REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 99 OF 2007

RINYA HOSPITAL LIMITED ……………..…………………………………PLAINTIFF

VERSUS

AWENDO TOWN COUNCIL …………………………………… 1ST DEFENDANT
JOHN ODONGO WADEYA ………………………………..………. 2ND DEFENDANT
MICHAEL NGOYA ……………………………………………..……. 3RD DEFENDANT
RUBIN ADERA ………………………………………………………. 4TH DEFENDANT
JOSHUA OMBAGO OGUTU ..………………………………..….. 5TH DEFENDANT
MOSES ODHIAMBO OKELLO ……...…………………….……..…. 6TH DEFENDANT
MR. LOMO …………………………………………………...…..…. 7TH DEFENDANT
OKETCH OWINO …………………………………….…….….…… 8TH DEFENDANT
GILBERT OLUOCH NYANDIGA ……………………………….…. 9TH DEFENDANT
PHILIP OWINO ………………..………………………………….…. 10TH DEFENDANT
OKELLO OLWAL ……………………………………………….. 11TH DEFENDANT
KENNEDY ONIERO ………………………………….………… 12TH DEFENDANT
DICKSON ONYANGO ……...…………...……….....………… 13TH DEFENDANT
JAKOM KISINO NYAKWESI ………………………..………….. 14TH DEFENDANT
BERNARD ONJIKO ……………………………...……….….. 15TH DEFENDANT
CHARLES SAOKE OKODO …………………...…………… 16TH DEFENDANT
OLOO MANYALA ………………………………………………. 17TH DEFENDANT
CHARLES OGADA ……………………………..……………. 18TH DEFENDANT
KENNEDY OTIENO ODONGO ………………………………. 19TH DEFENDANT
AYUB OTIENO ………………………………………………. 20TH DEFENDANT
KENNEDY ONGATI ………………………………………….. 21ST DEFENDANT
GEORGE OWINO OWENGA ………………………………… 22ND DEFENDANT

JUDGMENT

The plaintiff alleged in her plaint that she is the registered proprietor of a parcel of land known as **L.R. NO. 20592** vide Grant No.5240 situate within Awendo Town, hereinafter referred to as **"the suit land"**. The suit land measures **11.75 hectares**. The said Grant was issued on 18th April 1995 by the Commissioner of Lands on behalf of the County Council of Migori. The plaintiff further alleged that on/or about August 2007, the 1st defendant being the Local Authority in charge of the area where the suit land is situated, irregularly, illegally and without lawful authority entered upon and purported to subdivide, alienate and/or allocate the suit land to various persons and thus trespassed thereon. Pursuant to the irregular subdivision and alienation of the suit land, the 1st defendant allocated various portions thereof to the 2nd to 22nd defendants who have since commenced construction on portions of the suit land without authority of the plaintiff. The plaintiff lamented that she had been deprived of a substantial portion of the suit land and had thus suffered loss and damage. She made the following prayers:

1. A declaration that she is the registered proprietor of the suit land.

2. An order of nullification of all the subdivisions and/or allocations made by the 1st defendant in favour of the rest of the defendants.

3. A permanent injunction restraining the defendants by themselves, agents and/or servants and/or anyone claiming under the defendants, from trespassing onto, alienating, interfering with and/or in any other manner whatsoever dealing with the suit land.
4. An order of eviction.
5. General damages for trespass.
6. Costs of the suit.

The 1st defendant filed a statement of defence and counterclaim. She stated that the plaintiff's grant was fraudulently obtained. The particulars of fraud were set out as hereunder:

> **"(a) Obtaining a Grant upon public land namely L.R. No. 20592 vide grant No. 5240 contrary to the mandatory provisions of the law.**
>
> **(b) Obtaining the said Grant No. 5240 which covers ½ of the entire government land within AwendoTownship.**
>
> **(c) Obtaining the said Grant unlawfully after misleading the relevant government officials as to the facts and use thereof.**
>
> **(d) Obtaining the said Grant over government land at the detriment of the general public."**

The 1st defendant stated that she re-entered the suit land many years ago and not in August 2007 as alleged by the plaintiff. She added that she lawfully gained entry into the suit land and lawfully allocated portions thereof to the 2nd to 22nd defendants who have developed their respective portions with permanent structures and are in occupation thereof.

In her counter-claim, the 1st defendant reiterated that the plaintiff acquired the suit land fraudulently and upon such acquisition failed to comply with mandatory special conditions thereby breaching the terms of the allotment resulting to forfeiture of the suit land. The special conditions that were allegedly not complied with were, ***inter alia:***

(a) The plaintiff was to erect on the suit land buildings and construct a drainage system within 24 months from 18th April 1995 which the plaintiff has todate failed to do.

(b) Within six months from 18th April 1995 the plaintiff was to forward for approval of the 1st defendant building plans which she failed to do.

(c) The plaintiff was to pay rates, taxes, charges and duties to the 1st defendant which she has not done todate.

The 1st defendant contended that breach of the special conditions in the Grant entitled the Government to automatically re-enter and recover the suit land upon expiry of the specified period. On behalf of the Government of Kenya, the 1st defendant re-entered the suit land, it was contended. Consequently, on 6th August, 2003 vide minute **No.6/8/2003** of the full council meeting, the 1st defendant allotted portions of the suit land to the 2nd to 22nd defendants who have since developed their respective portions which they occupy.

The 1st defendant alleged that the plaintiff had colluded with one **George Onyango**, its former Town Clerk, who, without lawful authority, approved subdivision of the suit land by the plaintiff. The 1st defendant prayed for a declaration that the suit land was irregularly granted to the plaintiff and/or in the alternative, a declaration that the title to the suit land stands forfeited by the plaintiff to the 1st defendant on behalf of the Government of Kenya due to breach of the special conditions contained in Grant No. 5240. She also prayed for costs of the suit.

The 11th defendant filed a statement of defence and counterclaim through M/s G.S. Okoth and Company

Advocates whereas the other defendants filed a joint statement of defence through M/s Omode Kisera & Company Advocates who is also on record for the 1st defendant. The 11th defendant denied the plaintiff's claim and stated that he was lawfully allocated plot **No. 220'B'**, Awendo Town, by the Works and Town Planning Committee of the South Nyanza County Council vide **Minute No. 38/87 (51)** of 14th December 1987 and approved by the full council vide **Minute No. 33/87** of 29th December 1987.
By 18th April 1995 he had erected a permanent shop building on the said plot and consequently the plaintiff's alleged grant was fraudulently obtained.

By way of a counterclaim the 11th defendant stated that the plaintiff had unlawfully and fraudulently caused a Grant to be issued to her which included his developed plot **NO. 220 'B'** within Awendo Town. The particulars of the alleged fraud were set out. He urged the court to dismiss the plaintiff's suit with costs and award him general damages as provided for under **section 24** of the **Registration of Titles Act**.

The other defendants stated in their joint statement of defence that they had been lawfully allotted their respective portions of the suit land in the year 2003 and they had erected permanent structures thereon. They are also in occupation of the same. They were thus innocent and ***bona fide*** allottees without notice of the plaintiff's interest in the suit land. They urged the court to dismiss the plaintiff's suit.

The plaintiff filed a reply to defence and defence to counterclaim and denied that she had fraudulently acquired the suit land. She stated that the suit land was procedurally and regularly acquired and a Grant thereto was procedurally issued by the Commissioner of Lands. The alleged subdivision and allotment of portions of the suit land to the 2nd to 22nd defendants as alleged was therefore an act of trespass. The plaintiff further denied that the 2nd to 22nd defendants are innocent and ***bona fide*** allottees. They have no titles over the parcels of land which they allegedly occupy, she added. The plaintiff further stated that she had complied with all the terms and conditions of the grant and that the suit land had not been forfeited as alleged by the 1st defendant. She denied that the 1st defendant had re-entered and/or recovered the suit land as alleged or at all. She further denied the 1st defendant's contention that one George Onyango had colluded with her in obtaining approval to subdivide the suit land. She further stated that the 1st defendant has been aware of the Grant since 17th January, 2000 when the full council deliberated on the issue of subdivision of the suit land and approved the same.

The plaintiff further contended that the 1st defendant, not being Migori County Council, for and on whose behalf the Grant was issued, has no ***locus standi*** to file a counter claim in respect of the suit land. She further contended that the 1st defendant's claim relating to fraud is statutorily time barred, by dint of provisions of **section 4**of the **Limitation of Actions Act**, the Grant having been issued in 1995. The 1st defendant's defence and counterclaim are prohibited by dint of **sections 37** and **39** of the **Trust Land Act Chapter 288 Laws of Kenya**, the plaintiff averred.

The plaintiff testified through **Simeon Owuor Odede, PW1**, and **George Otieno Onyango, PW2**. PW1 is the Chairman of the Board of Directors of the plaintiff. He produced a certified copy of the Grant as **P. Exhibit 1**. The Grant was issued for a term of 99 years with effect from 1st November 1992. The plaintiff had on 25th August 1992 written to His Excellency Daniel Arap Moi, then the President of the Republic of Kenya, requesting for allotment of a parcel of land to put up a hospital within the vicinity of Awendo market. In the said letter which was produced as **P. Exhibit 2**, the plaintiff had stated that she had identified a vacant piece of land and highlighted the same on a map that was attached to the said application.

Upon presentation of the said letter the request was approved and PW1 was given a letter which he delivered to the Commissioner for Lands. Thereafter an allotment letter was issued and the plaintiff was requested to pay a sum of Kshs. 160,000/= which was duly paid. Thereafter the grant was issued.

A part development plan (**PDP**), was prepared. A deed plan was also prepared. The PDP was approved by all the necessary authorities, PW1 alleged. Thereafter the plaintiff made a request for subdivision of the suit land and change of user of the same. Approval was granted by the Commissioner of Lands on 6th February, 2001. The Town Clerk of the 1st defendant and the District Physical Planner and the Land Officer approved the subdivision plan. A certified PDP was produced as **P. Exhibit 4**. The subdivision scheme was produced as **P. Exhibit 5**.

PW1 further testified that the plaintiff could not place beacons on the ground because of resistance by people who said that they had been allotted plots on the suit land by the 1st defendant, although he contended that at the time when the land was given to the plaintiff it was unoccupied. It is to be noted that

the plaintiff wanted to plant the beacons in the year 2006.

After the plaintiff met resistance from some people who were on the suit land PW1 wrote to the 1st defendant and also made personal representation. He was informed by the 1st defendant's Town Clerk that the suit land had been repossessed from the plaintiff by the 1st defendant but no document was shown to him to that effect. PW1 went back to the Commissioner of Lands and confirmed that the suit land had not been repossessed. He wrote to the District Commissioner, Migori, and to the 1st defendant regarding the issue but there was no response.

The Grant had been issued by the Commissioner of Lands for and on behalf of Migori County Council to whom the annual rent of Kshs. 32,000/= was payable with effect from 1st November, 1992. PW1 alleged that the plaintiff had paid all the rents todate but the receipts that had been issued in respect thereof had gone missing. He had however been issued with a letter from Migori County Council dated 27th March, 2009 showing that the plaintiff had paid all the rents for the period 1st November 1992 to December 2009. The letter was not produced though it had been marked for identification.

PW1 further testified that the plaintiff had not made any development on the suit land but conceded that the 2nd to 22nd defendants had developed permanent and temporary houses thereon. The plaintiff had conducted a search at the Lands Registry and confirmed that the land was still registered in her name. He urged the court to enter judgment for the plaintiff as prayed in the plaint.

In cross examination, PW1 stated that the Grant that was issued to the plaintiff was valid. He said that the consideration of the sum of Kshs. 160,000/= had been paid but the appropriate receipt in respect of that payment had been lost. PW1 also conceded that the plaintiff did not, within six months of the issue of the grant, present any development plans for approval.

PW2 was the 1st defendant's Town Clerk from 1999 to 2002. He testified that in the year 2000 the plaintiff applied to the 1st defendant for change of user of the suit property and subdivision of the same. The application was deliberated upon by the Town Planning Committee on 17th January 2000. The committee approved the application and the minutes were thereafter adopted by the full council meeting on the same day. He produced a copy of the minutes as **P. Exhibit 5**. The witness said that he also signed the subdivision scheme. The PDP was executed on 18th January 2000. He denied having colluded with the plaintiff to obtain approval of the subdivision scheme.

In cross examination, PW2 said that at the time when the plaintiff was granted approval for the subdivision of the suit land he was not aware that there were people who had been allocated plots thereon.

The 1st defendant testified through its Town Clerk, **Josephat Ayonga, DW1**. He has been the Town Clerk since June, 2009. He said that the suit land is a big parcel of land occupying half of Awendo Township which was created in 1999. It was hived off the County Council of Migori. The suit land is therefore under the Town Council of Awendo. DW1 said that the plaintiff was supposed to be paying rent of Kshs. 32,000/= per annum to the 1st defendant but the plaintiff had not made any such payments. He further stated that the special conditions stated on page two of the Grant had not been complied with by the plaintiff. No building plans had been presented to the 1st defendant by the plaintiff. The 1st defendant was therefore entitled to repossess the suit land from the plaintiff. He further stated that portions of the suit land had been allocated to other people prior to issuance of the Grant to the plaintiff. In his view, the right procedure was not followed in issuing the Grant.

In cross examination, DW1 said that he did not know the exact date when the other defendants were allocated portions of the suit land. He however conceded that in 1995 when the Grant was issued to the plaintiff the 1st defendant had not been established. However, there was no evidence that the County Council of Migori had been consulted before the Grant was issued.

Although the witness said that the 1st defendant had re-entered the suit land, he conceded that the lawful procedure for such re-entry had not been followed. No notice had been given to the plaintiff.

With regard to the subdivision approval, the witness said that according to **P. Exh.5** the Market and Planning Committee met on 17th January 2000 and therefore it was true that the 1st defendant was aware of the said Grant before 2004.

The 11th defendant testified as **DW2**. He stated that in 1987 he applied to the South Nyanza County Council for allotment of a plot. At that time the County Council of Migori was not in existence. His application was allowed and thereafter he was issued with a plot card. The same was produced as **D. Exhibit 1**. It was issued on 3rd March, 1992. It shows that he was allocated plot No. 220 B within

Awendo market in Central Sakwa Location. The authority for allocation was made vide **Minute No.WTP38/87 (51)** of 14th December 1987. A certified copy of the said minutes was produced as **D. Exh.2**. He put up a commercial building thereon between 1990 and 1992. He also put up nine residential houses. He started paying land rent in 1988. He had not been given any notice that the plot which had been allocated to him had subsequently been allocated to any other person.

Gordon Odeka Ochieng, DW3, is the Chief Lands Administration Officer at the Ministry of Lands, Nairobi. He gave a detailed account of the procedure that is undertaken before Grants are issued by the Commissioner of Lands. He referred to the parcel file in respect of the suit land and told the court that the Grant was issued pursuant to the provisions of the **Registration of Titles Act, Cap 281 Laws of Kenya**. The suit land was initially Trust Land. Before such a grant is issued advertisements in the local dailies or the Kenya Gazette are made by the Commissioner of Lands on behalf of the relevant County Council on which the land is located. The advertisements invite members of the public to apply for plots. The advertisements specify the size of the plots, the prices thereof and other conditions relating to the intended allotments. Thereafter balloting is done and successful applicants are issued with letters of allotment.

That is not the only way of acquiring such lands, there are also direct Grants. Needy Kenyans can apply to the Commissioner of Lands indicating the purpose of the land sought to be allocated accompanied by a plan showing the location of the plot. The Commissioner of Lands checks the records to determine whether the land applied for is available or whether it has any prior commitment. Once satisfied that it is available and meets all the other requirements, the Director of Physical Planning institutes the process of preparing a Part Development Plan. The plan must show that the land is vacant. Upon preparation of the PDP the same must be circulated to all the relevant offices for appropriate comments. On receipt of positive comments from all the concerned offices, the District Physical Planner submits the final print of the PDP together with copies of the comments to the Director of Physical Planning who will recommend the plan for approval by the Commissioner of Lands. Upon receipt of the plan, the Commissioner of Lands will further re-confirm that no other commitments have surfaced on the earmarked plot. Once satisfied that it is vacant and available he instructs the Chief Valuation Officer to determine the value of the plot for alienation indicating the user of the plot, the term of the lease and conditions to be attached thereto. The Chief Valuer determines the premium and the annual rent payable. Thereafter the Commissioner of Lands directs issuance of an allotment letter. The allottee is given time to accept the allotment and make the necessary payments. Once that is done the allottee is instructed to engage a surveyor. After the land is surveyed and beacon certificate issued, the Director of Surveys issues the land reference number and forwards the survey details to the Commissioner of Lands for issuance of a Grant or lease.

The witness further testified that the Commissioner of Lands administers Trust lands on behalf of County Councils pursuant to the provisions of **section 53** of the **Trust Land Act**. The Grant in respect of this suit was issued on behalf of the County Council of Migori. DW3 did not come across any document showing that the County Council of Migori had authorized the Commissioner of Lands to allocate the suit land. DW3 said that once the Head of State recommended the application that was made by the plaintiff, the Commissioner of Lands wrote to the Director of Physical Planning to institute the preparation of the appropriate plans. The witness however stated that a Presidential recommendation is not binding upon the Commissioner of Lands. The plaintiff's application letter that bore the President's signature did not have any plan attached thereto, DW3 added. He went on to state that there were records to show that there was an application for subdivision and change of user made by the plaintiff. Approval was granted but in 2009 the same was suspended on the basis of a complaint by the 1st defendant who said that the allocation was overlapping onto a private land and that the size of the plot was too big given the size of Awendo Township.

Asked whether the allotment of the suit land to the plaintiff was fraudulent or not, DW3 stated that:

> **"Subject to confirmation that other private allotments existed prior to issuance of the title, I would say that there was fraud. There is evidence that such settlements existed. Our file does not show existence of beacon certificates, comments from the relevant authorities and evidence of developments by the plot owner."**

He said that the plaintiff had been given six months to submit development plans and complete developments thereon within twenty four (24) months from the date of the allotment but that had not been

done.

In cross examination, DW1 said that notwithstanding the word **"Approved"** and the former president's signature on the plaintiff's application, the Commissioner of Lands was obliged to follow the laid down process of alienating Trust land.

Concerning re-entry into the suit land by the first defendant, the witness said that he was not aware of any notice that had been served upon the plaintiff by the first defendant.

Peter Jaoko Opiyo, DW4, was an employee of the County Council of Migori where he had worked for about 24 years. At the time he testified he was working as an Assistant Administrative Officer. He said that the county council was not aware of the existence of the Grant that was made to the plaintiff until this suit was filed. The council had not participated in the issuance of the Grant. The council did not recommend alienation of the land. It had also not received any land rates in respect of the suit land, PW4 added. The witness said that after establishment of the first defendant the area on which the suit land is situated is now under the Town Council of Awendo. Consequently, the County Council of Migori could not receive any land rent in respect of land that was under the jurisdiction of the first defendant.

The advocates for the parties did not frame issues for determination. However, from the pleadings and the evidence on record, the issues for determination may be summarized as hereunder:

1. **Whether the plaintiff is the registered Grantee of the suit land.**
2. **Whether the Grant was fraudulently obtained.**
3. **Whether the Grant can be challenged at the instance of the 1st defendant.**
4. **Whether the 1st defendant's counterclaim is statute barred.**
5. **Whether the 1st defendant lawfully re-entered the suit land.**
6. **Whether the plaintiff is entitled to the orders as sought in the plaint.**
7. **Whether the 1st and 11th defendants are entitled to the prayers sought in their respective counterclaims.**
8. **What order should be made as to costs?**

Written submissions were filed on behalf of the plaintiff, the 1st and 11th defendants by their respective advocates. I have carefully perused and taken the same into consideration.

It was not disputed that the plaintiff obtained the Grant on 18th April 1995. The same was signed by **Mr. Wilson Gacanja**, then Commissioner of Lands, for and on behalf of the County Council of Migori. Thereafter it was issued by the Registrar of Titles under the provisions of the **Registration of Titles Act**. The vexing issue is whether the Grant was lawfully obtained or not. The defendants contended that it was fraudulently acquired. According to the evidence adduced by PW1, the process of acquisition of the Grant was commenced by a letter dated 25th August 1992 which was addressed to His Excellency Daniel Toroitich Arap Moi, who was then the president of the Republic of Kenya. In the said letter the plaintiff stated, ***inter alia***:

> **"RinyaHospital is a private undertaking and is already employing over 80 professional and non professional staff. It has become necessary, Your Excellency, to put up a bigger complex of the Hospital within the vicinity of Awendo market centre. Your Excellency, the Hospital has identified a vacant piece of land (area highlighted in green on attached map) which can accommodate the wards for 400 patients, pharmacy, out-patient wing, the Administration block, a modern mortuary and staff houses. The land was already acquired by the Government under the CompulsoryLand Acquisition Act.**
>
> **Your Excellency, the Kenya Commercial Bank is prepared to finance the proposed new hospital extension at Awendo township to the tune of over Kshs.10 million. The Hospital has also set aside over Kshs.3 million.**
>
> **Our earnest request, Your Excellency, is to seek your**

> **approval for the allotment of the requested plot to enable the directors of the RinyaHospital to play their part in nation building for health during the NYAYO era."**

A copy of the aforesaid letter that was produced in court as an exhibit bears the words **"Approved"** and a signature that was said to be that of the retired president.

PW1 did not give the details of the steps that were taken by the plaintiff to, identify the land before applying for allotment of the same or, after the aforesaid approval was obtained. Suffice to say that after presentation of that letter to the Commissioner of Lands the plaintiff was allegedly issued with an allotment letter and was requested to pay a sum of Kshs. 160,000/=. The allotment letter was not produced in court. PW1 further stated that a PDP was prepared and the same was duly approved by all the necessary authorities. Thereafter the Grant was issued.

However, the evidence of DW3 revealed that the County Council of Migori had not authorized the Commissioner of Lands to allocate the suit land to the plaintiff. Under **section 53** of the **Trust Land Act**, the Commissioner of Lands administers Trust land of each county council as an agent for the council. He can only alienate such land with express authorization of the concerned county council. The PDP that was produced in court did not indicate that the County Council of Migori had given its approval. There was no evidence of any favourable comments having been made by the authorities concerned except that of the Director of Physical Planning. It was upon the plaintiff to prove that the County Council of Migori and all other relevant offices gave favourable comments before the Grant was issued.

The Grant that was issued contained several special conditions which required compliance by the plaintiff within a specified period of time. Condition No. 2 required the Grantee, within six months of registration of the Grant, to submit in triplicate to the Local Authority concerned building plans for approval. That was not done. The plaintiff was also required to complete erection of the proposed buildings within 24 months from the date of the registration of the Grant. In the event of default, it was expressly stated that:

> **"It shall be lawful for the county council or any other person authorized by the county council to re-enter into and upon the land or any part thereof in the name of the whole and thereupon the term hereby created shall cease but without prejudice to any right of action or remedy of the county council in respect of any antecedent breach of any condition herein contained."**

There is no dispute that the plaintiff has todate failed to carry out any developments on the suit land. It would also appear that the plaintiff has not been paying the appropriate land rent to the Town Council of Awendo which is now responsible for collection of the same, having been established in 1999 or thereabout. The plaintiff did not adduce any documentary evidence to prove that such payments had been made.

Although the plaintiff applied for allocation of the suit land for purposes of expanding the Hospital, PW1 testified that after sometime the plaintiff changed her mind and decided to apply for change of user of the suit land. It sought approval to subdivide the same. According to the approved subdivision scheme, apart from a portion of the land measuring 3.0 hectares that was earmarked for development of a hospital, a portion of the land was to be utilized for a school, 23 commercial plots were proposed as well as 46 high density residential plots and several medium density residential plots. A petrol station and a church were also included in the new PDP. It is therefore doubtful whether the plaintiff was entirely truthful in applying for allotment of the suit land. It would appear that the plaintiff wanted to secure the suit land largely for speculative purposes. It is a prime land that was said to be covering nearly half of the town council of Awendo.

DW4 testified that the County Council of Migori was not consulted and neither did it give its approval to the Commissioner of Lands to allocate the suit land to the plaintiff. It appears to me that the plaintiff and the Commissioner of Lands assumed that once the president had endorsed the letter dated 25th August 1992 it was sufficient authority for alienation of the Trust land in favour of the plaintiff. In this regard, I wish to echo the words of the Court of Appeal in **WRECK MOTOR ENTERPRISES – VS- THE COMMISSIONER OF LANDS AND 3 OTHERS** in Civil Appeal No. 71 of 1997 where their Lordships held as hereunder:

> **"The fact that H.E. the President endorsed the**

appellant's application is of no consequence. In our view, the endorsement or the appending of his signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated GovernmentLand is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held."

By failing to consult the relevant county council before issuing the Grant, the Commissioner of Lands acted ***ultra vires***. **Section 53** of the **Trust Land Act** empowers the Commissioner of Lands to administer Trust land as an agent of a county council but the proviso to that section is emphatic that:

"the Commissioner of Lands shall act in compliance with such general or special directions as the council may give him."

It is therefore clear that the Commissioner of Lands issued a Grant in respect of Trust land which was under the County Council of Migori without power and authority to do so and to that extent the Grant was obtained fraudulently and without due regard to the relevant law. It is trite law that an agent cannot alienate property without authority of the principal. The plaintiff is not without blame either. She knew or ought to have known the lawful procedure that was supposed to be followed by any applicant seeking Public land but did not strictly adhere to the same. The plaintiff was a party to this fraudulent transaction.

It is important to note that long before the plaintiff applied for allotment of the suit land DW2 had already been allocated plot No. 220 'B' which is within the suit land. The allotment to DW2 was made in 1987 by the South Nyanza County Council before the County Council of Migori came into existence. DW2 has put up a commercial building thereon and nine residential houses. He is faithfully paying plot rents to the 1st defendant.

Section 3 (a) of the **Government Lands Act** states that:

"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 GovernmentLand."

The powers of the President under the above section are delegated to the Commissioner of Lands in some specific instances. A portion of the suit land had already been alienated to the 11th defendant and was thus not available for allocation by the Commissioner. Although PW1 stated that the suit land was completely unoccupied when the plaintiff applied for allotment of the same, it was demonstrated that was not so. If PW1 had exercised due diligence to inspect the suit land before the plaintiff sought its allotment, he would have realized that the 11th defendant had put up houses thereon.

Under the **Registration of Titles Act**, **"fraud"**, on the part of a person obtaining registration, includes **"a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration."**

I did not believe the plaintiff's contention through PW1 that she had no knowledge of the 11th defendant's unregistered interest on the suit land. She knew that by registration of the same in her name, the 11th defendant's interest would be defeated. That notwithstanding, she still went ahead to apply for allotment of the land to herself.

For the aforesaid reasons, I find and hold that the plaintiff's Grant was fraudulently obtained.

Can the 1st defendant lawfully challenge the issuance of the Grant to the plaintiff? Although the Grant

was purportedly issued on behalf of the County Council of Migori, there is no dispute that the 1st defendant was hived off the County Council of Migori in 1999 or thereabout. Thereafter the suit land fell within the jurisdiction of the 1st defendant. The 1st defendant therefore has ***locus standi*** to challenge the plaintiff's Grant or any other act which the plaintiff intends to do on the suit land that is contrary to the law.

The plaintiff's counsel submitted that the plaintiff's rights over the suit land are indefeasible and sought to rely on the provisions of **section 23** of the **Registration of Titles Act, Cap 281 Laws of Kenya**. The section provides as hereunder:

> **"23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party."**

However, it is clear that the above quoted section of the law states that it is a **Certificate of Title** issued by a registrar to a purchaser that is conclusive evidence of ownership, not a Grant. There is a distinction between the two. This issue was well considered by the Court of Appeal in **TITUS KIRAGU –VS- AGRICULTURAL DEVELOPMENT CORPORATION**, Civil Appeal No. 54 of 2002. The court, after citing the provisions of **section 23 (1)** above held as follows:

> **"As the language of the section states, it is the Certificate of Title issued by the registrar to a purchaser of the land upon a transfer or transmission by the proprietor which is the conclusive evidence of ownership. A Certificate of title is issued whenever land comprised in a Grant is transmitted by the grantee to a new proprietor, (section 22 (1) of the Act). The appellant still holds the original grant apparently given under section 21 of the Act. The Grant is not a certificate of title and is not within the purview of section 23 (1) of the Act."**

The plaintiff's advocate further submitted that even if the 1st defendant proved her claim that the Grant was issued fraudulently, she can only be entitled to damages and not any other relief. He cited the provisions of **section 24** of the **Registration of Titles Act**. The same states as hereunder:

> **"24. Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through fraud, error or misdescription."**

The operative words in the context of the submissions by the plaintiff's counsel are **"may bring and prosecute an action at law for the recovery of damages"**. My understanding of these words is that they are permissive and not restrictive to bringing only an action for recovery of damages. The use of the

word **“may”** implies that a person deprived of land in consequence of fraud has liberty to sue for damages but such a person is not barred from bringing an action to seek an appropriate declaration or recovery of the land itself. If the intention of the Legislature was that only an action for recovery of damages can be filed, nothing would have been easier than stating, for example, that **“a person deprived of land or of any interest in land in consequence of fraud shall only be entitled to bring and prosecute an action for recovery of damages and not for recovery of the land or any other remedy**.”

The provisions of **section 23** and **24**of**Cap 281** ought to be read together. Under **section 23** a certificate of title can be challenged on the ground of fraud. A Grant issued under the same Act is subject to the provisions of the Act and can also be challenged on the ground of fraud or misrepresentation.

Is the 1st defendant’s counterclaim statute barred? The purported Grant was issued in respect of county council land or Trust
land as expressly indicated on the face of the Grant.

Section 42 of the **Limitation of Actions Act** stipulates that the Act does not apply to an action to recover possession of Trust land. To the extent that some Trust land was unlawfully acquired by the plaintiff, an action to recover the same cannot be said to be time barred as was submitted by the plaintiff’s counsel.

Issue No. 5

Although it has been demonstrated that there has been several acts of breach of the special conditions of the Grant on the part of the plaintiff, the 1st defendant cannot lawfully re-enter the suit land without having served any notice upon the plaintiff. The provisions of **section 39** of the **Trust Land Act** must be complied with before exercise of the right of re-entry or forfeiture of the Grant. In that regard, the 1st defendant’s prayer for a declaration that the Grant stands forfeited by the plaintiff cannot be allowed.

Is the plaintiff entitled to the orders as sought in the plaint?

The plaintiff’s first prayer is for a declaration that she is the registered proprietor of the suit land. This court has already established that the plaintiff acquired the Grant in a fraudulent manner. In the circumstances, I am unable to make a declaration as sought. By parity of reason, the plaintiff is also not entitled to all the other prayers as sought in the plaint.

Are the 1st and 11th defendants entitled to the prayers sought in their respective counterclaims?

The 1st defendant has demonstrated that the plaintiff acquired public land in an irregular manner. A declaration to that effect is now issued as sought. The 11th defendant also demonstrated that plot No. 220 B Awendo market was allocated to him in 1987, long before the plaintiff purported to acquire the suit land. He has already developed the same. Although he prayed for general damages in terms of the provisions of **section 24** of the **Registration of Titles Act**, in view of this court’s finding that the plaintiff is not entitled to the suit land, the 11th defendant will not be awarded any damages because the plot that was allocated to him will not be interfered with.

The plaintiff has not succeeded in her suit and the same is therefore dismissed with costs to the 1st and 11th defendants. On the other hand, the 1st and 11th defendants have substantially succeeded in their counterclaims. They are awarded costs of their respective counterclaims as against the plaintiff.

DATED, SIGNED AND DELIVERED AT KISII THIS 10TH DAY OF SEPTEMBER, 2010.

D. MUSINGA
JUDGE.

10/9/2010

Before D. Musinga, J.
Mobisa – cc
Mr. Kisera for the defendants
Mr. Oguttu for the plaintiff

Court: Judgment delivered in open court on 10th September, 2010.

D. MUSINGA
JUDGE.