



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 97 OF 2014**

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

**VERSUS**

**LEKYO TOURS LIMITED .....1<sup>ST</sup> DEFENDANT**

**SAMMY SILAS KOMEN MWAITA..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

*(Suit for recovery of land claimed to belong to the Government; title issued to the 1<sup>st</sup> defendant by 2<sup>nd</sup> defendant who was then Commissioner of Lands; 2<sup>nd</sup> defendant being a director of the 1<sup>st</sup> defendant; plaintiff demonstrating that the land had been set aside for housing civil servants; defendants not offering any evidence; judgment entered for the plaintiff; title of 1<sup>st</sup> defendant to be cancelled)*

1. This suit was commenced through a plaint which was filed on 29 April 2014. The plaintiff is the Ethics and Anti-Corruption Commission (EACC) established by the Ethics and Anti-Corruption Commission Act, 2011 and it has brought this suit for the recovery of public property belonging to the Government of Kenya, pursuant to the provisions of Section 11 of the said statute. It is the case of the plaintiff that the land parcel MN/I/3074 situated in Bamburi, Mombasa, (the suit land) is Government land which was irregularly transferred to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant who was at the time the Commissioner of Lands. It is averred that in the year 1975, the Government alienated the suit land and constructed a house registered as MOMB/HOU/HG/199 between the years 1978 and 1979. The house was then occupied by Government employees. It is contended that on 20 March 1998, the 2<sup>nd</sup> defendant issued to the 1<sup>st</sup> defendant a letter of allotment over the suit land. A Deed Plan Number 109445 was then prepared and approved on 5 July 2000 culminating in a Grant dated 8 August 2000 in favour of the 1<sup>st</sup> defendant. It is claimed that the 2<sup>nd</sup> defendant conferred a benefit unto himself as he was a director of the 1<sup>st</sup> defendant. It is the case of the plaintiff that the suit land had already been alienated by the Government and the Government had already constructed a house on it and the land was thus not available for allocation. It is the claim of the plaintiff that the allocation of the land to the 1<sup>st</sup> defendant was thus fraudulent. It is pleaded that the 2<sup>nd</sup> defendant held a fiduciary position vis a vis all Government land and the public and breached his fiduciary duties by allocating the suit land to himself through the 1<sup>st</sup> defendant company. In this suit the plaintiff has asked for the following orders (slightly paraphrased):-

*(a) A declaration that the Grant issued to the 1<sup>st</sup> defendant over the suit land was issued ultra vires the 2<sup>nd</sup> defendant's statutory powers, is illegal, fraudulent, null and void ab initio.*

*(b) An order directing the Land Registrar, Mombasa District Registry, to rectify the register by cancellation of the entries relating to the Grant signed on 8 August 2000 and registered in favour of the 1<sup>st</sup> defendant over the suit land.*

*(c) As against the 1<sup>st</sup> defendant, an order of permanent injunction to restrain the 1<sup>st</sup> defendant from the suit land or dealing with it other than by way of a surrender to the Government.*

*(d) General damages for fraud and breach of fiduciary duty as against the 2<sup>nd</sup> defendant.*

*(e) Costs of and incidental to this suit.*

*(f) Interest at court rates on (e) above.*

2. The defendants filed a joint statement of defence. They pleaded inter alia that the suit land was lawfully allocated vide the letter dated 20 March 1998 by the Government of Kenya for residential purposes. It was further pleaded that the 2<sup>nd</sup> defendant executed the Grant in the

course of the discharge of his statutory obligation as Commissioner of Lands and that there existed no law precluding him from discharging his duties in favour of a legal entity in which he had an interest. He denied having abused his power or acting fraudulently or illegally as claimed.

3. The matter came up for hearing on 16 October 2019 on which date counsel for the defendants applied for an adjournment which I declined and placed the file aside to proceed. Later, there was no appearance on the part of the defendants and the case thus proceeded ex-parte. The plaintiff called as PW-1, one Jarso Dida its Senior Investigator. He referred to his statement and various documents to demonstrate that the suit land was allocated by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant. He testified inter alia that a house on the suit land was developed in the year 1978/1979 to accommodate civil servants. Since then, the house has been let out to civil servants to date. He stated that no consent was ever issued from the Ministry of Lands & Housing to transfer the land to the 1<sup>st</sup> defendant. He testified that to transfer such a property to an individual, a committee had to sit and recommend its allocation to the Permanent Secretary. The property would then be valued. He testified that in the instance of this case, this procedure was not followed and that the Ministry has no records authorising the transfer of the suit property to the 1<sup>st</sup> defendant.

4. PW-2 was Timothy Waiya Mwangi, the Deputy Director Physical Planning Department, Ministry of Lands and Physical Planning. He testified that his office issues a Part Development Plan (PDP) before a letter of allotment of land is issued. This PDP would have a specific number. He pointed out that in respect of the suit land, there was a PDP but with no number.

5. PW-3 was Wilson Kibichii, the head of survey records office in Nairobi, Survey Field Headquarters, Ruaraka. He testified that the suit land has a Deed Plan No. 109445 approved on 3 November 1980 and that the land is surveyed under F/R No. 145/24.

6. With the above evidence, the plaintiff closed its case. I invited counsel to file written submissions but only counsel for the plaintiff did so. I have gone through these submissions before arriving at my decision.

7. The evidence on record is not controverted as the defendants opted not to participate in the proceedings. The case of the plaintiff is premised on the claim that the 2<sup>nd</sup> defendant could not have allocated the suit land to the 1<sup>st</sup> defendant as this was already a house alienated by the Government to house civil servants. PW-1 testified that the process that ought to have been followed in allotting the house was never followed and thus the suit land was irregularly allocated to the 1<sup>st</sup> defendant. It has also been revealed that the 2<sup>nd</sup> defendant, who allotted the suit land to the 1<sup>st</sup> defendant company, is a director of the 1<sup>st</sup> defendant and thus was a beneficiary of the allocation. This to me, prima facie, is evidence of abuse of office, and it was incumbent upon the 2<sup>nd</sup> defendant to appear and justify the allocation to the 1<sup>st</sup> defendant. Neither the 1<sup>st</sup> nor the 2<sup>nd</sup> defendants have tendered any evidence to support the claims in their defence that the allocation of the house and its purported conversion to private property was done above board.

8. I am thus persuaded that the plaintiff has proved its case on a balance of probabilities and deserving of the orders sought.

9. I therefore declare that the suit land is still land held by the Government and further declare that the registration of the 1<sup>st</sup> defendant as proprietor was unlawfully and/or irregularly procured. I proceed to order the Land Registrar Mombasa, to cancel the title of the 1<sup>st</sup> defendant and have the title revert back to the Government. So that no member of the public is duped to deal with the suit land, I do order that the cancellation of the title of the 1<sup>st</sup> defendant be advertised in the Kenya Gazette. I further issue an order of permanent injunction to both defendants and/or their servants/agents restraining them from visiting, entering, being upon, or dealing with the suit land.

10. There is a claim for general damages for fraud and breach of fiduciary duty by the 2<sup>nd</sup> defendant but counsel for the plaintiff did not tender to me any submissions which would entitle me to make any such award or the quantum thereof. I therefore will not make any award under that head. Costs will however be to the plaintiff as against the defendants jointly and/or severally.

11. Judgment accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 27<sup>th</sup> day of February, 2020.**

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**MUNYAO SILA,**

**JUDGE.**

**IN THE PRESENCE OF:**

Mrs. Abdulrahim for the plaintiff.

Mr Kihara holding brief for Mr Rutto for the defendants.

Court Assistant; David Koitamet.