



Kenya Anti-Corruption Commission v Wak Limited & 3 others (Environment & Land Case 1334 of 2006) [2022] KEELC 3467 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3467 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1334 OF 2006
LC KOMINGOI, J
JULY 28, 2022**

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

WAK LIMITED 1ST DEFENDANT

REDWOOD PROPERTIES LIMITED 2ND DEFENDANT

SAMMY SILAS KOMEN MWAITA 3RD DEFENDANT

S.K.W WANGILA 4TH DEFENDANT

JUDGMENT

1. By the plaint dated 18th December 2006, the Plaintiff prays for judgement against the Defendants jointly and severally for:-
 - a. A permanent injunction restraining the 2nd Defendant, its servants or agents from alienating, transferring, charging or in any other manner dealing with the property known as L.R No.209/6337 I.R No.85631.
 - b. A declaration that the grant made to the 1st Defendant on or about 28th February 2001 in respect of L.R No.209/6337 I.R No.85631 was fraudulent and illegal and is void and did not vest any lawful title on the 1st Defendant.
 - c. A declaration that the transfer of the grant to the 2nd Defendant on or about 30th March 2001 in respect of L.R No.209/6337 I.R.No.85631 was made fraudulent and illegal and is void and did not vest any lawful title on the 2nd Defendant.



- d. An order rectifying by canceling the entries made in the grant and transfer in favour of the 1st and 2nd Defendants on 28th February 2001 and 30th March 2001 respectively and restoring the land known as LR No.209/6337 I.R to its reserved/planned and approved user.
 - e. General damages.
 - f. Costs of and incidental to this suit.
 - g. Interest on (e) and (f) above at court rates.
 - h. Any other relief this court deems fit and just to grant.
2. The Plaintiff averred that it carried out investigations that have established that at all material times to this suit, the land known as LR No.209/6337 (I.R. No.85631) was part of government land planned, reserved and approved for public utilities and purposes as a road reserve within Nairobi area and was thus not available for alienation. It further averred that on or before 28th February 2001, the 3rd and 4th Defendants acting jointly and severally and in concert with the 1st Defendant caused to be made to the 1st Defendant a grant registered on 12th March 2001. It added that the grant was transferred to the 2nd Defendant on 30th March 2001.
 3. It is the Plaintiff's case that the purported allocation, making of grant to the 1st Defendant and subsequent transfer of the suit land to the 2nd Defendant was fraudulent, is tainted with illegality and is incapable of passing any valid title on any of the Defendants. It outlined particulars of fraud against the Defendants and averred that by reason of the Defendants' actions, the suit property has not been available for the reserved user and that the 3rd and 4th Defendants abused their offices and are liable to pay damages.

The 2nd Defendant's case

4. A memorandum of appearance dated 13th February 2007 was filed for the 2nd Defendant by M/S Singh Gitau Advocates. The 2nd Defendant filed the statement of defence dated 5th March 2006.
5. It denied the allegations levelled against it in the Plaint. It contended that the suit land was duly registered, that it was not encumbered when it purchased it and that it was a bonafide purchaser for value without any knowledge or participation in any fraudulent schemes. It averred that it obtained all consents through the Commissioner of Lands in his official capacity and not through dealings with the 3rd and 4th Defendants in their personal capacity. It also contended that if any conditions in the grant had not been complied with, it was incumbent upon the Commissioner of Lands to deny it the requisite consents.

The 3rd Defendant's case

6. A memorandum of appearance dated 20th February 2007 was filed for the 3rd Defendant by M/S Kipkenda, Lilan & Company Advocates. The 3rd Defendant filed a statement of defence dated 7th March 2007. He denied allegations as contained in the plaint and contended that the Plaintiff had no capacity to institute these proceedings on behalf of the Government of Kenya.
7. He denied knowledge as to existence and creation of the suit land and contended that during his tenure in office as Commissioner of Lands, all duties conferred upon him and powers exercised by him whether express, implied and/or delegated by statute or otherwise were carried out to the best of his information, knowledge and ability and in utmost good faith and as such no personal liability lies as against him.



Evidence of the Plaintiff

8. PW1, Timothy Waiya Mwangi, a deputy director in the Department of Physical Planning of the Ministry of Lands testified on 23rd May 2017. He told the court that he had seen the letter of allotment dated 3rd June 1998 issued in favour of the 1st Defendant. He stated that the process of allocation of land commences with the Commissioner of Lands issuing authority to the Director of Physical planning to prepare a Part Development Plan for purposes of allocation. The Director of Physical Planning would then prepare a plan and forwards it to the Commissioner of Lands for approval. It was his testimony that there is no Part Development Plan in respect to the allocation of LR No.209/6337 in their records. He also stated that the land is within the interchange of the southern bypass as exhibited by PDP No.409.
9. When he was cross-examined, he stated that he had not carried out any search in the registry. He also stated that he knows that for a parcel of land to be allocated a Part Development Plan Number, it means it has been demarcated. He also stated that he is not aware whether Part Development Plan No.409 was registered as an encumbrance on the suit property. He stated that the letter of allotment dated 3rd June 1998 is signed the Commissioner of lands and copied to the Director of Survey and that he is not aware of any objections to the allocation of the suit land.
10. PW2, Peterson Wachira a clerical officer within the Registrar General's Department in the State Law Office testified on 13th February 2019. His witness statement dated 10th October 2011 was adopted as part of his evidence. He told the court that the Plaintiff through its letter dated 12th July 2007 requested the Registrar of companies to furnish it with particulars and certified copies of incorporation of documents of a company Known as Wak Limited and a copy of its incorporation certificate No.C.93340 was attached. It was his testimony that as per a report prepared by his colleague one Polyn Wanja, Wak Limited did not appear in the Registrar of Companies index of registered companies and business names. He testified that the certificate of registration C93340 belongs to Kenjoro Enterprises Limited as registered on 23rd March 1991. He stated that he did his own independent search which yielded the same results.
11. When he was cross-examined, he stated Miss Polyn Wanja, a state Counsel conducted the initial search but he also conducted both the online search and the manual search in the physical file. He further stated that digitization of records at the registry was done in 2009 and he does not know if it was completed but another one was done in 2017 and one can now get details of their registration but the same was physical prior to 2009.
12. When re-examined, he stated that he had done another search a week before testifying and that Wak limited does not exist.
13. PW3, Silas Kiogora Mburugu, a principal Land Administration officer with the National Land Commission, testified on 15th May 2019. His witness statement dated 29th July 2013 was adopted as part of his evidence in chief. He told the court that a beneficiary of an allocation of a parcel of land has to make an application and if the land is available for allocation it is planned by the Director of Physical Planning after allocation is done, the beneficiary pays then a survey is done and documents are then forwarded to the Commissioner of lands.
14. He produced the letter of allotment dated 3rd June 1998 signed by S.K.W. Wangila for the Commissioner of lands and stated that he cannot tell if the parcel was available for allocation as there are plans showing a road interchange had been planned in that area. He stated that the allotment was accepted by Wak Limited which was incorporated in in January 2001 and it is not possible for



- the Commissioner of Lands to have allocated land to a company that had not been incorporated. He stated that a receipt for ksh.979, 050/= was issued to Wak Limited. He further stated that there are instructions to prepare a lease and a grant was processed on 28th February 2001 and registered on 12th March 2001 as IR No.85635/1 thus the land became private land.
15. It was his testimony that rates were computed on 12th March 2001 and the suit property was transferred as there is a memorandum of transfer dated 12th March 2001 to the 2nd Defendant which was effected on 30th March 2001. He stated that the 2nd Defendant paid the rates on 29th March 2001. He testified that there were special conditions before the land could be transferred to the 2nd Defendant. One of them was that a consent had to be sought before any transfer could be effected.
 16. He told the Court that he 3rd and 4th Defendants had a duty to ensure that Wak Limited was registered before the grant to it was processed and the duty to note that the suit land had a prior commitment thus they failed to do due diligence before allocating the land to the 1st Defendant.
 17. When he was cross-examined, he stated that an officer of the Plaintiff went to his office to inquire how the land was allocated and that he is the one who perused the file relating to the suit land and saw the Certificate of incorporation of the 1st Defendant. He stated that land owned by the government is available for allocation and that since the land had a number, it means that it existed. He further stated that the map was with Director of Surveys and the Lands office and that if one did a search, they would find out the status of uncommitted government land. He also stated that he found a photocopy of the survey plan and no road reserve is marked and there is no encumbrance against the land. He added that the survey plan would be found at the Director of Survey and Director of Physical planning. He also stated that at the time of registration and transfer of the suit land, there were no encumbrances against title and that he could not tell if the road had been gazetted.
 18. He stated that the allotment was signed by the 3rd Defendant in his capacity as the Commissioner of lands. He also stated that he had not gone to the suit property and does not know if there are developments. He added that he could therefore not tell if what is on the map is what is on the ground. He also stated that once the certificate of incorporation is presented, it would be unusual to check with the Registrar of companies. He added that consent to transfer was obtained with no objection.
 19. He stated that the government would have to compulsory acquire the land if it required it for public purpose. He also stated that Wak Limited was incorporated on 23rd January 2001 while title was issued on 12th March 2001.
 20. When re-examined, he stated that the 3rd and 4th Defendants were in a position to know that the land was reserved for a road as they ought to have contacted the Department of Physical Planning to know the use. He also stated that officers at the lands Ministry acted in their own capacity by then therefore nothing could stop the transfer or issuance of the grant.
 21. PW4, Gedion Mokaya a former Investigator of the Plaintiff, testified on 2nd June 2021. His witness statement dated 26th July 2013 was adopted as part of his evidence. He told the court that he took over investigations over the suit land from his former colleague Mr. Nzioki wa Makau, now a judge. He testified that the suit property is owned by the government and that it was approved for public utility purposes as a road reserve within Nairobi. He stated that the grant in respect of the property was issued for the remainder of the term of 99 years with effect from 1st June 1998 on terms and conditions set out therein dated 28th February 2001 and registered on 12th March 2001.



22. It was his testimony that investigations established that the alienation of the suit property was a nullity. He stated that by a letter dated 3rd June 1988, by one Mr. S. K. W. Wangila, on behalf of the Commissioner of Lands, a grant in respect of the suit property was issued to the 1st Defendant.
23. PW4 also testified that transfer of the suit property to the 1st Defendant was done corruptly, fraudulently and illegally with the object of misappropriation of public property which had been alienated for a public use. He pointed out that investigations revealed that Wak Limited was not a legal person capable of accepting the allotment letter since its certificate of incorporation was purportedly registered as No.C93340 on 20th January 2001 yet the allotment letter was issued on 3rd June 1988 before its incorporation. He also pointed out that records at the Survey of Kenya indicate that the survey of the property was done on 26th May 1993 before Wak Limited was incorporated. He also stated that further inquiries at the Registrar of Companies indicated that C.93340 belonged to a company called Kenjoro enterprises Limited which was registered on 27th March 2001.
24. PW4 also pointed out that under the special conditions in the letter of allotment, transfer was to be with consent in writing by the Commissioner of Lands but the transfer to the 2nd Defendant was done immediately the suit property was fraudulently acquired. He further stated that the suit property had been set aside for interchange of the southern bypass and Mombasa road just before Airtel building.
25. When he was cross-examined, he stated that though he is not a lawyer, a valuer or a surveyor he is qualified to verify the authenticity of the letters relied on by the Plaintiff. He further stated that the suit land was reserved as an interchange and that the plan for the road reserve from the survey of Kenya is dated 26th May 1993. He stated that the report from the Registrar of Companies was signed by Polyn Wanja but he did not interview her. He also stated that he went to the suit property with a surveyor and that there were no beacons then as the interchange is part of the suit property.
26. He stated that the focus of the investigations was the suit property and not the adjacent parcels and that he went to the lands registry and he did not see any encumbrances against the title but if someone did a search at the lands registry, they would have come across an approved development plan which was at the survey of Kenya. He added that he could not say with certainty that the plan was at the Ministry of lands but it was there.
27. When referred to Peter Mbithi's witness statement dated 28th January 2013 and filed on 14th February 2013, he stated that they did the same investigation so the reports are the same as they reached the same conclusion. When referred to his witness statement, he stated that he does not recall the exact provision of the Government *Land Act* which prohibits allocation of alienation government land.
28. He stated that the response from Polyn Wanja of the Registrar of Companies was that the certificate of registration No.C93340 belonged to another company. He stated that he did not visit offices of the 1st Defendant or their Advocates. He also stated that he saw a letter from Farouk Adam Advocates but he did not see it fit to see it fit to contact the said advocate as Wak Limited was non-existent. He believed the information they got from the Registrar of companies that Wak Limited did not exist. He further stated that he did not visit the office of 2nd Defendant to find out about the transaction and that nobody was charged with any offence in respect of this transaction as this is a civil matter.
29. He stated that he knows the 3rd Defendant who was the Commissioner of Lands at the time but he did not interview him. When referred to the special conditions of the grant, he stated that condition no.2 provided that the grantee would submit building plans on the plot within six (6) months but the Commissioner of Lands did not have permission to consent to a transfer. He added that the consent to transfer prepared by Farouk Adam Advocate and payment of the fee of Ksh.22,000/= led to the transfer document being signed. The Commissioner of lands signed the transfer.



30. PW5, Felix Naphtaly Mutethia, a clerical officer with Business Registration Service formerly the Registrar of Companies testified on 29th November 2021. His witness statement dated 17th June 2021 was adopted as part of his evidence. He told the Court that the office received a letter from the Plaintiff requesting the Registrar of Companies to avail particulars in respect of Wak Limited. He added that a copy of its incorporation certificate No.C.093340 was availed. It was his testimony that one Polyn Wanja did a search and she could not trace any company by the name Wak Limited. He stated that the certificate of incorporation No.C09340 belongs to Kenjoro Enterprises Limited registered on 27th March 2001. He testified that he also conducted his own search on 15th June 2021 before recording his statement and he confirmed that Wak Limited does not appear in the index of registered companies and C93340 belonged to Kenjoro Enterprises.
31. When he was cross-examined, he reiterated that he conducted a search from the data base, printed the results and gave to the investigating officer. He further stated that the registry is in the process of digitizing records so that files do not get lost and to avoid duplicating registration numbers and the names of companies.

Evidence of the 2nd Defendant

32. DW1, Chirag Sanghrajka, the general manager of the 2nd Defendant, testified on 29th November 2021. His witness statement dated 24th October 2013 was adopted as part of his evidence. He stated that the 2nd Defendant and its sister company Nandlal & company deal in real estate development and some of the properties they own are Tile and carpet Center complex on Mombasa Road as well as LR 209/6337 which is the suit property, and LR 209/140305 which are next to each other.
33. He further stated that one David Kamunya who told them he is a director of the 1st Defendant and offered to sell them the suit property and they got interested since it is adjacent to their other properties. He added that they instructed their lawyers M/S C. B. Gor & Gor Advocates to investigate the title and prepare a sale agreement between the vendors and Nandlal & Co. Limited and thereafter, Nandlal Limited nominated the 2nd Defendant as the purchaser who paid the entire purchase price of ksh.6 million. He also stated that he does not know the 3rd and 4th Defendants and never had any personal dealings with them and that prior to the purchase, he had no dealings with the director of the 1st Defendant.
34. When he was cross-examined, he stated that he dealt with Mr. Kamunya who said that he was a director of Wak Limited. He stated that they paid the purchase price by cheque to C. B Gor & Gor Advocates. He also stated that he would not know if his lawyers checked the status of the 1st Defendant with the Registrar of Companies. He further stated that the 1st Defendant owned the suit land but he would not know whether rates and stamp duty were paid by any party. He also stated that they took physical possession of the suit property and erected a boundary wall around it but they are not on the land and have never used it as the Southern bypass now goes through it.
35. When re-examined, he stated that the suit property is next to Parkwood Towers and that at the time of the transaction, it was vacant as there was no bypass going through it. He further stated that he erected a wall around it but it was pulled down in 2007 but they were not given the reasons. He also stated that the Land Registrar issued the title to them upon transfer from Wak Limited.
36. DW2, Regina Wambui Kimaru, an Advocate of the High Court of Kenya and a partner at the firm of LJA Associates, which firm has conduct of this matter on behalf of the 2nd Defendant. Her witness statement dated 1st February 2022 was adopted as part of her evidence.



37. She stated that while she was aware that a business Registration Services official has testified in this case and stated that the Company Registration Number C.93340 belongs to a company called Kenjoro Enterprises Limited, it is a likely occurrence that two different companies can be allocated the same registration number.
38. She pointed out that she had in the past represented a company by the name Sandalwoods (K) Limited incorporated on 22nd April 2008 with incorporation number C.153420 and which number was the same registration number with Admani Brothers Company Limited. She further stated that by a letter dated 28th August 2012 from the Registrar of Companies, Directors of Sandawoods (K) Limited were notified that the certificate of incorporation issued to them on 22nd April 2008 had a typographical error and that it belonged to Admani Brothers Limited and went on to state that the correct registration number for Sandawoods Limited is C.153428.
39. When she was cross-examined, she stated that she does not work for Wak Limited and that her testimony relates to Sandawoods (K) Limited. She reiterated the possibility that two companies can be given the same registration number.
40. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's submissions

41. They are dated 14th March 2022. Counsel for the Plaintiff submitted that the following issues arise for determination;
 - a. Whether the 1st Defendant was in existence when it was allotted the suit property vide the letter of allotment dated 3rd June 1998.
 - b. Whether the 1st Defendant was a legal person capable of owning and selling the suit property.
 - c. Whether the suit property was available for alienation to the 1st Defendant and subsequent transfer to the 2nd Defendant.
42. Counsel for the Plaintiff submitted that while the letter of allotment to the 1st Defendant is dated 3rd June 1998, the certificate of incorporation from the 1st Defendant indicates that it was incorporated on 29th January ,2001 thus fraud was perpetuated by the purported allocation to the non-existent Defendant. Relying on the case of Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015]e KLR, counsel for submitted that allocation of the suit land to the 1st Defendant was fraudulent and any registration and transfer following the allocation was equally tainted by the said fraud and is incurable.
43. He further submitted that there is overwhelming evidence that the suit property was alienated, surveyed and reserved as a road reserve and thus not available for allocation to private entities. He relied on the cases of James Joram Nyaga & Another v the Hon. Attorney General & Another [2007] e KLR; Kenya Anti-corruption Commission v Peter Oloo Aringo & 3 others[2020] e KLR as well as the case of Kenya Anti-corruption Commission v Online Enterprises Limited & 4 others[2019]e KLR.
44. It was also his submission that illegal transactions cannot confer indefeasible title and that public interest should prevail. He relied on the case of Munyu Maina vs Hiram Gathiha Maina[2013] e KLR. Counsel also submitted that none of the Defendants adduced evidence that a new part development plan had been approved to allow the allocation to the 1st Defendant. He added that the 2nd Defendant did not prove that it was a bona fide purchaser and that the doctrine of bona fide purchaser without notice cannot be used to enable a purchaser to take away the legal rights as distinct from equity interests.



45. He pointed out that the 2nd Defendant failed to do due diligence to establish status of the suit property as well as due diligence on the 1st Defendant who was the alleged vendor. He added that the claim by the 2nd Defendant that it owns adjacent plots shows that it had interacted with the part development plan No.409 thus it cannot feign ignorance. He relied on the decision in *Flemish Investments Limited v Town Council of Mariakani* [2016]e KLR.

The 2nd Defendant's submissions

46. They are dated 13th June 2022. Counsel for the 2nd Defendant submitted that the following issues arise for determination:-

- a. Whether the Plaintiff has proved the allegations of fraud and conspiracy regarding the transfer of the suit property.
- b. Whether the 2nd Defendant is a bona fide purchaser for value of the suit property.
- c. Whether the Plaintiff has proved its case to the required standard.
- d. Whether the Commissioner of lands would allocate the property to the 1st Defendant.
- e. Whether there was any encumbrance registered against the title and whether reservation of land is an overriding interest not required to be registered under section 30 of the Registered *Land Act*.

47. It was counsel for the 2nd Defendant's submission that the Plaintiff's case is primarily founded on the allegations of conspiracy and fraud thus it was incumbent upon the Plaintiff to prove that the Defendants met and conspired to defraud the government of its property but it failed to discharge that burden. He relied on the cases of *LWN v PLM & 3 Others* [2021] e KLR; *Denis Noel Mukhulo Ochwada & another v Elizabeth Murungari Njoroge & Another* [2018] e KLR. He also put forward the cases of *Hangshou v Agrochemicals Industries Ltd v Panda Flowers Limited* [2021] e KLR; *Julia Wambugu Mwangi v Family Bank Limited & Another* [2021] e KLR.

48. On the issue whether the 2nd Defendant is a bonafide purchaser for value, Counsel submitted that the 2nd Defendant had no knowledge of any fraud and that the title to the suit land did not bear any encumbrances. He relied on the cases of *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authorities & 4 others*[2019]e KLR; *David Peterson Kiengo & 2 others vs Kariuki Thuo* [2012] e KLR; and *Lawrence Mukiri v Attorney General & 4 others*[2013] eKLR.

49. It was also counsel's submission that the 2nd Defendant holds title to the suit land and once a proprietor has been issued with a certificate of title by the land registrar, it shall be conclusive evidence of absolute and indefeasible ownership. He relied on the Supreme Court case of *Rutogut Farm Ltd v Kenya Forests Service & 3 others* [2018] e KLR.

50. Counsel further submitted that it is the duty of the state through the land Registrar to maintain the register of lands thus a title evidences conclusive ownership. He added that due diligence by a bona fide purchaser does not require him to go past the register.

51. He also put forward the case of *Ingosi & 87 others v Kenya Forestry Services & 20 others* [2015]e KLR to submit that the subject property was not alienated land thus it was available for alienation by the Commissioner of lands.

52. Counsel also submitted that whilst this matter was before the court, the Plaintiff proceeded to publish in Gazette 11536 of 1st October 2010 in which it cancelled the Plaintiff's title.



53. The 3rd Defendant's counsel told the court that they did not wish to put in any written submissions. The 3rd Defendant did not adduce any evidence or avail any witnesses.
54. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The issues for determination are:-
- i. Whether the 1st Defendant was in existence when it was allotted the suit property vide the letter of allotment dated 3rd June 1998.
 - ii. Whether the 1st Defendant was a legal person capable of owning and selling the suit property.
 - iii. Whether the suit property was available for alienation to the 1st Defendant and subsequent transfer to the 2nd Defendant.
 - iv. Is the 2nd Defendant an innocent purchaser for value without notice?
 - v. Is the Plaintiff entitled to the reliefs sought?
 - vi. Who should bear costs of this suit?
55. The Plaintiff's case is that the 3rd and 4th Defendants fraudulently caused the land currently known as LR No.209/6337 (I.R No.85631) which is public land to be allocated to the 1st Defendant who in turn fraudulently transferred it to the 2nd Defendant.
56. The 1st and 4th Defendants failed to enter appearance. The 3rd Defendant, who was the commissioner of Lands at the time filed a defence contending that he acted in exercise of the statutory functions in the Office of the Commissioner of lands which he conducted in utmost good faith. The 2nd Defendant contends that he is an innocent purchaser for value without notice.
57. Is the suit land public land? The Part Development Plan No. 409 (Reference No.42.28.93.18A) signed by the Director of Surveys and approved by the Commissioner of lands on 3rd June 1993 shows that LR No.209/6337 falls within an interchange of two roads which PW1 identified as the Southern by pass and Mombasa road. This evidence was not controverted. Therefore, the suit land is government land alienated for public utility. It was therefore not available for allocation to the 1st Defendant or to any other person. Only unalienated land would be available for allocation under the Government Lands Act(Repealed). Section 2 of the said Act defines unalienated government land as, "unalienated Government land" means 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.
58. In Kenya Anti Corruption Commission v Lima Limited & 2 others [2019] eKLR , the court held, " In a nutshell, the 1st defendant un-procedurally obtained title to the properties in issue as the same had been alienated as public land with public utilities and not available for conversion to private land."
59. In my view, the Plaintiff has established that the Defendants colluded to defraud the government of the suit property. As found above, the suit land was incapable of allocation and the buck stops with the 3rd Defendant on that. He ought to have been guided by Section 2 of the Government Lands Act on that issue.
60. Further, the Letter of Allotment dated 3rd June 1998 was issued to the 1st Defendant, an entity that was incapable of legally holding the suit property at the time. The 1st Defendant presented a certificate of registration No.C 93340 allegedly registered on 20th January 2001 after the Letter of Allotment was issued. PW3 and PW5 led evidence that the said certificate belongs to a company known as Kenjoro Enterprises Limited and that Wak limited does not exist in their records. While DW2 created a picture



of the possibility of two separate companies being issued with the same incorporation number due to the possibility of clerical errors by the Registrar of Companies, it is my view that her evidence had no relevance with the purported registration of the 1st Defendant in the circumstances of the uncontroverted evidence of PW3 and PW5. PW2 took the court through the records and it emerged that the Commissioner of lands did not satisfy himself on the particulars of the 1st Defendant.

61. Additionally, the allotment letter dated 3rd June 1998 was not accompanied by a Part Development Plan. The Plaintiff also led evidence that the grant herein was registered to the 1st Defendant on 12th March 2001 and transferred almost immediately to the 2nd Defendant on 30th March 2001. The transfer was executed by parties misrepresenting themselves to be directors of the 1st Defendant as the 1st Defendant has been found to have been non existent.

62. The 2nd Defendant submitted extensively that he is an innocent purchaser for value without notice. According to plan 409, the Mombasa road and the southern bypass interchange meanders through the suit land. It is inconceivable that an innocent purchaser would buy land that is right in the middle of the road. Further, by DW1'S own testimony, the 2nd Defendant owns parcels adjacent to the suit land. Faced with similar facts, the Court of Appeal stated in *Chemey Investment Limited v Attorney General & 2 others* [2018] Eklr observed thus:

“We ask ourselves, which innocent purchaser, without notice, would accept to purchase a property that is being used for public purposes, just next to the provincial headquarters and the law courts, without any form of inquiry?”

Further, the 2nd Defendant was not a diligent bona fide purchaser as described in *Katende v Haridar & Company Limited* [2008] 2 E.A. cited by the Court of Appeal in *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v Attorney General & 4 others* [2017] eKLR.

63. It was also held by the Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina* [2013] e KRL:

“We state that when a registered proprietors’ root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of acquires the title and show that the acquisition was legal, formal and free from any encumbrance including any and all interest which need to be noted on the register”.

64. The Plaintiff sought for cancellation of title. It emerged that the subject title was cancelled vide Gazette 11536 of 1st October 2010. The Plaintiff also sought damages. The person who issued the allotment letter is the 3rd Defendant in cohorts with the 4th Defendant. The 2nd Defendant is not an innocent purchaser for value. Damages are therefore payable by the 2nd to 4th Defendants as the 1st Defendant is non existent. The guiding authority is *Ethics & Anti-Corruption Commission v Ann Wanjiku & 3 others* [2021] eKLR where after finding the Commissioner of Lands liable for involvement in a fraudulent scheme , the court held:

“I would have considered making the award if the person who effected the allotment and transfer was personally a party in this suit, which is not the case.”

65. In conclusion, I enter judgment in favour of the Plaintiff as against the Defendants jointly and severally, as follows:-



- a. That a permanent injunction is hereby issued restraining the 2nd defendant, its servants from dealing with the Plaintiff's property known as LR NO 209/6337 (IR No 85631).
- b. That declaration is hereby issued that the grant made to the 1st Defendant on or about 28th February 2001 in respect of L.R No.209/6337 I.R.No.85631 was fraudulent and illegal and is void and did not vest any lawful title on the 1st Defendant.
- c. That a declaration is hereby issued that the transfer of the grant to the 2nd Defendant on or about 30th March 2001 in respect of L.R No.209/6337 I.R.No.85631 was made fraudulent and illegal and is void and did not vest any lawful title on the 2nd Defendant.
- d. That an order is hereby issued directing the Chief Land Registrar to rectify by canceling the entries made in the grant and transfer in favour of the 1st and 2nd Defendants on 28th February 2001 and 30th March 2001 respectively and restoring the land known as LR No.209/6337 I.R to its reserved/planned and approved user.
- e. General damages Kshs.300,000/-.
- f. Costs of the suit and interest .

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF JULY 2022.

.....

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Nyoike advocate for the Plaintiff

No appearance for the 1st Defendant

Ms Dave advocate for the 2nd Defendant

No appearance for the 3rd and 4th Defendants

Steve - Court Assistant

