



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT 276 OF 2003**

**AFRICAN LINE TRANSPORT CO LTD.....PLAINTIFF**

**VERSUS**

**ATTORNEY GENERAL.....DEFENDANT**

**CORAM: BEFORE HON. JUSTICE L. NJAGI**

**MR. ABEID FOR PLAINTIFF**

**MR. OKELLO FOR DEFENDANT**

**COURT CLERK – MITOTO**

**J U D G M E N T**

The Plaintiff in this case claims to be the registered owner of the suit premises known as plot Number 4105/VI/MN CR 34774 situate within the Municipality of Mombasa. It also claims that the defendant's agents or officers, the National Youth Service, trespassed into and unlawfully occupied the said suit premises since the beginning of 2003. The plaintiff therefore prays for judgment against the defendant for –

- (a) A declaration that the plaintiff is the legal owner of plot Number 4105/VI/MN/CR 34774.
- (b) A declaration that the entry, trespass and continued stay by National Youth Service into the premises is unlawful.
- (c) Payment of mesne profits for unlawful occupation of the premises at Ksh.200,000/= per month from March 2003 until delivery of vacant possession of the premises to the plaintiff; damages for loss and damage to the property in the premises, and for loss of use.
- (d) Costs of this suit and interest on (c) above.
- (e) Such order and further relief as this Honourable Court may deem fit and just to grant.

In its amended written statement of defence, the defendant does not admit that the plaintiff is the registered owner of the suit premises. Alternatively, the defendant avers that if the plaintiff is the

registered owner of the said premises, then the plaintiff was so registered pursuant to fraud and misrepresentation to which the plaintiff was a party. The particulars of the alleged fraud and misrepresentation are-

- (i) Unlawfully representing to the Commissioner of Lands that he had a valid transaction on the suit premises i.e. Plot Number 4105/VI/MN CR 34774
- (ii) Fraudulently inducing the Commissioner of Lands to register the aforesaid plot in his name.
- (iii) Purporting to obtain, via a transfer, a purported grant of the suit premises from a person who clearly had no title to the said land and who has never been issued a grant to the said land and thereafter falsely causing to be registered in his name the suit property which was and still is a public utility.
- (iv) The alleged title to Justus Omari was given irregularly and the process was fraudulent.

The defendant therefore prays that the plaintiff's suit against him be dismissed with costs.

The undisputed facts surrounding this saga are that by a letter Ref. No. 90750/XII dated 20<sup>th</sup> November, 1996, a letter of allotment in respect of an unsurveyed industrial plot in Mombasa was issued to Nyabuco Services, P.O. Box 90301, Mombasa. By that letter, the addressee was offered "a grant of the above plot shown edged red on the attached plan No.12.3.CT.310.96" subject to the addressee's "formal written acceptance" of the conditions laid out in the letter, and to the "payment of the charges" prescribed thereunder. The letter was signed by H.B.Osodo for Commissioner of Lands.

Two days later, that is to say on 22<sup>nd</sup> November, 1996, a similar letter of allotment bearing the same Ref. No.90750/XII, was apparently issued to Justus Omari, P.O. Box 30089, Nairobi. By that letter, Mr. Omari was offered "a grant of plot No. L.R.MN/VI/4105 – Mombasa Mainland North, shown edged red on the attached plan No.12.3.CT.343/96" subject to Mr. Omari's formal written acceptance" of the conditions spelt out in the letter, and to the "payment of the charges" prescribed thereunder. This letter was signed by Mbogori M.K. for Commissioner of Lands.

Apart from the dates, the plot reference numbers, the Part Development Plan Numbers, the appropriate number of hectares, the charges payable and the signatories, the rest of the contents of the two letters were identical. Whereas the letter to Nyabuco Services was dated 20<sup>th</sup> November, 1996, the one to Mr. Omari was dated 22<sup>nd</sup> November, 1996. The letter to Nyabuco Services referred to an unsurveyed industrial plot, while that to Mr. Omari bore L.R. No.MN/VI/4105- Mombasa Mainland North. The Part Development Plan Number in respect of the letter to Nyabuco services was 12.3.CT.310/96. The approximate hectares for the letter to Nyabuco Services was 2.0 while in Mr. Omari's letter it was 1.999 hectares. Finally, whereas the charges payable by Nyabuco Services were kshs.641,400/= those payable by Mr. Omari were Kshs.214,870/=.

By a grant witnessed by the then Commissioner of Lands on 17<sup>th</sup> September, 2001, Mr. Omari was granted the suit plot L.R. No. MN/VI/4105. The plot was subsequently transferred to the plaintiff by a transfer instrument dated 21<sup>st</sup> June, 2002. The transfer was registered on 25<sup>th</sup> June, 2002, and on the same date, the plaintiff conducted a postal search which showed that the plaintiff was the registered owner. It is this plot that the plaintiff alleges that the defendant's agents, to wit, the National Youth Service, trespassed into and occupied in March, 2003, thereby necessitating this suit.

As expected, the defendant has its own different story to tell. Its story dates back to Legal Notice Number 306 of 15<sup>th</sup> July, 1988, by which the Nyayo Bus Service was established as a new Unit within the National Youth Service, hereinafter referred to as the NYS. According to the evidence of DW4, Albert Too, the NYS started following the title to the suit property in 1988. In response to a letter of 3<sup>rd</sup> March, 1989, from the Director of National Youth Service, the then Commissioner of Lands wrote on 20<sup>th</sup> March, 1989, as follows –

*“Thank you for the above letter for which the delay is regretted. It is confirmed that the site proposed is Government land and it has therefore been reserved for the Nyayo Bus Corporation as recommended by the DDC Mombasa.*

*Authority has therefore been given for you to enter the site while the other formalities follow.”*

Mr. Too testified that the NYS had plans for the plot from 1989 and were still planning their activities even though nothing was going on at the site. However, they had put up a chainlink. The property fell under the command of the Officer Commanding Mtongwé and, in the course of his duties, this Commandant discovered that the plaintiff had encroached upon the plot. With the assistance of the Provincial Administration, the NYS removed the plaintiff from the plot whereupon the plaintiff filed Miscellaneous Civil Application Number 261 of 2003 which was dismissed with costs. It was then that the plaintiff filed this suit. That, in a nutshell, is the defendant's story.

Against that background, the plaintiff called one witness and the defendant called four witnesses including Mr. Too. Testifying for the plaintiff as PW1 was Adnan Abdalla Hussein, the plaintiff's Human Resource Manager. He said that the suit property belonged to the plaintiff who bought it from a Mr. Omari after doing a search and getting a confirmation from the Commissioner of Lands that the plot belonged to Mr. Omari. He produced the plaintiff's exhibit Number 1. Thereafter the plaintiff's lawyers prepared a transfer in favour of the plaintiffs, and that transfer was produced as Plaintiff's exhibit Number 2. The transfer was signed by the Plaintiff, Mr. Omari, and the Commissioner of Lands. A search dated 25<sup>th</sup> June, 2002, confirmed that the plaintiffs were registered as owners. The search was produced as Plaintiffs' exhibit Number 3. Thereafter, the plaintiffs obtained a title which was marked as MFI 4. The defendants invaded the suit property in March, 2003, and since then the plaintiffs have not had access to the suit premises. By reason thereof, they are losing Kshs.200,000/= per month by way of rent. They therefore claim to be given back the land and be paid rent arrears.

In cross examination, the witness said that the Vendor got the title to the suit property in 1996 and that it was not signed by the President. He also said that looking at the Part Development Plan dated 5<sup>th</sup> April, 2000, it was not made in favour of Mr. Omari. And in re-examination, he said that Legal Notice Number 306 of 1988 was issued long before the transfer. That was the close of the Plaintiff's case.

The defence witnesses testified on the irregularities surrounding the allocation of the suit premises to Mr. Omari. According to Mr. Silvester Musera Osodo, a Senior Lands Officer in the Ministry of Lands who testified as DW1, the allocation of the suit premises to Mr. Omari was irregular as it related to an area already committed and developed as a public utility. Secondly, the proper application procedure requires an applicant to put in an application through the local District Allocation Committee, whose minutes are thereafter forwarded to the Commissioner of Lands. The witness was doubtful that these procedures were observed. He also dealt with the issue of the two allotment letters dated 20<sup>th</sup> November and 22<sup>nd</sup> November, 1996, addressed to Nyabuco Services and Mr. Justus Omari, respectively. He faulted the letter of allotment addressed to Mr. Omari on the ground that it carried both a Land Reference Number as well as a Part Development Plan Number (PDP). He testified that a PDP is not supposed to be given along with the Land Reference (L.R.) Number because an L.R. Number means that the plot has been surveyed, and therefore there is no need to attach a PDP number. Secondly, an investigation by the Director of Physical Planning revealed that the PDP number and the L. R. Number in Mr. Omari's letter of allotment did not tally as the PDP number was not in respect of the plot in dispute, while the L.R. number was in respect of that plot. Referring to the letter of Allotment to Nyabuco Services, the witness said that the PDP stated therein related to the unsurveyed plot allocated to Nyabuco Services. But because both letters bore the same Reference number, the witness concluded that the proper letter of allotment was the one issued to Nyabuco and not the one issued to Mr. Omari. Consequently, the issue of any title to Mr. Omari in respect of the disputed land was illegal.

DW2 was one Jonathan Nyoka Chivatsi, a Land Surveyor with the Ministry of Lands, and currently the Provincial land Surveyor, Coast Province. He testified that survey work in respect of the plot in dispute was undertaken in the year 2000 by a private surveyor, and that no other survey had been undertaken before that year. He explained that upon receipt of the letter of allotment, the allottee takes that letter

along with the PDP to the Department of Survey for surveying. Once the survey is complete, it is then referred to the Director of Survey for authentication and approval, after which a Land Reference Number is issued. In most cases and under normal circumstances, the letter of allotment would not have an L.R. Number as this comes later. The letter of allotment dated 22<sup>nd</sup> November, 1996, was erroneous because it referred to an L.R. Number which was not in existence in 1996 since the survey was authenticated by the Director of Survey on 1<sup>st</sup> August, 2000. The PDP was made in favour of Nyabuco Services; the survey work approved for Nyabuco Services, and the L.R. No 4105 was also for Nyabuco Services.

DW3 was the District Physical Planning Officer, Mombasa, one Mr. John Okayang Sabatia. He testified that the copy of the PDP referred to in Plaintiff's Exhibit 3, which was the letter of allotment addressed to Justus Omari, was for a proposed residential plot which has nothing to do with the site in dispute in this matter. The two sites are in different places. The witness also explained that their department does not prepare PDPs for plots which have already been surveyed. Rather, planning comes first, the survey follows.

Arising out of the pleadings and against the background of the evidence adduced, the paramount issue for determination is this – which, between the two contestants, has a better claim than the other to the suit property? Is it the plaintiff, who claims to be the registered owner, or is it the defendant, who claims that the plot in question was alienated as a public utility for the National Youth Service? The first logical step to take is, in my view, to evaluate the validity of the title to Mr. Omari from whom the plaintiff claims. This should be looked at from two perspectives; the alleged irregularities attendant to the letter of allotment to Mr. Omari, and secondly, the validity of the subsequent grant itself.

It is significant that the rival letters of allotment to the defendant and to Mr. Omari bear the same reference number. This means that they were written on the same file. Whereas the letter to Nyabuco services is dated 20<sup>th</sup> November, 1996, the letter to Justus Omari was apparently written two days later. Whether this is factual or not we shall see in a few moments. The PDP numbers attached to the respective letters are different. That means that these numbers do not relate to one and the same plot. In this regard, the evidence of Mr. Sabatia, DW3, is quite revealing. He testified that the PDP attached to Mr. Omari's letter of allotment had no relation to the suit property. Instead, it related to a residential plot which had nothing to do with the site in dispute in this matter. Moreover, the two sites are in two different places. This raises an eyebrow about the propriety of the letter of allotment issued to Mr. Omari.

Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the Department of Survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Survey for authentication and approval. Thereafter a Land Reference Number is issued in respect of the plot. Applying this procedure to the facts of this case, there is uncontroverted evidence by Mr. Sabatia, DW3, that the survey of the plot, which is the subject matter of this suit, was effected in the year 2000. It was authenticated by the Director of Survey on 1<sup>st</sup> August, 2000. It was only at this point in time that the Land Reference Number in respect of the plot could issue. This being the case, it means that the Land Reference Number in respect of the suit property could not have been issued before August, 2000. And yet, Mr. Omari's letter of allotment dated 22<sup>nd</sup> November, 1996, carried the plot's reference number which was not in existence until August, 2000! This is a logical impossibility. It means only one thing – that Mr. Omari's letter of allotment was not issued in November, 1996. It was issued after the plot's reference number 4105 was generated in August, 2000. It could not have been issued any earlier since the reference number was not in existence until then. Logic dictates the conclusion that the letter was backdated. If the letter to Mr. Omari was genuine and issued in good faith, why was it backdated to show that it was issued about the same time as the letter to Nyabuco Services?

A third intriguing aspect of this matter is the very identity of Mr. Omari himself. Is he real or a fake? His address in all the documents produced in court is P.O. Box 30089, Nairobi, which is actually the postal address of the office of the Commissioner of Lands. Yet, correspondence exchanged between the office of the President, the Ministry of Lands and the Public Service Commission of Kenya

enced in the defendant's exhibits' 11,12 and 13, is to the effect that the Ministry of Lands does not have such a person in its current staff complement control records or in its previous records. However, on the face of the record, there does appear to exist a person by the name of Justus Omari, who holds a Kenya Passport Number A 610008, and who appeared before E.J. Manghnani, Advocate, and who also signed the document of transfer of the suit property to the plaintiff on 21<sup>st</sup> June, 2002. Confronted with this information, the burden of proving that no such person existed shifts to the defendant. And it would have been easy to do so by calling the Advocate to testify as to the identity of the person who appeared before him and signed the document of transfer. It would have been even easier and more conclusive to cross check with the Immigration Department as to the particulars of the holder of Kenya Passport Number A 610008. Such particulars would include the date and place of his birth, parentage, occupation, and even his height and colour of his eyes. As the defendant did not take either of these options, we may never know.

In contrast, there is evidence on record that as early as November, 1988, the District Development Committee, (DDC), Mombasa, approved a project proposal by the National Youth Service for a site to be set aside for the establishment of a garage depot for servicing and repairing buses belonging to Nyayo Buses Corporation, which was then a gazetted unit of the National Youth Service. The approval of the DDC was duly communicated to the Commissioner of Lands by a letter dated 16<sup>th</sup> November 1988. The letter was copied to the Permanent Secretary/Administration, Nairobi, the Director of the National Youth Service, Nairobi, the District Lands Officer, the Town Clerk, and the Provincial Physical Planning Officer, all of Mombasa. This process culminated in the letter from Mr. Gachanja dated 20<sup>th</sup> March, 1989, confirming that the site proposed was Government land, and that it had been reserved for the Nyayo Bus Corporation as recommended by the DDC, Mombasa. It was also in this letter that authority was given for the NYS to enter the site while the other formalities followed. Finally, there is nothing on record to suggest that the site was ever surrendered back to the Government. Having been allotted to the NYS as a public utility, there was nothing left to be re-allotted to Mr. Omari. The allotment to Mr. Omari and the subsequent grant to him were therefore irregular.

The second major aspect of this case is that it is not in dispute that the suit property was Government land before the grant of lease was made to Mr. Omari, and also before the transfer to the plaintiff. It cannot also be disputed that the suit land will revert to the Government when the land lease expires. Logically, therefore, the land in question is subject to the provisions of the Government Lands Act, Chapter 280 of the Laws of Kenya. This fact is, indeed, acknowledged in the grant to Mr. Omari, in which it is expressly stated that the grantee would hold the land so granted subject to, inter alia, the provisions of the Government Lands Act, which regulates the leasing and other disposal of Government Lands.

Section 3 of the Government Lands Act sets out the special powers which the President enjoys in relation to Government land. It states –

“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 estate, interests or rights in or over unalienated Government land...”

The powers of the President under this paragraph are delegated to the Commissioner of Lands in certain defined cases. However, Section 3 should be read in conjunction with Section 7 which is in the following terms –

*“The Commissioner may, subject to any general or special directions from the President, execute for and on behalf of the President, any conveyance, lease or license of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act.”*

Wide, however, as the language of this section may be, it is severely limited by the proviso thereto. The

proviso states –

“Provided that nothing in this section shall be deemed to authorize the Commissioner to exercise any powers conferred upon the President by sections 3, 12, 20, and 128.”

The import of this proviso is clear beyond peradventure. It is that the making of grants or dispositions in or over unalienated Government land is the exclusive preserve of the President, and that in so doing he acts personally, unless he expressly delegates the power to do so to the Commissioner of Lands. This view gathers support from the case of THE REPUBLIC v. THE COMMISSIONER OF LANDS & 2 OTHERS, High court (Malindi) Miscellaneous Civil Application Number 24 of 2001, in which Ouko, Acting Judge, as he then was, said –

*“It was argued for the respondent that section 3 of the Government Lands Act, under which the suit premises fall, the power to issue grants is vested in the President. Indeed I may add that although vast powers vested in the President by the Act are delegated to Commissioner of Lands, the power to issue grants is not one of those powers delegated to the Commissioner of Lands... The making of a grant or disposition of any interest of right over unalienated Government land is the preserve of the President...”*

In the present case, the grant to Mr. Omari was made by the then Commissioner of Lands. No evidence was led to demonstrate that he did so with the express authority of the President. On the contrary, by a letter dated 30<sup>th</sup> June, 2006, the Commissioner of Lands states that there was no proof in her records that this allocation was authorized by the President. In the absence of such proof, one can draw only one conclusion – that the grant to Mr. Omari was null and void for not having been executed by the President. And if the grant to Mr. Omari was null and void ab initio, it conferred no interest in Mr. Omari. By extension of the principle of *memo dat quod non habet*, if Mr. Omari acquired no interest in the property, then he had no interest to transfer to the plaintiff. And that is the plaintiff’s lot. There was a gross irregularity which went to the very root of the title to the suit property, and the plaintiff acquired no interest out of it.

In all the above circumstances, the letter of allotment to Mr. Omari and the subsequent grant and transfer to the plaintiff can best be described in the words of Omolo J.A., in the case of NJILUX MOTORS LTS v. KENYA POWER & LIGHTING CO. LTD. [2002] EA. 466, where he said at page 473-

*“To put it crudely, the purported sub-lease... amounted to what Kenyans would derisively call ‘land grabbing’ which I understand to mean the taking away of land meant for public utility or benefit by an individual without following the laid down legal process.”*

Even though Omolo J.A. did not say so in so many words, that is what fraud is all about. In Osborn’s Concise Law Dictionary, fraud is defined as-

“...obtaining of a material advantage by unfair or wrongful means; it involves moral obliquity.”

This is precisely what we have in this matter – obtaining by wrongful means, which is not morally upright. The process was riddled with irregularities right from the very beginning. Mr. Omari was supposed to apply for the allocation of the plot through the local District Allocation Committee whose minutes thereon would have been forwarded to the Commissioner of Lands. There was no evidence that this was ever done. The letter of allotment contains a multiplicity of irregularities. The PDP number cited therein bears no relationship whatsoever with the suit property. Instead, it relates to a residential plot in another area altogether. The same letter also carries a land reference number which was non-existent in November, 1996, when the letter was ostensibly issued. Since the number came into existence in August, 2000, it follows that the letter was issued in or after August, 2000. It was therefore backdated. Mr. Omari was obviously aware of this fact since he received this letter in or after August, 2000, yet it bore a date in November, 1996. The totality of these irregularities render Mr. Omari’s title voidable. To crown it, he obtained his grant from a person who had no proven authority to issue the same. This latter fact renders the title void not only against Mr. Omari, but also against the plaintiff.

It is noteworthy that although the Certificate of Title was marked for identification, it was not produced in evidence. Even it had been produced, its production would not have been of any consequence since the original grant was void as having been issued by a person without authority to do so. And all this was done in a bid to wrongfully defeat the interests of the NYS whose interest in the property was known, and is still known, even though they do not as yet have a Certificate of Title.

For the above reasons, I do not see that the plaintiff has proved its case on a balance of probabilities. The gravity of the anomalies in this case expose the plaintiff's purported title to the suit property as voidable and fit for cancellation at the instance of the Commissioner of Lands upon obtaining the appropriate orders. However, the fact that the grant was made by a person without authority to do so renders the same void ab initio. In consequence, I find that the plaintiff is not entitled to the orders sought, and its suit against the defendant is bound to fail.

The suit is accordingly dismissed with costs to the defendant.

Dated and delivered at Mombasa this 11<sup>th</sup> day of April 2007

L. NJAGI

JUDGE

11.4.2007

Before Hon. Mr. Justice Njagi

Mr. Abeid for plaintiff

Mr. Okello for defendant

Court Clerk – Mitoto

COURT: Judgment read and delivered in open court in the presence of Mr. Abeid and Mr. Okello

L. NJAGI

JUDGE

11/04/2007

ABEID: I apply for a certified copy of the proceedings and judgment.

COURT: Certified copies of proceedings and judgment be supplied to counsel upon payment of typing charges.

L. NJAGI

JUDGE

11/04/2007