suit properties were available for alienation and allotment.
- (ii) Whether the suit properties were properly alienated.
- (iii) Whether the titles of the defendants are liable to be cancelled.

Issue 1 : Whether the suit properties were available for alienation and allotment

27. The matters herein commenced in the year 1996 when an allotment letter was issued to the 1st defendant over the suit properties. It is common ground that the suit properties were hitherto Government land. The governing law is therefore the Government Land Act (Cap 280) (repealed in the year 2012 by the Land Registration Act, Act No. 3 of 2012). The Government Land Act (GLA) defined what is alienated and what was unalienated Government land and also provided for what could be alienated. Section 2 of the GLA inter alia defined un-alienated Government land 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.”



28. From the above, it will be seen that what the GLA defined as un-alienated Government land comprised of land which was not leased to any other person or land for which no letter of allotment had issued. It is common ground that the land herein was not subject to any prior leasehold title nor had a letter of allotment been issued before. However, the land was developed with a Government estate housing civil servants and the same was in active use. Could such land be alienated and be allocated ?

29. I do not think so. I held in the case of *Ethics and Anti-Corruption Commission vs Frann Investments & 6 Others* (2020) eKLR, that in as much as the GLA narrowly defined “un-alienated” Government land, land that was in active use by the Government needed to be considered as alienated Government land. In that case, I held as follows :-

“39. Whereas there certainly cannot be a second allocation of land that the Government has previously assigned a lease or an allotment to, the law was rather grey on whether land that had been set apart for use for a certain public purpose, but where no lease or allotment letter has previously been issued, could be allocated to an individual for private use. I have not been pointed to any law by any of the counsel on record. My view would be that where Government land had been specifically assigned for a specific public purpose, then so long as that public purpose remains, that land ought to be considered to be part of Government land that cannot be alienated to private individuals for private use. I do not think any other interpretation would make sense. I say so because it is a fact that historically, not all Government land had been titled. Probably the Government was easy that because such land is under its use, or has been assigned a public use, then nobody is going to tamper with it. But does it mean that because the Government has not issued an allotment letter to such land, to say a Government parastatal or Government Department, and has not issued a title to the body that is supposed to make use of the land, then the said land can be allocated to private individuals for private use ? I do not think so. If this was to be the position, then developed infrastructure including roads, hospitals, schools, and even courts could be allocated to private individuals simply because no allotment letter or title had been issued. People would literally loot and grab all public infrastructure. Let us take the example of a court. If there is a survey plan, or a PDP that provides that certain land has been set aside by the Government for building a court, and a court is so built, but no allotment letter or title is issued to the judiciary, can a person now be allotted that land and hold private title to it for his own private use ? I think that result would be absurd and I do not think that this was the purpose of the law when it defined what “unalienated Government land” is under the GLA.40. My view is that so long as land had, or has been, set aside by the Government for specific use, which use is apparent from the pertinent records, including survey plans and/or PDPs, or visible on the ground, then that land must be considered to be part of “alienated Government land.”

30. I am still of the opinion that the above dictum holds water. Where there is evidence of alienation of the land through a PDP or survey plan, or such other documents, meaning that such land was set aside for specific Government use, and such land is actively being used for the purpose for which it was set aside, I hold the view that such land must be considered as alienated Government land. In our case, there is no question that a whole Government estate, Hobley Estate, was built on the suit properties. The houses within the estate were leased out by the Government to civil servants. The



houses were occupied and the tenants therein were paying rent to the Government at the time the purported allotment of the land was made. There is no doubt that the land where the suit properties lay was set aside for housing civil servants. I have no evidence that the Government had stopped using the Estate for purposes of housing civil servants when the purported allotment of the land was made. I have no evidence that the Government no longer needed the Estate so that the land can be given out to private individuals. The reality of the matter was that the Government was using the land to house civil servants at the time the purported allocation was made. I am not persuaded that with all the investment the Government had put, and the fact that the Government was still using the land, that it was the law, that on a whim and mere stroke of the pen, the President or the Commissioner of Lands had the power to take away all this property from the Government, and vest it upon a private individual. Any Government Department in use of the land first needed to be consulted and affirm that the land is no longer being used for the purposes for which it was set aside, and that the land is no longer needed for such purpose. This was not done in the circumstances at hand. The collective evidence of PW-3, PW-4, and PW-5, all from the Department of Housing of the Government, was that they were never consulted before such alienation, and there was no boarding as is supposed to be the case. Hobley Estate, where the suit properties are located, was still being used for the purpose for which it was developed, that is, to house civil servants. It is therefore my finding that this land was not land that could be considered “unalienated” Government land. I am not persuaded that it was land that was available for allotment and allocation to private individuals. My view is that the allocation of it was wrongful and null and void and must be set aside.

Issue 2 : Whether the suit properties were properly alienated

31. Let us assume that I am wrong and that the land was actually unalienated Government land which could be allocated to private individuals. The next issue I need to address is whether the land was properly allocated according to law. The allotment herein was done by the Commissioner of Lands. Did the Commissioner of Lands have power to allocate unalienated Government land such as this ? I do not think so. The power to alienate Government land was vested in the President under Section 3 of the GLA, and I will set it out in full . It provided 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;
 - (b) with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;
 - (c) extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him;



- (d) accept the surrender of any lease or licence under this Act;
- (e) accept the surrender of any certificate granted under the East Africa Land Regulations, 1897, or of any lease granted under the Crown Lands Ordinance, 1902, and grant to the lessee a lease under this Act of the area the subject of the surrendered certificate or lease, provided such surrender is made within such period as the President may by notice in the Gazette direct, such period to be not less than twelve months from the commencement of this Act:

Provided that this paragraph shall not apply to land granted under the East Africa Land Regulations, 1897, or leased under the Crown Lands Ordinance, 1902, upon terms which differ from the ordinary terms in force at the time at which such land was granted or leased; and

- (f) accept the surrender of any freehold conveyance under the Crown Lands Ordinance, 1902, or freehold grant under this Act.

From the above, it will be seen that under Section 3 of the GLA, the President indeed had power to issue grants over unalienated Government land. In certain instances, the power was delegated to the Commissioner of Lands. The parameters of such delegation was outlined under the following explanation :-

The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—

- (a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;
- (b) for town planning exchanges on the recommendation of the Town Planning Authority, Nairobi, within the total value, and subject to the conditions, laid down by the President;
- (c) the sale of small remnants of land in the City of Nairobi and Mombasa Municipality acquired for town planning purposes and left over after those town planning needs have been met;
- (d) for the use of local authorities for municipal or district purposes, viz. office accommodation, town halls, public parks, native locations, fire stations, slaughterhouses, pounds, incinerators, mortuaries, crematoria, stock sale yards, libraries, hospitals, child welfare institutions, garages, housing schemes, markets and public cemeteries;
- (e) the extension of existing township leases on the fulfilment of the conditions specified therein as being precedent to such extensions;
- (f) the temporary occupation of farm lands on grazing licences terminable at short notice;
- (g) the sale of farms and plots which have been offered for auction and remain unsold, such grants being subject to the general terms and conditions of the advertised auction sale and the application therefor being submitted within six months of the date of the auction in the case of township plots and within



twelve months in the case of farms, except that in the case of godown plots the power to sell shall not be limited to a period of six months from the date of sale.

†The powers of the President under this paragraph to accept the surrender of a lease granted under the Crown Lands Ordinance, 1902, and to grant the lessee a lease of the same land under this Act are delegated to the Commissioner (Cap. 155 (1948), Sub.Leg.).

32. The grant herein was certainly not under (a) above for it was not a grant for religious, charitable, educational or sports purposes. It was not under (b) as it was not for town planning exchange. It was not under (c) for it was not a sale of any remnant of land left over after the town planning needs have been met. It was not under (d) for it was not for the use of a local authority. It was not under (e) for it was not an extension of an existing township lease. It was not under (f) for it was not a grant for temporary occupation of a farm. It was not under (g) for it was not a plot that was subjected to any auction and left over unsold. The allotment of the land in the instance herein was done by the Commissioner of Lands. He had no power to make such a grant. Any purported grant that he issued to the 1st defendant is therefore null and void ab initio and incapable of transferring any interest and must be nullified.
33. Apart from the above, the grant herein was made to an entity that did not exist at the time the allotment was made. I am aware that PW-7 led evidence that allotment letters could issue to entities that were in the process of incorporation. I find that curious. I wonder how land can be allotted to an entity that does not exist. An allocation to a non-existent entity is in my view irregular. In respect of the case at hand, there is no evidence of who applied to be allotted the suit properties. No explanation was given as to why an allotment letter was issued to a non-existent entity. I will forget for a moment that I find it irregular for an allotment letter to be issued to a non-existent entity and recall that the 1st defendant tried to use in her favour, the evidence of PW-7, that an allotment can be done to an entity under incorporation. It was mentioned by PW-7 that where allotment was done to a company under incorporation, there would be an entry of “under incorporation” made. There is no evidence of such entry in our case. I wonder how the 1st defendant can try to benefit from the argument that PW-7 stated that an allotment could be made to an unincorporated entity, but yet not wish to be bound by the same evidence of PW-7, that in such case, there needs to be an entry of “under incorporation” for this to be effective. My holding however is that allocation to a non-existent entity was in itself irregular.
34. Apart from the irregularity in the allocation to a non-existent entity, I observe that payment for the allotment was made way outside the 30 days period stipulated in the allotment letter. It can be urged that the payment was not rejected, which in other instances may be waived, but there are unique circumstances in this case which make that late payment pertinent. For example, it can be argued that the offer was made to a non-existent entity and was not capable of being accepted. Moreover, if the Government had allotted the land in the year 1997, why was it still using it in the year 2002 when the payment for the allotment letters was made? One can very well press the point that in those circumstances, the Government had not yet given up her land, and thus, if at all there was an offer, it had lapsed and was not capable of acceptance as the Government was not conducting itself as if the offer was still alive. That late payment in the circumstances of this case was also irregular.
35. The above aside, it is the plaintiff’s case that the allotment was done through a fraudulent PDP. The defence of the 1st defendant is that the issue of a PDP was an internal procedure and it cannot be held liable. I don’t agree. The allotment was to the 1st defendant. It was incumbent upon the 1st defendant to see to it that any document of allotment is an authentic document. In any event, the duty to survey the land was upon the 1st defendant. The 1st defendant therefore had an obligation to see to it that survey is conducted based on documents that are valid. The 1st defendant cannot therefore run away from the allegation that the PDP was fraudulent and we must interrogate it.



36. The evidence of PW-1 was that the PDP was not authentic as it had no registration number. He testified that once approved, a PDP is given a number which is then entered in the register. There is no such number in our case. This evidence was not controverted by the defendants. I am thus persuaded that this was an irregular PDP and it ought not to have been used for purposes of survey or be used to alienate the suit properties. Moreover, when you look at the purported PDP, you would imagine that the land being allocated was vacant land that had nothing built on it. That PDP has no indication of any buildings on the land. The PDP shows that the land is bare which is not a true reflection of the position on the ground. It is apparent that the purpose was to deliberately mislead any person dealing with the PDP that there was no development on the land. This was an act of fraud on whoever drew the PDP. The fact of the matter is that there was a Government estate on the land being allotted and this needed to be reflected on the PDP. The surveyor who did the survey also neglected, deliberately in my view, to capture the fact that there are Government houses on the land being allotted. In my opinion, all this was tailored to hide the fact that the suit properties fell within a Government Estate that was fully built. This was fraudulent. There is no other conclusion to reach other than that the intention was to have the 1st defendant get the land for a song and obtain unjust enrichment from a development that was put up using tax payers' money. That is how the 1st defendant ended up paying a paltry total sum of Kshs. 858,810/= for an estate that comprised of a total of 56 built up units valued at Kshs. 310 million in the year 2012. The pittance paid is in itself evidence of the fraud. The public was clearly being cheated. Such fraudulent allocation cannot be sanctioned.
37. I will again revisit the fact that the suit properties comprise a Government Estate that was in active use. The properties form part of Hobley Estate. The allocation herein involved 56 housing units. There is no evidence of involvement of the requisite state department before the suit properties were purportedly allocated. It is apparent that the allotment of the land was done in deep secrecy. The Government in fact does not appear to be aware that one of her employees, the Commissioner of Lands, had allocated the land. The Government proceeded to keep civil servants in the houses therein. It continued receiving rent. It continued using tax payers' money to renovate and maintain the estate. It was blind to any allotment of the land. As far as I can see, this was an act of a Government employee gone rogue. The person who sat as the Commissioner of Lands at the time, without the blessing of any State Department, and without following procedure, at a whim, simply decided to will away part of a housing estate that had been developed by the Government. This was a heinous act of abuse of office on his part. It was also a breach of the trust that the Government had bestowed upon the Commissioner of Lands, to hold in trust any land that belonged to the Government. Such act cannot be allowed to stand. If we are to allow such act to stand then that would be to sanction theft of public property. The act of allotting the land was not only irregular but was unlawful and a theft of public property. It must be set aside.

Issue No. 3 : Whether the title of the defendants should be cancelled

38. Section 26 of the *Land Registration Act*, does provide that title is to be taken as prima facie evidence of proprietorship and the same section also provides for instances of challenge of title. That law is drawn as follows :-

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.
- c) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

39. From the above, it will be seen that title can be cancelled on account of fraud or misrepresentation to which the person is a party, or it can be cancelled if procured illegally, unprocedurally or through a corrupt scheme. Counsel for the 1st defendant referred me to the case of *Elijah Makeri Nyangwara vs Stephen Mungai Njuguna* (2013) eKLR, on the interpretation of Section 26 above, which I have no issue with. For title to be cancelled under Section 26 (1) (a), it needs to be demonstrated that the person (here meaning the proprietor) was party to the fraud or misrepresentation that led to him being registered as proprietor. However, for title to be cancelled under Section 26 (1) (b), it is not necessary for the proprietor to be party to, or to have contributed to the illegality, procedural irregularity or the corrupt scheme. It is enough that he is a beneficiary of a title that results out of these vitiating factors.
40. So is the title impeachable under Section 26 (1) (a) of the *Land Registration Act* ? I am aware that DW-1 tried to cover himself by stating that all he did was purchase the 1st defendant company as a going concern from one Mr. Aboo. I have no evidence of this company ever being in the directorship or shareholding of a Mr. Aboo. Neither is there any evidence of purchase of the company as DW-1 claimed. If at all the company was purchased, for how much was it purchased ? This information was not given. Where is proof of any agreement to purchase ? None was given. Where is any evidence of purchase ? There was none. I am afraid that in those circumstances, I cannot hold that the 1st defendant company was sold to DW-1. What I have before me is that DW-1 is a shareholder and director of the plaintiff company. If at all he was not a promoter of the company, there would have been nothing easier than to provide evidence of the initial Memorandum and Articles of Association to demonstrate as much. Even assuming that DW-1 purchased the suit properties, the manner in which he behaved thereafter implies that he was privy to the irregular transactions herein. He never proceeded to take possession of the properties. He never wrote asking anybody in occupation to pay him rent. He was actually afraid of what he claims to have purchased. He transferred two of the properties, without ever having taken possession of them. On the last property that he kept in name of his company, he merely proceeded to charge it. Is that the action of an innocent purchaser for value ? Certainly not.
41. But I do not even think that it really matters, whether or not we are to hold that DW-1 was not involved in the fraudulent allocation of the land. I say so because it is trite that a company is a separate legal entity from its shareholders or directors. Any irregularity in the allotment of the land to the 1st defendant followed it, even where there was a change of proprietorship or directorship. Any fraud or misrepresentation that involved its shareholders or directors is fraud on the part of the company. I have already demonstrated that the suit properties were allotted to the 1st defendant when the 1st defendant did not exist. It was an irregular allocation. The allotment was also done using a dubious PDP that was not registered. It was a fake PDP. I have also raised issue about the survey of the land which did not



demonstrate that the suit properties hold civil servant houses. There was certainly a misrepresentation of the status of the suit properties. It was deliberately made to appear as if they were vacant when in reality an estate existed in them. I do not see how the suit properties could have been allotted to the 1st defendant without an element of participation by the directors and/or shareholders of the 1st defendant. To hold otherwise, is akin to stating that out of the blue, an allotment letter was dropped in the laps of the directors/shareholders of the 1st defendant. In the circumstances, I am persuaded that the 1st defendant obtained title through fraud and/or misrepresentation to which it was a participant. In any event, it has been demonstrated that the title was acquired illegally and unprocedurally, in that the Commissioner of Lands had no power to issue a grant over the said land. The 1st defendant is still proprietor of the Plot No. 1549. Its title to this property is thus impeachable pursuant to the provisions of Section 26 (1) (a) and (b) of the *Land Registration Act*.

42. What about the title of the 2nd and 3rd defendants to the Plots Nos. 1547 and 1548? The record shows that the 1st defendant became registered as proprietor on 18 December 2002. On the same day, title was issued to the 1st defendant. On the same day, the 1st defendant transferred the Plot No. 1548 to the 2nd defendant, and again on the same day, a certificate of title in the name of the 2nd defendant was issued. The speed at which the transactions took place is certainly baffling. It means that on the same day, the 1st defendant became registered as proprietor and obtained title; on the same day, applied for consent to transfer, and obtained it; on the same day, applied for a rent and rates clearance certificate and obtained them; on the same day, entered into a sale agreement; on the same day, appeared before an advocate for preparation of the transfer documents; on the same day, booked the transfer documents and lodged them; on the same day, paid stamp duty and registration fees; on the same day, the 2nd defendant became registered as the new proprietor; and on the same day, title was issued to the 2nd defendant. That was quite a lot to do in one day and one must be amazed at the terrific speed. Was it a case of efficiency? Certainly not. No sale agreement was displayed by the 1st defendant to demonstrate that there was an actual sale of the property that took place to the 2nd defendant. Nobody knows for how much, if at all, the properties were transferred to the 2nd and subsequently to the 3rd defendant. There is a transfer of both Plots No. 1547 and 1549 from the 2nd to the 3rd defendant that was registered on 10 March 2006. Neither the 2nd nor 3rd defendants offered any evidence regarding the transfers. Neither came to court to demonstrate that they were innocent purchasers for value without notice. Whether or not they were privy to the fraud and/or misrepresentation is however immaterial, for it is apparent that their titles are tainted with illegality and/or procedural impropriety. These titles are thus challengable and can be cancelled.
43. I am persuaded that the plaintiff, on a balance of probabilities, has displayed sufficient material that would bring this court to the conclusion, as I have demonstrated above, that all the titles herein are liable to be challenged under Section 26 (1) (a) and 26 (1) (b) of the *Land Registration Act*, 2012. I am moved to cancel the titles of the 1st, 2nd and 3rd defendants to the Plots Nos. 1547, 1548 and 1549. Any encumbrances that may have been entered thereto in favour of any third parties, including any charge, are also hereby ordered cancelled. The land will revert back to the status that it was before the issue of the allotment letter and issue of title to the defendants.
44. There was a prayer for general damages but I am not moved to award any.
45. The final issue is costs. Costs will follow the event. I award costs to the plaintiff against the defendants jointly and/or severally. I make no orders as to costs for or against the Interested Party.
46. Judgment accordingly.

DATED AND DELIVERED THIS 23 DAY OF JUNE 2022



**JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
AT MOMBASA**

