



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KISUMU

E & L CASE NO. 901 OF 2015

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

VINCENT KIPKURUI TUWEI.....1ST DEFENDANT

SAMMY KOMEN MWAITA.....2ND DEFENDANT

JUDGMENT

1. **Kenya Anti-Corruption Commission**, the Plaintiff, commenced this claim through the Amended Plaint dated the 22nd June, 2010 against **Vincent Kipkurui Tuwei** and **Sammy Komen Mwaita**, the 1st and 2nd Defendant respectively seeking for the following prayers;

“(a) A declaration that the issuance of a Lease by the 2nd Defendant to the 1st Defendant over Kisumu Municipality/Block 7/521 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 registration of the Lease and issuance of a Certificate of Lease over Kisumu Municipality/Block 7/521 to the 1st Defendant was null and void and ineffectual to confer a good title upon the 1st Defendant.

(bb) In the alternative to (a) and (b) above, a declaration that the 1st Defendant holds registration of Kisumu Municipality/Block 7/521 in trust for the Corporation and that the land register be rectified by deleting the name of the 1st Defendant and substituting the name of Kenya Railways Corporation as the proprietor.

(c) An order for rectification of the land register by cancellation of the Lease over Kisumu Municipality/Block 7/521 and Certificate of Lease issued to the 1st Defendant so as to restore the suit property to the Corporation.

(d) An order for a permanent injunction against the 1st Defendant by himself, his 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 7/521.

(e) General damages for fraud.

(f) Costs of an incidental to the suit.

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

The Plaintiff avers that at all material times, Kisumu Municipality/Block 7/521, the suit property, was part of a larger parcel of land set apart as railway reserve, and vested with the Kenya Railways Corporation, the Corporation, vide Legal Notice No. 24 of 1986 and before that, in its predecessors in title. That following the investigations carried out in 2001, the Plaintiff discovered that the 1st Defendant had wrongfully and fraudulently procured from the 2nd Defendant a lease over the suit property for private purposes without the knowledge of the Corporation. The Plaintiff has set out the particulars of fraud, illegality, constructive trust and knowledge attributed to the Defendants in paragraphs 7, 8, and 12A of the Amended Plaint.

2. The 1st Defendant opposed the Plaintiff’s claim through the Amended Statement of Defence dated the 26th June, 2010. He avers that the suit is incurably defective and an abuse of the process of the court. That he obtained registration with the suit property procedurally and the suit should be dismissed with costs.

3. The 2nd Defendant also opposed the Plaintiff's claim through their statement of defence dated the 7th August, 2009. He denied knowledge that the suit property was part of the land vested with the Corporation, and that he fraudulently allocated it to the 1st Defendant. That if the said land was allocated, then it was by virtue of the Executive Powers of the President, and prays for the suit to be dismissed with costs.

4. The hearing of the Plaintiff's case commenced on 1st August, 2017 when Wilson Francis Ojunju, a government surveyor, and Dedan Ochieng Okwama, an investigator with the Plaintiff testified as PW1 and PW2 respectively. Then on the 2nd May, 2018 Victor Kariuki Wahome, a Surveyor with the Corporation testified as PW3. That was followed by Joseph Kiragu Kariuki, Chief Land Administrator, with National Land Commission who testified on the 12th February, 2019 as PW4. That it is the Plaintiff's case that the suit property was always part of the land vested with the Corporation, and that it had not been surrendered back to the Government by the time the 2nd Defendant allocated it to the 1st Defendant. That the suit land has since then been amalgamated with the other parcels belonging to the Corporation and registered.

4. The Defendants did not call any witnesses and none of the learned Counsel filed any submissions.

5. The following are the issues for the court's determinations;

(a) *Whether the suit property was available for alienation when the 2nd Defendant allocated it to the 1st Defendant.*

(b) *Whether the process of allocating and registering the suit land with the 1st Defendant was regularly, procedurally and lawfully done.*

(c) *Whether the Plaintiff suffered loss and damages and if so whether it is entitled to damages.*

(d) *Who pays the costs?*

6. The court has carefully considered the pleadings by the parties, oral and documentary evidence tendered by PW1 to PW4 and come to the following conclusions;

(a) That from the testimonies of PW1 to PW4, the documentary evidence tendered, including the copies of the title in respect of L. R. No. 1148/1184 [I.R. 23354], Kisumu Municipality/Block 7/365 and L. N. No. 24 of 1986, confirms that the suit land was part of the land set apart in 1935 for railway reserve and currently vested in the Corporation. That in the absence of evidence to the contrary, the court finds that the suit land was at the time it was allocated to the 1st Defendant for private purposes by the 2nd Defendant, who was then the Commissioner of Land, unavailable for alienation.

(b) That though the Defendants had in their statements of defence averred that the allocation of the suit land, and the registration thereof in the 1st Defendant's name was through the President's executive power and hence procedurally done and processed which is denied by the Plaintiff, the Defendants failed to tender any evidence in support of their allegations and or averments.

(c) That the 2nd Defendant, as the Commissioner of Lands then, ought to have confirmed from the Corporation first whether the suit land had been surrendered in accordance with **Section 14(4) and (5) of the Kenya Railways Act Chapter 397 of Laws of Kenya** before allocating it to the 1st Defendant for private purposes. That further, the 2nd Defendant ought to have known that as the suit land was part of the land vested in the Corporation, it was already alienated for public use and therefore not available for allocation. The decision of the Court of Appeal, Eldoret in **Kipsirgoi Investments Ltd Vs Kenya Anti-Corruption Commission – Civil Appeal No. 288 of 2010** pages 26 and 27 is relevant.

(d) That further to the finding in (b) above, the provisions of **Section 3 of the Government Land Act chapter 280 of Laws of Kenya** on the power delegated to the Commissioner of Lands to alienate land, it is clearly limited to educational, charitable, sports and other purposes set out at the foot of page 8 of the Act. That none of the said purposes were available to the 2nd Defendant to alienate the suit land to the 1st Defendant. The decision in the case of **James Joram Nyaga & Another Vs The Attorney General & Another [2007] eKLR** is relevant.

(e) That as the suit land was not available for alienation, and the 2nd Defendant was without powers to allocate it to the 1st Defendant, the title given and registered in the name of the 1st Defendant was unlawfully obtained, and therefore unprotected under **Article 40(6) of the Constitution and Section 26 of the Land Registration Act No. 3 of 2012**. The following decisions are relevant; **Republic Vs District Land Registrar, Mombasa & 5 Others Exparte Super Nova Properties Ltd [2016] eKLR**, **Milankurman Shah & Two Others Vs City Council of Nairobi & Others Nairobi – Hccc No. 1024 of 2005 [unreported]** and **Paul Nderitu Ndungu & 20 Others Vs Pashito Holdings Ltd & Another – Nairobi Hccc No. 3063 of 1996**.

(f) That though the Plaintiff seeks for general damages among its prayers, they failed to tender evidence to show what damages and losses they suffered as a result of the suit land being allocated and registered by the 2nd Defendant to the 1st Defendant. That even though the Defendants did not tender evidence to dispute that claim, the Plaintiff nevertheless failed to discharge its legal obligation under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya**, and the claim for general damages fails.

(g) That as the Plaintiff has substantially succeeded in their claim and prayers, they are entitled to costs of the fruit under **Section 27 of Civil Procedure Act Chapter 21 of Laws of Kenya**.

7. That in view of the foregoing, the court finds that the Plaintiff has established its claim against both Defendants to the standard required by the law of a balance of probabilities. The Court therefore enters judgment for the Plaintiff against the Defendants in terms of prayers (a), (b), (bb), (c), (d) and (f).

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