



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 145 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

VERSUS

ANN WANJIKU 1ST DEFENDANT

MTAMWINI ENTERPRISES LIMITED 2ND DEFENDANT

OCEAN VIEW PLAZA LIMITED 3RD DEFENDANT

CHIEF LAND REGISTRAR.....4TH DEFENDANT

JUDGMENT

(Suit by the EACC seeking to recover public land; position of the plaintiff that the land is a road reserve; title to the said land held by 3rd defendant; genesis of the land being an allotment letter to the 1st defendant; allotment letter accompanied by a PDP that the Director of Physical Planning has disowned; 1st defendant transferring the land to the 2nd defendant, a limited liability company; Registrar of Companies writing that 2nd defendant does not exist; transfer subsequently made from 2nd defendant to 3rd defendant; transfer effected in 1996 yet 3rd defendant registered in 2016; evidence of the plaintiff not challenged; plaintiff demonstrating to the required standard that the land was fraudulently acquired; judgment entered for the plaintiff for nullification of the title; general damages and costs)

1. This suit was commenced through a plaint which was filed on 18 June 2018. The plaintiff is the Ethics and Anti-Corruption Commission, which is established under the Ethics and Anti-Corruption Commission Act, Act No. 22 of 2011. It has brought this suit pursuant to its mandate under Section 11 (j) of the said statute, which gives the Commission mandate to institute court proceedings for the recovery of public property. The subject matter of this case is the land parcel MN/I/9776 situated in Nyalii, Mombasa, whose title is held by the 3rd defendant. From the plaintiff's pleadings, the genesis of the 3rd defendant's title is an allotment letter dated 15 November 1995 and a Part Development Plan (PDP) No. 12.4.CT.22.95, vide which an unsurveyed residential plot measuring 0.095 Ha, was allotted to Ann Wanjiku, the 1st defendant. On 23 November 1995, the 1st defendant transferred her interest to the 2nd defendant, Mtamwini Enterprises Limited, who in turn transferred the property to Ocean View Plaza Limited (3rd defendant) in the year 1999. It is the plaintiff's case that the allotment of the land and registration of it was fraudulent, illegal, null and void, and the same could not confer any estate upon the 1st defendant or any other person subsequently. Inter alia, it is pleaded that the defendants knew or ought to have known that the suit land is not available for alienation as it was public property. The plaintiff contends further that the 4th defendant, the Chief Land Registrar, corruptly acted in concert with the rest of the defendants. The plaintiff thus seeks orders to nullify the allotment letter; cancellation of the title; rectification of the register by cancellation of the entries therein; a permanent injunction against the defendants to restrain them from dealing or utilising the land; an order to compel the defendants to render accounts for the mesne profits drawn from the use of the suit land; general damages for wrongful interference with public land and for the irregular dealings and damages for breach of statutory provisions; costs of the suit; and any other order deemed fit.

2. Despite being served with summons, the 1st – 3rd defendants did not enter appearance and did not file any document to oppose the suit. Neither did they participate in any of the court proceedings including the hearing of the case. The 4th defendant did not file anything but was represented by the State Law Office at the hearing of the suit. The only material that I have is therefore that supplied by the plaintiff.

3. To support its case, the plaintiff called Mohamednoor Isaack as its witness. He is an investigator with the Commission. He relied on his witness statement. I have gone through it. He inter alia avers that he was part of the team which investigated alienation of the suit land. He has stated that on 15 November 1995 an allotment letter for unsurveyed Government land was issued to Ann Wanjiku, the 1st defendant. He stated that the Part Development Plan (PDP) used to prepare the letter of allotment, also dated 15 November 1995, was not approved, valid

nor registered. He continued that on 24 November 1995, the 1st defendant purported to accept the offer in the allotment letter; that on 27 November 1995, the 1st defendant applied for consent to transfer the suit property; that on 23 November 1995, the 1st defendant purported to transfer the suit property; that on 26 February 1996, instructions to prepare a new lease for the suit property was purportedly made in favour of the 2nd defendant for a term of 99 years from 1/11/1995; that in the year 1999, the 2nd defendant purportedly transferred the suit property to the 3rd defendant (Ocean View Plaza Limited), which company was incorporated on 16 November 2016. He contends that the office of the Commissioner of Lands facilitated the alienation of the suit property. He states that the alienation of the suit property was contrary to the provisions of the Government Land Act (repealed); that the alienation of the land could not have been proper without a valid and duly registered PDP; that the land was alienated with the knowledge that it was public property. He stated further that despite demand being made, the defendants have failed to account for mesne profits, or surrender the title and vacant possession thereof, which necessitated the filing of this suit. He wishes to have the property returned back to the Government.

4. I invited counsel to file submissions, but only Mr. Makori, learned counsel for the plaintiff, filed submissions. I have gone through the same. Mr. Makori submitted inter alia that the suit land was reserved for public use as a road reserve hence it was not available for alienation. He referred to Section 3 and 7 of the Government Act (repealed) and submitted that there is no evidence that the President executed the Grant No. 28223 in favour of the 1st defendant in the first instance, or that the Commissioner of Lands issued the said Grant pursuant to instructions from the President. He submitted that the alienation was thus in excess of the statutory powers of the Commissioner of Lands and amounted to abuse of office. He submitted that the said alienation could not confer any title upon the 1st defendant in the first instance and subsequently to the 2nd and 3rd defendants. He submitted that the title would only be sacrosanct if the alienation of the land was done in accordance with the law. He submitted that pursuant to Section 23 (1) of the Registration of Titles Act (repealed) title could be challenged on ground of fraud or misrepresentation. He relied on various authorities which I have considered.

5. I will reiterate that the only material is that supplied by the plaintiff. The defendants have not bothered to defend this suit in any way or controvert the allegations of the plaintiff. It is the plaintiff's case that the allotment of the land was irregularly done.

6. The allocation of unalienated Government land was provided for in Section 3 of the Government Land Act (GLA) which was drawn as follows :-

S.3 : The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;*

(b) with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;*

(c) †extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him;

(d) accept the surrender of any lease or licence under this Act;*

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

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

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

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

** The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)— (a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President; (b) for town planning exchanges on the recommendation of the Town Planning Authority, Nairobi, within the total value, and subject to the conditions, laid down by the President;(c) the sale of small remnants of land in the City of Nairobi and Mombasa Municipality acquired for town planning purposes and left over after those town planning needs have been met;(d) for the use of local authorities for municipal or district purposes, viz. office accommodation, town halls, public parks, native locations, fire stations, slaughter-houses, pounds, incinerators, mortuaries, crematoria, stock sale yards, libraries, hospitals, child welfare institutions, garages, housing schemes, markets and public cemeteries;(e) the extension of existing township leases on the fulfilment of the conditions specified therein as being precedent to such extensions;(f) the temporary occupation of farm lands on grazing licences*

terminable at short notice;(g) the sale of farms and plots which have been offered for auction and remain unsold, such grants being subject to the general terms and conditions of the advertised auction sale and the application therefor being submitted within six months of the date of the auction in the case of township plots and within twelve months in the case of farms, except that in the case of godown plots the power to sell shall not be limited to a period of six months from the date of sale.

7. I agree that pursuant to the above Section, the Grant of land was to be made by the President under Section 3 (a). The powers of the President could be delegated to the Commissioner of Lands in the special cases specified in the explanation to this section, and these encompass grants for religious or charitable purposes; town planning exchanges; sale of small remnants of land within Nairobi and Mombasa acquired for town planning purposes and left over after the town planning needs have been met; land for use by local authorities; extension of existing leases; temporary occupation of farm lands on grazing licences; sale of farms and plots offered for auction and remain unsold.

8. I have seen the allotment letter issued to the 1st defendant on 15 November 1995. It is not one issued by the President but by one F.O Otieno on behalf of the Commissioner of Lands for residential purposes. There is therefore doubt whether the allocation was regular, and without an explanation from the defendants, I can only hold that it was indeed irregular. Apart from that, there is a letter dated 19 September 2017 from the Director of Physical Planning who states that the PDP that accompanied the allotment letter was never approved. It follows that the allotment letter was on the basis of a non-existent PDP.

9. Back to the allotment letter, I have seen that the 1st defendant accepted the offer in the allotment letter by making payment for it on 24 November 1995, but just three days thereafter, on 27 November 1995, sought consent to sell it, with the consent being received and being granted on the same day. In that letter, the 1st defendant was informed to pay some fees for the transfer, and I can see that on the same day, 27 November 1995, she did make payment of the fees. On that same day, 27 November 1995, a letter was written by one Mr. Kagwi on behalf of the Commissioner of Lands to the Director of Surveys, directing that the land be surveyed. Interestingly, the 1st defendant transferred her interest in the suit land to the 2nd defendant on 23 November 1995, even before accepting the terms of offer in the letter of allotment, which it will be recalled she accepted on the following day, 24 November 1995. The survey for the land was submitted on 15 December 1995, and on 26 February 1996, instructions for preparation of a lease to the 2nd defendant were given. On 25 October 1996, the 2nd defendant transferred the lease to the 3rd defendant. The plaintiff has produced a letter from the Registrar of Companies dated 6 October 2017. That letter states that Mtamwini Enterprises Limited (the 2nd defendant) does not appear in its data base of registered businesses or companies. How it managed to obtain a lease to the suit land is therefore a mystery. The same letter further states that Ocean View Plaza Limited, the 3rd defendant, was registered on 16 November 2016. It will be recalled that a transfer to the 3rd defendant was registered on 25 October 1996, and this again begs the question how such transfer was effected to an entity that was non-existent at the time. A transfer would need to be accompanied by the proof of existence of the entity such as a certificate of incorporation, PIN, and signatures of directors. All these could not have been available as the company did not exist.

10. It is clear to me from the foregoing, that the title issued under the Registration of Titles Act (RTA), could not have been issued without elements of fraud and/or misrepresentation. Section 23 of the RTA provided as follows :-

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.

11. It will be seen from the above that although the RTA recognised sanctity of title, title could be challenged on ground of fraud or misrepresentation to which the title holder is proved to be a party. Clearly, no good title could issue to the 2nd defendant as it has never existed, and no good title could be issued to the 3rd defendant before it was even incorporated. Any transfer was executed by parties misrepresenting themselves to be directors of these two companies and they were thus directly party to the fraud. I have already shown that the allotment letter to the plaintiff was illegal. It is noteworthy that the 1st defendant quickly discarded the property, and in fact, was quick to enter into a transfer even before accepting the letter of allotment. All these point at nothing else but a fraudulent and a corrupt scheme. These scheme could not have been executed without the involvement of the Commissioner of Lands, who is the predecessor of the 4th defendant.

12. Given the foregoing, I am of the view that the plaintiff has proved its case to the required standard. The title now held by the 3rd defendant cannot be allowed to stand and it is hereby nullified. I further issue direction to the 4th defendant to proceed to rectify the register by nullifying the title of the 3rd defendant and have the parcel of land revert back to the Government as a road reserve.

13. There is prayer for mesne profits but it did emerge at the hearing that the land has remained vacant throughout and has never been put to any use. I am not therefore persuaded to make any award for mesne profits. There is also the prayer for general damages. In my discretion, I award general damages of KShs. 1,000,000/= against the 1st and 3rd defendants for the 2nd defendant does not exist. I will not make an award of general damages against the 4th defendant as the offences were committed by the office of the Commissioner of Lands. I would have considered making the award if the person who effected the allotment and transfer was personally a party in this suit, which is not the case. The only issue left is costs. Costs shall be paid jointly and/or severally by the 1st and 3rd defendants.

14. Judgment accordingly.

DATED AND DELIVERED THIS 10TH DAY OF MARCH 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA