



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KISUMU

E & L CASE NO. 415 OF 2015

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

VINCENT KIPKIRUI TUWEI.....1ST DEFENDANT

WILSON GACANJA.....2ND DEFENDANT

UNITED MILLERS LTD.....3RD DEFENDANT

JUDGMENT

1. **Kenya Anti-Corruption Commission**, the Plaintiff, commenced this suit against Vincent Kipkurui Tuwei, Wilson Gacanja and United Millers Ltd, the 1st to 3rd Defendants respectively vide the further amended plaint dated the 22nd June, 2010 seeking for;

“(a) A declaration that the issuance and registration of a Lease by the 2nd Defendant in favour of the 1st Defendant over Kisumu Municipality/Block 7/503 was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st Defendant in the first instance.

(b) A declaration that the subsequent transfer of the Lease and issuance of a Certificate of Lease over Kisumu Municipality/Block 7/503 to the 3rd Defendant was null and void and ineffectual to confer a good title upon the 3rd Defendant.

(c) An order for rectification of the land register by cancellation of the lease over Kisumu Municipality/Block 7/503 and Certificate of Lease issued to the 3rd Defendant so as to restore the suit property to the Corporation.

(d) An order for a permanent injunction against the 3rd Defendant by itself, its agents, servants or assigns restraining them from leasing, transferring, charging, entering upon, developing, or in any other manner howsoever from dealing with Kisumu Municipality/Block 7/503.

(e) General damages for fraud as against the 1st and 2nd Defendants only.

(f) Costs of and incidental to the suit.

(g) Any other or further relief the court may deem fit and just to grant.”

2. The Plaintiff avers that Kisumu Municipality/Block 7/503, the suit land, was at all material times part and parcel of a larger parcel of land surveyed and assigned L. R. No. 1148/Section LV and set apart as railway reserve in 1935. That it was subsequently vested in the East African Railways & Harbours in 1963, and to East African Railways Corporation in 1969, and thereafter to Kenya Railways Corporation, the Corporation in 1986. That pursuant to investigations carried out by the Plaintiff, it was established that on or about 14th October 1999, the 1st Defendant wrongfully and fraudulently procured from the 2nd Defendant a lease over the suit land for private purposes. That the 1st Defendant then transferred the suit land to the 3rd Defendant on the 2nd February, 2000. The Plaintiff avers that the transaction by the Defendants over the suit land were fraudulent and illegal as they all knew of the Corporation’s interest over the land. The Plaintiff has set out the particulars of fraud, illegality, knowledge and constructive trusts at paragraphs 7, 8, 10 and 12A of the Further Amended Plaint.

3. The 1st and 3rd Defendants filed their Amended Statement of Defence dated 11th February, 2010 and Statement of Defence dated 29th June, 2010 respectively, through M/s Onsongo & Company Advocates denying the Plaintiff's claim. The 1st Defendant contends that the process through which he obtained the suit land was legal, procedurally correct and was not holding it in trust for any person. The 3rd Defendant averred that they procured the suit land as a bonafide purchaser for value without notice.
4. The 2nd Defendant, Wilson Gacanja filed the statement of defence dated 11th November, 2009 through M/s Rachier & Amollo Advocates disputing the Plaintiff's claim. The 2nd Defendant denies knowledge of the conveyance over the suit land and the Corporation's interest over the same. That the person holding the office of Commissioner of Lands would generate the documentation required for unoccupied government land to be divested to the public in exercise of the President's delegated statutory authority, and in his official capacity, in pursuance of the government privatization policy.
5. That during the hearing, the Plaintiff called Wilson Francis Ojunju, a Senior Lands Surveyor, Judith Akinyi Olewe of the Ministry of Lands Records Office, and Joseph Ndirangu Kariuki, a Lands Officer with National Land Commission who testified as PW1 to PW3 respectively. It was their case that the suit land was part of the land set apart and vested with the Corporation as per the Registry Index Map (RIM) produced by PW2 as exhibit 2. That after receiving complaints from the Plaintiff that the land belonging to the Corporation had been illegally allocated, the Commissioner of Lands Office carried out investigation as explained by PW3. The investigations confirmed the complaints were correct and in respect of the suit land, they did a letter on 10th March, 2009 to the 1st Defendant withdrawing the offer and seeking for the title documents to be returned for cancellation. That 1st Defendant declined to return the document. That they asked the Director of Surveys to resurvey the Corporation's land and after the exercise, issued a letter of allotment for Kisumu Municipality/Block 7/567, measuring 72.38 hectares to the Corporation. The lease was later issued and registered.
5. The 2nd Defendant did not participate in the hearing though duly served with hearing notices. The 1st and 3rd Defendant participated in the proceedings through Counsel but did not call any witnesses despite being given time to do so.
6. The following are the issues for court's determination;
- (a) **Whether the suit land was part of the land set apart and vested with the Corporation.**
 - (b) **Whether the suit land was available for alienation when it was allocated to the 1st Defendant.**
 - (c) **Whether the 1st Defendant obtained good title to the suit land capable of being transferred to the 3rd Defendant.**
 - (d) **Which of the prayers sought by the Plaintiff should be granted?**
7. The court has after considering the parties' pleadings, oral and documentary evidence by PW1, PW2 and PW3 come to the following findings;
- (a) That the oral and documentary evidence presented to the court by the Plaintiff's witnesses clearly shows that the suit land was part of a larger parcel of land set apart and vested in the Kenya Railways Corporation, the Corporation, and previously its predecessors in title.
 - (b) That the evidence adduced by the Plaintiff's witnesses through specifically PW3, confirms that the Corporation had not surrendered the said land back to the government at any time, and it was therefore not available for allocation to the 1st Defendant by the time the 2nd Defendant issued the letter of allotment and the lease thereafter. The Court of Appeal decision in **Kipsirgoi Investments Ltd Vs Kenya Anti-Corruption Commission Eldoret Civil Appeal No. 288 of 2010** pages 26 and 27 is relevant.
 - (c) That the Defendants having failed to call evidence in support of their defence left the averments in their statements of defence as mere allegations and hence incapable of challenging the evidence adduced by the Plaintiff in support of its case.
 - (d) That the fact the suit land was part of the land dedicated for the use of the Corporation, and not available for alienation, leads the court to find that the 2nd Defendant acted beyond or outside his powers when he allocated the land to the 1st Defendant. The decision in the case of **James Joram Nyaga & Another Vs The Attorney General & Another [2007] eKLR** is relevant. That the physical position of the suit land as confirmed through the survey map and Registry Index Map (RIM) produced as exhibits would have been reason enough to warn the 3rd Defendant that the property belonged to the Corporation. That as the 3rd Defendant has not tendered any evidence to confirm whether or not they carried out due diligence before entering into the transaction with the 1st Defendant, then there is no evidence upon which they could claim to be bonafide purchaser for value without notice. The title is therefore not protected under **Article 40 (6) of the Constitution and Section 26 of the Land Registration Act No. 3 of 2012**.
 - (e) That the Plaintiff has not adduced any evidence upon which the court could base the prayer for general damages on and none is granted.
 - (f) That the Plaintiff has proved its case against the three defendants and is entitled to the declaratory prayers, permanent injunction, and rectification of the register order as prayed.
 - (g) That the Plaintiff having substantially succeeded in its claim, the three Defendants should pay its costs of the suit as under **Sections 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, costs follow the event.

8. That flowing from the foregoing, the court finds that the Plaintiff has proved its case against the Defendants on a balance of probabilities. That the court enters judgment for the Plaintiff against the Defendants in terms of prayers (a), (b), (c), (d) and (f) of the Further Amended Plaint dated the 22nd June, 2010 and filed on the 23rd June, 2010.

Orders accordingly.

Dated and signed at Eldoret this 3rd day of February, 2020.

S. M. KIBUNJA

JUDGE

Delivered and signed this 6th day of March, 2020.

A. OMBWAYO

JUDGE

Judgment read in open court in the presence of:

M/s Omweri for Plaintiff.

M/s Onsongo for 1st and 3rd Defendants.

Court Assistant: Joane