



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

PETITION NO. 20 OF 2019

BETWEEN

JACOB ADUOGO.....PETITIONER

-VERSUS-

PROFESSOR OTIENO JOWI.....1<sup>ST</sup> RESPONDENT

THE NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT

DISTRICT LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT

MINISTRY OF LANDS, HOUSING AND URBAN

DEVELOPMENT.....4<sup>TH</sup> RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT

JUDGMENT

INTRODUCTION

The court of Appeal lamented in Chemey Investments Limited v. Attorney General & 2 Others [2018] eKLR In the opening part of that judgment as follows: "There was a time in the history of this country, not too long ago, when public officers appeared to have been bitten by a bug that infested them with a malignant and shameless craving to acquire for themselves, their friends or relatives, public property in respect of which they were trustees or custodians."

The same scenario is reflected in this case wherein Jacob Aduogo hereinafter referred to the Petitioner filed this petition on 12/11/2019 based on Articles 2, 3, 10,19,20,21,22,23,24, 40(6), 48, 156(6), 165(3) (a), 258 & 259 of the Constitution and Sections 3, 4(3) and 13 of the Environment and Land Court Act No. 19 of 2011.

The Petitioner seeks a declaratory Order that the parcel Title No. West Kisumu/Ojola/1213 is public land and prayed for a mandatory injunction compelling the District Land Registrar to cancel the registration of the suit parcel of land in the name of the 1<sup>st</sup> respondent.

He further prays for a declaratory order that the 4<sup>th</sup> Respondent had no capacity to sell the suit parcel of land Title No. West Kisumu/Ojola/1213 and a declaratory order that the 2<sup>nd</sup> Respondent which is an independent commission established under Article 67(1) of the Constitution and operationalized by the National Land Commission Act No. 5 of 2012 invokes its jurisdiction pursuant to Sections 14(1) of the National Land Commission Act, with regard to the parcel Title No. West Kisumu Ojola/1213. Moreover, a declaratory order that the registration by the 1<sup>st</sup> Respondent as the proprietors of all the property referred to as West Kisumu/Ojola/1213 as well as subsequent transfers arising therefrom are void ab initio and unlawful.

The petitioner prays for a declaratory order that the 1<sup>st</sup> respondent whether acting by himself, his servants and/or agent(s) howsoever from occupying and/or continuing with any construction work on the property known as West Kisumu/Ojola/1213 and selling, disposing off, transferring or otherwise interfering with the said property.

The other order sought by the petitioner is an Injunction restraining the Respondents jointly and severally whether acting by themselves, their

servants and/or agent however from interfering with, selling disposing of and /or transferring or causing to be transferred any interest in the property title no. West Kisumu/Ojola/1213. Lastly, the petitioner prays for costs of the petition and that this Court be pleased to extend time limited for lodging an Appeal. It is the petitioner's case that he brings the suit as a matter of public interest under article 258(2) (c) of the Constitution of Kenya 2010 especially with the threat posed on letting the 1<sup>st</sup> Respondent acquire and own public land illegally.

The gist of the Petitioner's case is that he has at all material times pertinent to this suit been a resident of Ojola village in Kisumu County where the suit property is located. That the property is government land having been acquired by the government through the 4<sup>th</sup> respondent on 21<sup>st</sup> June 1978.

The 1<sup>st</sup> respondent had in several instances indicated his intentions of selling the suit property to an interested buyer, thus prompting the Petitioner to conduct an official search to ascertain the true owner of the suit property which search revealed the 1<sup>st</sup> Respondent as the registered owner.

It is the Petitioner's case that the transfer and registration of the 1<sup>st</sup> Respondent as proprietor of the suit property is fraudulent and/or irregular, unlawful and void ab initio; that the particulars of fraud are; Selling Government Land without following the proper procedures laid out in the Government Land Act (GLA) now repealed. Transfer or causing to transfer parcel of land that is owned by the government without the duly set out procedure in the Government Land Act (GLA), the Registration of Titles Act (RTA) and Registered Land Act (RLA) now repealed. Registration of the land that belongs to the Government in the name of the 1<sup>st</sup> Respondent by the 3<sup>rd</sup> Respondent which is contrary to the Government Land Act (GLA), Registered Land Act (RLA) and the Registration of Titles Act (RTA) now repealed.

The petitioner further states that the particulars of unconstitutionality include:

- a) The Respondents jointly and/or severally contravened the Constitutional provision that requires that a property cannot be owned if the property is unlawfully acquired contrary to article 40(6) of the Constitution of Kenya.
- b) The Respondents jointly and/or severally were under the obligation to observe, respect, protect, promote and fulfill the rights and freedoms enshrined in the Bill of Rights, Chapter Four of the Constitution.
- c) The 5<sup>th</sup> Respondent is required under the law to protect the interest of the public and uphold the rule of law and has failed to do this, an action that is contrary to article 56(6) of the Constitution.

The Petitioner further contends that he brings the petition in the interest of public and to secure and protect the right of people who use the parcel of land as government land.

In their submissions filed on 27/01/21, the Petitioner relied on the case of *Niaz Mohamed Jan Mohamed v Commissioner of Lands & 4 others* in support of their submission that public land cannot be converted to private use once it has been set for public use, even by the government, and that the same cannot be allocated or be sold for private purposes as seems to have happened in this case.

The petitioner further submitted that on the basis of article 62(4) of the Constitution, the County government cannot dispose of any public land unless imposed by an Act of Parliament, hence the 1<sup>st</sup> Respondent has no right of claim of ownership over the suit property and cannot enjoy property rights over the same on the basis of article 40(6) of the Constitution.

That the suit property was always government land reserved for public use, a fact which the respondents were fully aware and accordingly its acquisition by the 1<sup>st</sup> respondent was fraudulent and unlawful within the meaning of section 2 of the Registration of Titles Act (Cap 28 Laws of Kenya) which provides that; fraud, shall on the part of the person obtaining registration include 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.

None of the respondents filed their responses and submissions as directed by the Court on 16/11/21. In fact, on 20/01/21, the Court was categorical that in the event of failure to comply with the Court directions, the petition would be deemed as dismissed with costs. The petitioner in compliance with the directions filed their submissions on 27/01/21.

There is on record an affidavit of service sworn by James Otieno Okudo to the effect that the petition was served on all the respondents. I have looked at the copy of the petition attached to the affidavit of service. It bears the stamps of the National Land Commission (received on 4/12/19), Attorney general (received on 06/12/19) and a signature by the 1<sup>st</sup> respondent (received on 26/11/19). I therefore have no doubt that the respondents were served.

The memorandum of appearance dated and filed on 10/02/20 by the Attorney general bears the correct case number but the parties are different from the ones in this petition. The filed memorandum of appearance indicates that appearance has been entered for the 1<sup>st</sup> and 3<sup>rd</sup> defendants. However, from the Court record, a Mr. Kobimbo appeared for the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents on 20/01/21.

### **ISSUES FOR DETERMINATION**

The main issue for determination is whether the suit property was public land and whether it was available for allocation

### **ANALYSIS**

#### **a) Whether the suit property is/was public land**

Article 61 (2) of the Constitution classifies Land in Kenya as public, community or private. Article 62 (1) lists land that falls under the category of public land and of relevance to this petition is section 62(1) (c) which provides that public land is land transferred to the State by way of sale, reversion or surrender. It is the case that the suit land was initially acquired by the government of Kenya. Entry number 1 on the green card marked 'JA-1' attached to the petitioner's affidavit indicates the Republic of Kenya as the owner of the suit property as at 21/07/78. It is further indicated on the green card that the property is reserved for use as ministry of works quarry. The same is confirmed by the certificate of official search dated 19/06/19 marked 'JA-2' in the petitioner's supporting affidavit.

The available documents show that the suit property was at on 21<sup>st</sup> of July 1978 public land owned by the government of Kenya but was converted into private land and registered by transfer to the 1<sup>st</sup> respondent. The act of transferring the parcel of land to the 1<sup>st</sup> respondent is an illegality as no person has the right to transfer government land to an individual. Despite being served, the respondents did not file a response to explain how they acquired the land that belonged to government. It is clear from both the green card and the certificate of official search that there was transfer and issuance of a title deed in favour of Otieno Jowi (the 1<sup>st</sup> Respondent herein) on 31/10/96.

It is the petitioner's case that any transfer in favour of the 1<sup>st</sup> Respondent was fraudulent and/or irregular and void ab initio. The petitioner has set out the following particulars of fraud; Selling Government Land without following the proper procedures laid out in the Government Land Act (GLA) now repealed. Transfer or causing to transfer parcel of land that is owned by the government without the duly set out procedure in the Government Land Act (GLA), the Registration of Titles Act (RTA) and Registered Land Act (RLA) now repealed. Registration of the land that belongs to the Government in the name of the 1<sup>st</sup> Respondent by the 3<sup>rd</sup> Respondent which is contrary to the Government Land Act (GLA), Registered Land Act (RLA) and the Registration of Titles Act (RTA) now repealed.

The act of transferring government land directly from the government to the 1<sup>st</sup> respondent was fraudulent.

In *John Mbuqua Gitau v Simon Parkoyiet Mokare & 6 others [2014] eKLR*, the Court held that;

**'The petitioner having alleged fraud and irregularities on the part of the 2nd and 3rd Respondents was duty bound to provide proof to the required standard. The burden of proof rests with whoever alleges. In the present petition the legal burden to prove fraud, discrimination, unfair procedure and breach of the constitution provisions pleaded ... lies with the petitioner.'**

**The burden of proof on the person who alleges fraud is on a standard higher than on a balance of probabilities adopted in ordinarily civil cases but lower than proof beyond a reasonable as in criminal cases. It is somewhere in between.'**

The petitioner has discharged his burden of proof to the required standards by demonstrating that the land was initially registered in the names of the Government of Kenya but transferred to the names of the 1<sup>st</sup> respondent in unclear circumstances.

Though the transactions herein were done before the advent of the new constitution, Article 62(4) of the Constitution provides that Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use. My understanding of article 62(4) is that public land can be disposed of in accordance with the act of parliament specifying the nature and terms of disposal or use. The transfer to the 1<sup>st</sup> respondent was effected in 1996. The Government Land Act (repealed), Registration of Titles Act and Registered Land Act(repealed) were in force at the time.

The Government Land Act (repealed. Sections 3(a) and 7 are relevant in the circumstances.

Section 3(a) provides;

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;

Section 2 of the Government Land Act (repealed defines unalienated government as 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. Section 7 of the Government Land Act (repealed gives the Commissioner power to execute conveyances lease or licence for the occupation of Government lands on behalf of and under the directions of the President.

Justice Mbogholi Msagha in the case of *Paul Nderitu Ndung'u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996)* (referred to in the case of *Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR*) held that the **Commissioner of Lands had no legal authority to allocate two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated.** He further stated that

**“Under the Government Lands Act (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void ab initio.”**

The Petitioner has submitted that the respondents had no power to alienate land set aside for a public purpose and that the land cannot be converted to private use once it has been set aside for public use, even by the government. The petitioner relied on the case of *Niaz Mohamed Jan Mohamed v Commissioner of Lands & 4 others*. In the said case, the court was confronted by a situation in which the

remainder of land compulsorily acquired for a road had been converted to private use and a title for it issued. The Court found that the title was invalid. This court agrees with the Petitioner that the suit property was not available for alienation as it had been set aside for particular purpose. Both the green card and the certificate of official search clearly indicate that the property was reserved for use as ministry of works quarry.

Indeed, in Kenya *Anti-Corruption Commission v Online Enterprises Limited & 4 others* [2019] eKLR the Court stated that

**‘In order to determine the question whether the lease held by the 1st defendant is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process.’**

## **CONCLUSION**

Due to the foregoing facts that the suit land had been reserved for a specific public purpose and there being no evidence to the contrary, the Court finds that the registration of the 1<sup>st</sup> Respondent as the proprietor of the suit property was void ab initio and the same is hereby cancelled and the land to revert to the government of Kenya. This court grants a permanent Injunction restraining the Respondents jointly and severally whether acting by themselves, their servants and/or agent however from interfering with, selling disposing of and /or transferring or causing to be transferred any interest in the property title no. West Kisumu/Ojola/1213. Lastly, I do grant costs of the petition to the petitioner.

**DATED AT KISUMU THIS 29<sup>th</sup> DAY OF APRIL, 2021**

**ANTONY OMBWAYO**

**JUDGE**

**This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2019.**

**ANTONY OMBWAYO**

**JUDGE**