



**Ethics and Anti-Corruption Commission v Chepto & 3 others (Environment & Land Case 167 of 2009) [2023] KEELC 17313 (KLR) (9 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17313 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 167 OF 2009**

**NA MATHEKA, J**

**MAY 9, 2023**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**LUKA KIMUTAI CHEPTO ..... 1<sup>ST</sup> DEFENDANT**

**SALLY JEPKOECH CHEPTOO ..... 2<sup>ND</sup> DEFENDANT**

**TOROR ESTATES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**SAMMY SILAS KOMEN MWAITA ..... 4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that at all times material the Government of Kenya through the then East African Community, reserved land reference number MN/ 1/2414 (hereinafter referred to as the suit property) situated in Bamburi/Nyali estate within Mombasa Municipality for the construction of a house for the members of staff of the then Directorate of Civil Aviation by way of a Survey Plan Folio Reference number 131/31 dated October 22, 1975. On or about August 18, 1976, and upon completion of the survey, the Government of Kenya, through the then East Africa Community caused to be prepared and registered a Deed Plan for the suit property. The said Deed Plan was duly registered with the Director of Survey. Sometimes in 1977, the Government of Kenya through the then East African Community completed the construction of a four bedroomed bungalow with a servant quarter on the suit property and allocated the same to then Directorate of Civil Aviation to house its members of staff. The said house was entered into the Government building register as HG 19 and later on changed to HG 161. The suit property and the house thereon formed part of Government land reserved for use by and to be held by the then Directorate of Civil Aviation as a public utility and for a public purpose of housing the members of staff of the then Directorate of Civil Aviation.



2. By dint of the provisions of the *Civil Aviation Act*, Chapter 394 laws of Kenya, the Kenya Civil Aviation Authority was established to provide air navigational services in place of the Directorate of Civil Aviation and took over all assets, liabilities, functions and employees of the Directorate of Civil Aviation (Reference to Kenya Civil Aviation Authority hereinafter is reference to either or both Kenya Civil Aviation Authority and or the defunct Directorate of Civil Aviation. Pursuant to the provisions of the said *Chapter 394* laws of Kenya, the Minister for Transport, vide a gazette notice dated October 13, 2006 vested in the Kenya Civil Aviation Authority all movable and immovable property and assets which were by October 24, 2002 held by the Government on behalf of the Directorate of Civil Aviation which included the suit property and the house thereon. Sometimes in the year 2000, the Defendants fraudulently and illegally used the Survey Plan and the Deed Plan prepared by the then East Africa Community and registered with the Director of Surveys to prepare and register a Grant in the name of the 1<sup>st</sup> Defendant. The said Grant was prepared and registered in favour of the 1<sup>st</sup> Defendant who subsequently transferred to his company, the 3<sup>rd</sup> Defendant, without the consent or approval of the Board of Directors of the Kenya Civil Aviation Authority, the Minister for Transport, Minister of Lands and Minister for Finance, and or without following due process of bonding the house on the suit property as provided for in the Government Lands Act, the Government Financial Regulations and Bond of Survey Procedures. At the time of the allocation, the suit property and the house thereon had already been allocated and reserved for use by members of staff of the Kenya Civil Aviation Authority and who were in actual occupation of the said house in the provision of air navigational services to the public. And the suit property was therefore not available for alienation or allocation to the 1<sup>st</sup> Defendant. By reason of the matters aforesaid, the allocation of the suit property and the house thereon to the 1<sup>st</sup> Defendant and the subsequent transfer to the 3<sup>rd</sup> Defendant was done unlawfully, corruptly and contrary to the provisions of the *Government Lands Act*, Cap 280 and the Government Financial Regulations and Bond of Survey Procedures.
3. In the premises, the purported issuance of the title over the suit property to the 1<sup>st</sup> Defendant and the subsequent transfer to the 3<sup>rd</sup> Defendant was null and void ab initio and incapable of conferring on the 1<sup>st</sup> Defendant any or at all any estate, interest or right in the suit property. In the alternative and without prejudice to the foregoing, the Plaintiff avers that the 4<sup>th</sup> Defendant, with the knowledge that he had no statutory power and/or was acting in excess of his statutory powers, and that his actions were likely to occasion loss to the public, purported to grant a title over the suit property to the 1<sup>st</sup> Defendant in circumstances constituting misfeasance in public office.
4. The Plaintiff prays for judgment against the Defendants jointly and or severally for;
  - a. A declaration that the allocation to the 1<sup>st</sup> Defendant by the 4<sup>th</sup> Defendant and subsequent issuance of the Lease to the 1<sup>st</sup> Defendant of the land comprised in MN/ 1/2414 and the subsequent transfer to the 3<sup>rd</sup> Defendant was irregular, fraudulent, and illegal and consequently null and void.
  - b. An order for rectification of the register by cancellation of the title and all entries made on the land register in favor of the 1<sup>st</sup> Defendant and the subsequent transfer to the 3<sup>rd</sup> Defendant in respect of land reference number MN/ 1/2414.
  - c. An order of preservation and a permanent injunction against the 3<sup>rd</sup> Defendant, its agents, servants or assigns restraining it from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with MN/ 1/2414 otherwise than by transfer or surrender to the Kenya Civil Aviation Authority or/and the Government of Kenya.
  - d. General Damages for fraud and breach of fiduciary duty as against the 4<sup>th</sup> Defendant.



- e. Costs of and incidental to the suit.
- f. Any other or further relief the Court may deem fit and just to grant.
5. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants deny that they fraudulently and illegally used the survey and deed plans prepared by the then East African Community and registered with the Director of Surveys to prepare and register a grant in the name of the 1<sup>st</sup> Defendant as alleged or at all. The 1<sup>st</sup> Defendant avers that he was lawfully registered as the proprietor of the property known as land reference MN/1/2414 after being formally offered the Suit Property for sale by the Government of Kenya and thereafter paying in full the stand premium, land rent, registration fees and all other fees prescribed in the letter. It is denied that the grant in respect of the Suit Property was prepared and registered in favor of the 1<sup>st</sup> Defendant and subsequently transferred to the 3<sup>rd</sup> Defendant without the consent or approval of the Board of directors of the Kenya Civil Aviation Authority, Minister of Transport, Minister of Lands and the Minister for Finance and or without following the due process of bonding as provided for in the Government Land Act, the Government Financial Regulations and Bond of Survey Procedures. That the registration of the 3<sup>rd</sup> Defendant's proprietary interest in the Suit Property were undertaken with the full knowledge, co-operation, consent and approval of the Government of Kenya through her relevant officials, to wit, the Town Clerk, the District Commissioner, the Director of City Planning, the Commissioner of Lands and the Registrar of Titles and all the charges due to the Government and the City Council of Nairobi were duly prescribed and approved by the City Council of Nairobi and the relevant Government Departments and Officers concerned and dutifully and fully paid for by the 1<sup>st</sup> and 3<sup>rd</sup> Defendants. That the Plaintiff, as a result of the action of the Government of Kenya (through its Officials) acting in its executive capacity in registering and facilitating the legal recognition of the 3<sup>rd</sup> Defendant's title to the said Property are estopped from denying the Defendant's legal and valid title to the Suit Property. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that by virtue of Section 23 (1) of the Registration of Titles Act, Chapter 281 once a title is issued by Registrar to a purchaser upon a transfer the said title shall be taken by all courts to be conclusive evidence that the person named therein is the absolute and indefeasible owner and the said title shall not be subject to challenge except on the ground of fraud or error to which the registered proprietor is proved to be a party. In the alternative and without prejudice to the foregoing, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that 3<sup>rd</sup> Defendant's title and interest in the Suit Property is protected by Article 75 of the Constitution under the principle of sanctity of title which vests the registered proprietor with inviolable rights that can only be defeated by a lawful procedure under the Lands Acquisition Act. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that where fraud is alleged it must be clear, distinct and precise in the pleadings. The particulars of fraud in the Plaintiff fail in this legal requirement as they merely imputes that the Defendant ought to have knowledge that the Suit Property was not available for alienation. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants pray that the Plaintiff's suit against them be dismissed with costs.
6. The 4<sup>th</sup> Defendant avers that he performed/executed his duties as Commissioner of Lands (as he was then) within his statutory powers and not ultra vires as alleged by the Plaintiff. That the Plaintiff's suit is incompetent/ incurably/ fatally defective. The 4<sup>th</sup> Defendant prays that the Plaintiff's suit be dismissed with costs.
7. This court has considered the evidence and the submissions therein. PW1 testified that Sometimes in 1977, the Government of Kenya through the then East African Community completed the construction of a four bedroomed bungalow with a servant quarter on the suit property and allocated the same to then Directorate of Civil Aviation to house its members of staff. The said house was entered into the Government building register as HG 19 and later on changed to HG 161 The suit property and the house thereon formed part of Government land reserved for use by and to be held



by the then Directorate of Civil Aviation as a public utility and for a public purpose of housing the members of staff of the then Directorate of Civil Aviation. The said Deed Plan was duly registered with the Director of Survey and was produced as PEx5 PW2, PW3, PW4 and PW5 corroborated his evidence. The 1<sup>st</sup> Defendant testified that he was lawfully registered as the proprietor of the property known as land reference MN/1/2414 after being formally offered the Suit Property for sale by the Government of Kenya and thereafter paying in full the stand premium, land rent, registration fees and all other fees prescribed in the letter. It is denied that the grant in respect of the Suit Property was prepared and registered in favour to the 1<sup>st</sup> Defendant and subsequently transferred to the 3<sup>rd</sup> Defendant fraudulently.

8. Section 2 of the *Government Land Act*, Cap 286 Laws of Kenya (now repealed), defines un-alienated land 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.”

9. Section 3 of the *Physical Planning Act* Cap 286 of the Laws of Kenya (now repealed) also defines un-alienated land in similar terms. The Section describes un-alienated Government Land as;

“un-alienated Government land” means Government land which is not for the time being leased to any person, or in respect of which the Commissioner of Lands has not issued any letter of allotment or reservation.”

10. Section 3 of the *Government Land Act* (Repealed), gave the power to make grants or dispositions in or over un-alienated Government land to the President. The act limited the delegation of the powers given to the President to the Commissioner on specified purposes only, being;

“(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;”

11. In the case of *James Joram Nyaga & Another v the Ho Attorney General & Another* (2007) eKLR, the court, in reference to Sections 3 and 7 of the Government Lands Act the court held that;

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate un-alienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act, Cap 281 Laws of Kenya.”

12. It is clear from the evidence adduced and exhibits produced before this Court that the Suit Property and the house thereon was already alienated and formed part of Government land reserved for use by and to be held by the then Directorate of Civil Aviation as a public utility and for a public purpose of housing the members of staff of the then Directorate of Civil Aviation. I find that the suit property was public land with public property and therefore not available for allocation for private purposes.



13. In the case of *Lalitchandra Dugarshankar Padya & Another v Saled Awale & Another*, Mombasa HCCC No 87 of 2001 the court held that;

“I am also satisfied and I find that at all material times the suit piece of land was to the knowledge of the Plaintiffs as it is clear from the letters EX 25 and 26, public land vested in the second Defendant (Kenya Railways) for its use as a marshaling yard. At no time did the second defendant surrender it to the Government. It was therefore by virtue of section 9 of the Government Land Act, not available for allocation by the Commissioner of Lands. Its allocation to the people who later transferred it to the Plaintiffs was therefore null and void.”

14. In the case of *African line transport Co Ltd v the AG*, Mombasa HCCC No 276 of 2003 the court stated that;

“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-allocated to Mr Omari and the subsequent grant to him was therefore irregular.”

15. In the case of *HH DR Syedna Mohammed Burbennuddin Sabeb & Others v Benja Properties Ltd*, Nairobi HCCC No 73 of 2000, the court held as follows;

“In any event the letter of allotment purchased by the Defendant had expired, and was subject to a disclaimer. In any event, that letter was worthless because it purported to allot land under the Government Land Act that was not available for allotment.”

16. In the case of *James Joram Nyaga & another v The AG and Others*, the court held as follows:

“We therefore hold that the suit land having been acquired for public purpose, that is construction of road, is held in trust of the public and could not have been allocated to the Applicants who are private individuals for their private use.”

17. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants argue that by virtue of s23 (1) of the Registration of Titles Act, *Chapter 281* once a title is issued by Registrar to a purchaser upon a transfer the said title shall be taken by all courts to be conclusive evidence that the

18. person named therein is the absolute and indefeasible owner and the said title shall not be subject to challenge except on the ground of fraud or error to which the registered proprietor is proved to be a party. I find that this is a clear case of fraud and land grabbing of public land and property. In the case of *Kenya Guards Allied Workers Union v Security Guards Services & 38 Others* Nairobi HC Misc 1159 of 2003 the court stated as follows;

“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 unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public plot such as a 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”.



19. In the case of *Republic v Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others* Mombasa HCMCA No 617 of 2003 (2006)1 KLR (E&L) 563 the court stated that;

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. 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 spirit of section 1 and 1A of the Constitution.”

20. In the case of *Mureithi & 2 Others (For Mbari Ya Murathimi Clan) v Attorney General & 5 Others* Nairobi HCMCA No 158 of 2005 (2006) 1 KLR 443 the court held that;

“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.”

21. In the case of *Chemel Investments Limited v The Attorney General & Others* Nairobi Petition No 94 of 2005 the court stated that;

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt



the sentiments of the court in the case of Milan Kumar Shah & 2 Others v City Council of Nairobi & Another (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

22. In a nutshell, I find that the Defendants un-procedurally obtained title to the suit property as the same had been alienated as public land and is not available for conversion to private land. I find the Plaintiff has proved their case on a balance of probabilities and I grant the following orders;
23. A declaration that the allocation to the 1<sup>st</sup> Defendant by the 4<sup>th</sup> Defendant and subsequent issuance of the Lease to the 1<sup>st</sup> Defendant of the land comprised in MN/ 1/2414 and the subsequent transfer to the 3<sup>rd</sup> Defendant was irregular, fraudulent, and illegal and consequently null and void.
24. An order for rectification of the register by cancellation of the title and all entries made on the land register in favor of the 1<sup>st</sup> Defendant and the subsequent transfer to the 3<sup>rd</sup> Defendant in respect of land reference number MN/ 1/2414.
25. An order of preservation and a permanent injunction against the 3<sup>rd</sup> Defendant, its agents, servants or assigns restraining it from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with MN/ 1/2414 otherwise than by transfer or surrender to the Kenya Civil Aviation Authority or/and the Government of Kenya.
4. Costs of the suit to the Plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> DAY OF MAY 2023.**

**N.A. MATHEKA**

**JUDGE**

TABLE

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