**Kenya Anti-Corruption Commission v Kimumu Service Station Ltd & 2 others; Chief Land Registrar & another (Interested Parties) (Environment & Land Case 137 of 2017) [2022] KEELC 14822 (KLR) (15 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14822 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT & LAND CASE 137 OF 2017**

**SM KIBUNJA, J**

**NOVEMBER 15, 2022**

**(FORMERLY NAIROBI HCCC NO. 1204 OF 2017)**

**BETWEEN**

**KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**KIMUMU SERVICE STATION LTD ..... 1ST DEFENDANT**

**PHOEBE AMIANI ..... 2ND DEFENDANT**

**WILSON GACANJA ..... 3RD DEFENDANT**

**AND**

**CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**ATTORNEY GENERAL ..... INTERESTED PARTY**

## JUDGMENT

1. The plaintiff commenced this suit through the plaint dated the September 26, 2006 and filed on the November 15, 2006, seeking for the following reliefs;

    a. A declaration that the grant of LR No 20927 (IR 5356) to the 1st Defendant is null and void and incapable of conferring any estate, interest or right.

    b. An order that the grant of the LR 20927 (IR 5356) to the 1st defendant be cancelled

    c. An order of eviction directing the 1st Defendant to vacate LR 20927 (IR 5356) forthwith.

d. An order of permanent injunction to restrain the 1st defendant from leasing, charging, transferring, trespassing or in any other manner dealing with LR No 20927 (IR 5356) otherwise than by way of surrender of the land to the Government of Kenya

e. Costs of the suit.

The plaintiff averred among others that the suit land was allocated to the 1st defendant through a grant issued by the 3rd defendant. That prior to the said allocation, the land was a road reserve set aside for public purpose, and not available for alienation. That the grant by the 3rd defendant was illegal, fraudulent, made in excess of his statutory authority and hence null and void.

2. The plaintiff's claim is opposed by the 1st defendant through its filed defense dated the October 1, 2007, in which it *inter alia* denied collusion between it and the other defendants. It also denied that the suit land was a road reserve or that it had been alienated before the grant in its favour was issued. It stated that the suit land was part of the un-alienated government land, and hence available for allocation. The 1st defendant therefore averred that it had acquired a good title which was indefeasible in law, and in the circumstances, the Plaintiff's claim should be dismissed with costs.

3. The 2nd defendant entered appearance but did not file defence.

4. The 3rd defendant entered appearance and filed defence on the February 11, 2007, averring that the grant was in compliance with the *Registration of Titles Act* and the applicable procedure. That the suit land was un-alienated Government land and the allocation was legal, valid and within his powers. That this suit was actuated by malice, is scandalous, frivolous, and vexatious for having been instituted against him in his personal capacity.

5. The 1st and 2nd Interested Parties were subsequently allowed to join the proceedings and they filed their defence dated October 8, 2019, among others averring that it has never been the intention of the Government of Kenya to allocate to any individual land reserved for a public purpose. That the actions by the 2nd and the 3rd Defendants of appropriating or attempting to allocate the suit land to the 1st defendant was in personum, and therefore, not binding to the Interested parties. That the land was already alienated land and the actions of the 2nd and 3rd defendants was an affront to section 2 of the *Government Land Act*, and section 3 of the *Physical Planning Act*. That the process from formulation and approval of the PDP, creation of the suit property, and issuance of certificate of title under the *Registration of Titles Act* in a region that was already adjudicated under the *Registered Land Act* was tainted with illegalities, outright fraud, procedural lapses and transgressions of the *Constitution* and other applicable laws. They further contended that the said appropriation of the suit land by the 2nd and 3rd Defendants to the 1st defendant was summarily null and void, and sought for similar prayers to those by the Plaintiff.

6. After all the parties had complied with the perquisite provisions of *Civil Procedure Rules*, the case proceeded vide viva voce evidence, with the plaintiff calling five witnesses, PW1 to PW5. PW1 was Sanayan Kanda Cherop, who told the court that he bought his plot number 419 at Kshs 600,000.00 at Kimumu Settlement Scheme. That he had objected to the allocation of plot number LR 2927, plot in dispute, to the 1st defendant because it was a road reserve and was restricting his plot's access by 90%, leaving only 20 metres frontage. That his complaints over the allocation to the various public offices was never responded to, and he filed court case number 94 of 1999 that was however dismissed for want of prosecution.

7. The second witness was George Ojowi, an Assistant Director EACC, who testified as PW2. He told the court that he investigated the complaint that had been received by the office of allocation of a plot on a

road reserve. In the cause of investigations, he established that the plot, which is the suit land herein, had been adversely mentioned in the Report of the Commission of Inquiry into illegal/irregular Allocation of Public Land (Ndung'u Commission), at page 43 of the report (Vol, 1), which stated that part of the road reserve at Chepkoilel junction, between roads known as D328 and C51 had been encroached. The said Report had according to PW2, recommended that the site be surveyed, marked and cleared to serve its intended purpose. He also found out that PW1 had filed Eldoret HCCC No. 94 of 1999 to challenge the allocation of the plot but the case was dismissed for want of prosecution. PW 2 stated that he found correspondence from the District Physical Planning office, Clerk to the Council and Land office to the effect that they had no adverse comments to the allocation of the suit property. That at the conclusion of his investigation, he found out that the suit land was not available for alienation as it was a public land, and the purported transfer by the 2nd and 3rd defendants to the 1st defendant was illegally and fraudulently done. That the title issued to the 1st defendant was subsequently revoked. The witness stated that he was not aware that the revocation of the title was successfully challenged through Judicial Review No 2 of 2014, but when shown a copy of the decision in that matter, he agreed that the revocation had indeed been quashed, by the court.

8. PW3, Engineer Laban Ngigi, the Regional Manager Kenya Rural Roads Authority, [KERA], Uasin Gishu, testified that the suit land was a road reserve abutting D328 (C21) and C51 (B16). He further told the court that a junction should always have a wider road reserve whose purpose is to allow future road expansion to accommodate slip roads, roundabouts, interchanges or dual carriage. He confirmed that his authority was established in 2009 and in this case, only road D328, Eldoret/ Ziwa road, is under its authority, as the other roads there are under Kenya National Roads Authority, [KenHA]. He added that the suit property was outside the minimum 40 metres wide road reserve in that area.

9. Charles Kimani, the County Physical Planning officer, testified as PW4. The witness produced copies of an approved PDP, and letters from his office, District Works office, District Commissioner, District Lands officer and District Surveyor indicating that those offices had no adverse comments to the suit land's allocation. The witness added that when he later learnt that the suit property was part of the road reserve and the office declined to approve the development plans for a petrol station on the site even though he admitted he had no documentary evidence to support that position. The witness confirmed that the PDP contains the roads measurements that are different from those of the plot in dispute. The witness accepted that on the basis of the available documents, the allocation and registration of the suit plot to the 1st defendant, appear to have been done regularly. He however pointed out that there was no comments or approval received from the Department of Roads.

10. The last witness for the Plaintiff was Thomas Gichira Gachoki, who was the Deputy Director Surveys at KenHA, until his retirement in June 2019. He told the court that he came to know the transaction relating to the suit land when he received a letter dated January 28, 2013 from Japhet Magut, who had also made several visits to their offices, enquiring whether the suit property was on road reserve. That on the July 4, 2013, the Kenya Highways Authority responded to the letter communicating that as a suit, Eldoret HCCC No 94 of 1999, was still pending in court, the office could not confirm whether or not the plot was on the road reserve. They again received another letter dated the July 11, 2013 pointing out that their earlier reply had not clarified whether or not the plot was on the road reserve. The letter was replied through theirs dated the November 5, 2015 informing the said Magut, that only the National Land Commission could offer the clarification he sought. The witness told the court how he visited the suit property and prepared the report dated the April 23, 2019 that show the said plot was inside the junction, and therefore part of the road reserve. During cross examination, PW5 confirmed that he is not a registered surveyor, but had written authority to perform survey duties for KenHA. That during his visit to the suit property, he found a substantial portion of the plot was within the roads under KERA, but he did not involve their office in the exercise. That from his physical observations

and the google maps, the existing roads at the site were outside the suit property. That he did not take measurements of the road reserve at the suit property. That the 40 metres width of roads reserves applies only to roads in rural areas but not to junctions. He agreed that if measurements were taken at the junction at the point where the disputed property was situated, the plot would be found not to have encroached the road reserve.

11. In its defence, the 1st defendant called Japhet Magut, and Boniface Wanyama, who testified as DW1 and DW2 respectively. DW1, a director of the 1st defendant, told the court how he applied for the plot to President Moi through his letter dated October 4, 1993. The plot was from the land that had remainder after the Kimumu Settlement Scheme allocations, and was vacant when he applied for it. His application for the plot was successful and he produced copies of the letter of allotment of the suit property dated May 10, 1994, his acceptance letter dated September 5, 1994 through which a cheque for payment was forwarded, and a receipt of Kshs 85,302.00 dated October 19, 1994 among others as exhibits. He testified that all the necessary approvals were sought and obtained before the plot was allocated to the 1st defendant, and he produced copies of letters on approvals dated the March 22, 1994 from the District Physical Planner with an attached PDP, District Surveyor and District Works Officer as exhibits. He also produced other approval letters dated the March 25, 1994 from District Commissioner, Clerk, Eldoret Municipal Council, and District Lands Officer, and another dated September 1, 1995 from Engineer Roads as exhibits. It was his testimony that on the April 30, 1999, the 1st defendant's building plans for a petrol station on the suit property were approved. However, when the contractor came to the site, an order to stop issued in Eldoret HCCC No 94 of 1999 was served. The case was heard and decided in the 1st defendant's favour on the February 6, 2001, and no appeal has been preferred. That through JR No 2 of 2014, the Registrar of Titles decision to revoke the 1st defendant's title to the suit land was quashed. Then the plaintiff filed this suit. DW1 told the court of his visits and letters dated January 28, 2013 and July 11, 2013 to KenHA in his efforts to get a confirmation whether or not the suit land was on road reserve. That the KenHA replied to his first letter vide theirs dated the July 4, 2013 indicating that the road reserve is 40 metres and the allocation of the plot was with approval. Their subsequent reply dated the November 5, 2015 to his second letter came after this case had been filed. The 1st defendant then instructed Boniface Wanyama, a private surveyor who testified as DW2, to conduct a survey on the suit property and he prepared a report dated the April 14, 2016. He pointed out that the contention by PW5 that the presence of electricity poles on the plot was evidence that it was part of the road reserve is not true because KPLC removed those post upon his written requests through his letter dated the 3rd June 2015. He produced a copy of the Registry Index Map [RIM] that confirms that the suit plot exists contrary to the plaintiff's claim that it is on road reserve. He added that the suit land was registered before the neighbouring plot number 419, which has a 100 metres access to the public road. That the letter of objection to the allocation of the suit land dated August 31, 2020 contradicts the earlier ones that had no objections to the same. That DW1 had not known that the Land Registrar had objected to the 1st defendant's building plans through a letter dated the September 5, 1999. That the report by the surveyor he engaged after getting the letter from KenHA indicating that the road's road reserve was 40 metres confirmed that the suit property was not on the road reserve. That at the time of allocation of the plot in dispute, the road affairs were being handled by the District Roads Officer who was among the officers who had indicated they had no objections. That the allocation was regularly done, lease forwarded to the Land Registrar for registration and he has been paying the annual rates and rents. That this suit should therefore be dismissed with costs.

12. Boniface Oluoch Wanyama, a licensed land surveyor, testified as DW2 and told the court how he received instructions to survey the suit property and confirm whether it had encroached onto the road reserve. That relying on the existing survey data of the plot, he took its measurements using

appropriate equipment and tape measure among others, and after analyzing the information gathered, concluded that the suit plot had not encroached onto Eldoret/Iten road, [C51], and Kimumu/Ziwa road, [D328]. He pointed out that the report by PW5 was not done by a licensed surveyor and amounts to a contravention of section 36 of *Survey Act*, Chapter 299 of the Laws of Kenya. It was his evidence that the suit plot has a survey plan with list of coordinates marking the boundary beacons, which were not taken in consideration in the report by PW5. That when he contacted KenHA and Kenya Rural and Urban Road Authority [KERA] verbally, they advised that he relies on the area's registered survey plans, as they had not done a survey for that section of the roads. He disputed that the road reserve at that point of the junction should be more than 40 metres. That as PW5 had not done a cadastral survey of the suit land, then his conclusion that the plot was part of the road reserve was erroneous, as the google maps that he relied on have an accuracy ratio of 1:50. That he did not find it necessary to contact the owners of the neighbouring plots, and the Land Adjudication and Settlement officer before conducting the survey of the suit property or compiling his report.

13. At the conclusion of the taking of viva voce evidence, the court directed the parties to file and exchange written submissions. The learned counsel for the plaintiff, 1st defendant and Interested parties filed the submissions dated the April 8, 2022, May 3, 2022 and May 20, 2022 respectively which the court has considered.

14. The plaintiff and Interested Parties submissions are more or less similar as they support the suit and seek for the same orders against the 1st defendant. They submit that the applicable laws in this matter are the *Government Land Act* and the *Physical Planning Act*. They used the above mentioned legislations to define the meaning of the words 'un-alienated land," which definition they submitted meant that once land is mapped and reserved for public use, it ceases to be un-alienated land, and becomes unavailable for alienation. To buttress their submissions, they relied on the case of Eldoret CACA No 288 of 2010 *Kipsirgioi Investement Ltd Vs Kenya Anti-corruption Commission*. They went further and relied upon a plethora of other case law to support their position that the suit land was not available for alienation, as it amounted to a public land. That the disposition of the suit land by the 2nd and the 3rd Defendants to the 1st defendant was null and void ab initio. On the question of whether the 1st Defendant acquired indefeasible rights, they submitted that since the suit land was hived from the public land, the whole process was tainted from the very beginning, as there was no land to alienate in the first place. To support their submission on this issue, they relied upon the Court of Appeal decision in *Wreck Motor Eneterpise Vs Commissioner Of Lands & 3 Others* which amplified the court's reasoning in *Dr Joseph Nk Arap Ng'ok Vs Justice Maijo Ole Keiwa & 4 Others*. They contended that the 1st Defendant's title cannot be protected by the law as the whole process of the plot's allocation and registration was drenched in an illegality.

15. The 1st Defendant submitted that due process was followed in acquiring the grant to the suit land. That the suit land was before being allocated to the 1st defendant un-alienated land. That there is no evidence that has been availed to the court to support the plaintiff's claim that the suit property was road reserve. That even PW5 had acknowledged that the google maps he relied upon in his report had shown that the land where the suit land is located was vacant, and was not part of the road reserve. The learned counsel cited the cases of *Sammy Mwangangi & 10 others versus Commissioner of Lands & 3 others* [2018] eKLR, *Wilson Masila Muema versus County Government of Machakos* [2020] eKLR, among others and submitted that the process through which the suit land was applied for, allocated and registered in the 1st defendant's name was lawful.

16. The following are the issues for the court's determinations;

a. Whether the suit property, being LR No 20927 (IR5356), comprised a public land, that is a road reserve.

b. Whether the allocation and registration of the 1st defendant with the suit property conferred good and or indefeasible title to the land.

c. Whether the plaintiff is entitled to, or any of the reliefs sought.

d. Who pays the costs.

17. The court has carefully considered the pleadings by the parties, evidence tendered by PW1 to PW5, DW1 and DW2, submissions by the learned counsel, superior courts decisions cited thereon and come to the following determinations;

a. The law has since the promulgation of the *Constitution of Kenya 2010* been settled through the various superior courts decisions that land that forms part of the public land, like public road reserves, are alienated land and therefore unavailable for disposition to any private entity, until and unless such land is first and foremost procedurally and legally surrendered back for fresh alienation. The meaning of the term "un-alienated land", is stated in Section 2 of the *Government Lands Act* (Repealed) as;

> " un-alienated 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."

Moreover, Section 3 of the *Physical Planning Act*, Chapter 286 of the Laws of Kenya defines 'un-alienated land' in a similar fashion. It follows that until the lawful surrender of alienated land is done, any party to whom such land is allocated to cannot find refuge in law, when it is established that the disposition was illegally and fraudulently acquired, in view of the provision of Article 40 (6) of the *Constitution*, provide that the protection of rights to property do not "extend to any property that has been found to have been unlawfully acquired." Even before the *Constitution 2010*, that position of the law had already crystalized as can be seen in the case of *Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs Attorney General & 5 Others* Nairobi HCMCA No 158 of 2005 [2006] 1 KLR 443 where the court held as follows:

> " Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins."…….In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the Constitution captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in "a democratic society." This phrase

> also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency...A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view...The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and "kayas" just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land."

And in Civil Appeal No 288 of 2010, *Kipsirgoi Investments Limited vs Kenya Anti-Corruption Commission* the court relied on section 2 of the *Government Lands Act* [GLA] and Section 3 of the *Physical Planning Act* when it found that the suit property in the matter was planned as an open space and held that the subsequent lease under section 3 of the GLA was irregular as the land was already alienated.

b. In this case the plaintiff and Interested Parties have taken the position that the land comprising of the suit land was already alienated public land by the time it was allocated and registered with the 1st defendant. The 1st Defendant's position is that it was vacant and un-alienated public land that had remained after the Kimumu Settlement Scheme allocations, and that it was available for allocation, and that he obtained good title from the requisite government agency. That in a situation like this, the Plaintiff being the one challenging the allocation of the plot to the 1st defendant, remained duty bound to adduce evidence to prove their claims against the 1st Defendant on a balance of probabilities. That is what the provision of section 107 of the *Evidence Act*, Chapter 80 of Laws of Kenya requires of the party or parties raising allegations against another. The party or parties against whom allegations are made, like the 1st defendant, herein need not necessarily say anything, as the burden of proof remained with the plaintiff and Interested parties.

c. That from the evidence adduced by both parties, it comes out clearly that DW1 applied for the plot in writing to the then President in 1993. That a PDP was drawn as confirmed by PW4 and circulated to several government offices then involved in plot allocations in Uasin Gishu district, including the District Works Officer, District Lands office, District Surveyor District Commissioner, and Municipal Council, who responded in writing that they had no objections. The allocation was made through the letter of allotment signed by the 2nd defendant, a lease was issued and forwarded for registration to the Land Registrar, Uasin Gishu. That according to the DW1 and DW2, the process through which the plot was allocated and registered with 1st defendant was regular and lawful. That though the plaintiff contention was that the plot was within the road reserve and therefore unavailable for alienation, the 1st defendant disagreed and called DW2, a licensed private surveyor, who did a survey on the property and produced his report as exhibit, that takes the position that the suit land's beacons are outside the 40 metres road reserve. The plaintiff's position is that whereas a road reserve is 40 metres in width, it is larger at junctions, which claim was disputed by the 1st defendant through DW2. The court takes note that none of the witnesses called by the plaintiff referred the court to any documentary evidence that provides for the width of road reserves at junctions. That the court has no basis upon which to ground a finding that road reserve at the junction

where the suit land is situated, is supposed to be more than 40 metres in width, and not the existing 40 metres.

d. That when PW4 was being re-examined, he stated that other than the absence of a no objection from the Department of Roads, the allocation of the suit property to the 1st defendant appear to have been regular. The court has looked at the District Works Officer's no objection letter dated the March 22, 1994 to the District Physical Planner, and noted it was copied to the Chief Engineer Roads and the Secretary Central Authority, Nairobi. The conclusion the court arrives at is that the office responsible for roads was made aware of the suit land's allocation process and had no objections to raise, and none was raised. The response by KenHA to the enquires by DW1 in 2016 to confirm whether or not the suit plot was on the road reserve to the effect that it is the National Land Commission [NLC] that can make that determination, does not help the court much. The NLC was established under Article 67 of the *Constitution* to *inter alia* manage public land, recommend national land policy, advise national government on comprehensive programme for registration of land, conduct research on land and use of natural resources and make recommendations, initiate investigations on present and historical land injustices and recommend appropriate redress. Possibly what KenHA had in mind when it responded to the enquiries made by DW1 in 2016 was to prompt him to lodge a complaint with the NLC for investigations to be carried out and recommendations on redress made. It appears neither KenHA nor the 1st defendant took that route, possibly because this suit had already been filed. Probably, that is a route the owners of the plots neighbouring the suit property, including PW1, or the promotors of Kimumu Settlement Scheme should have taken, and can consider taking even now, depending on the outcome of this suit.

e. Section 26 of the *Land Registration Act* (LRA) No 3 of 2012 states as follows; -

> "(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
>
> (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
>
> (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
>
> (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original"

That from the findings above, the court comes to the conclusion that the plaintiff has failed to discharge its duty of proving it claims or allegations against the 1st defendant upon which its title to the suit property could be challenged or impugned. Should KenHA or KERA be of the view that they will need the suit land for road construction or expansion in the future, then all is not lost as they can petition the NLC to commence the process of compulsorily acquiring the same in accordance with the appropriate provisions Constitution 2010, and the applicable statute.

f. That under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, the 1st defendant, as the successful party in defending the suit, is entitled to costs.

18. That flowing from the above determinations the court finds and orders as follows;

a. That the Plaintiff has failed to prove its claim against the defendants to the standard required and its suit is dismissed.

b. The plaintiff will pay the 1st Defendant costs of the suit.

Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 15th DAY OF NOVEMBER 2022.**

**S.M. KIBUNJA, J.**

**ELC MOMBASA.**

IN THE PRESENCE OF:

PLAINTIFF .....

DEFENDANTS .....

INTERESTED PARTIES .....

COUNSEL .....

.....

.....

WILSON .. COURT ASSISTANT.

S.M. Kibunja,J.

ELC MOMBASA.