



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KISUMU**

**E&L CASE NO. 872 OF 2015**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**VINCENT KIPKURUI TUWEI.....1<sup>ST</sup> DEFENDANT**

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

**JUDGMENT**

1. **Kenya Anti-Corruption Commission**, the Plaintiff, filed this suit against **Vincent Kipkurui Tuwei** and **Sammy Komen Mwaita**, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's respectively vide the Amended plaint dated the 22<sup>nd</sup> June, 2010 seeking for the following prayers;

“(a) A declaration that the issuance of a lease by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant over Kisumu Municipality/Block 7/520 was null and void ab initio and ineffectual to confer any right, interest or title upon the 1<sup>st</sup> 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 7/520 to the 1<sup>st</sup> Defendant was null and void and ineffectual to confer a good title upon the 1<sup>st</sup> Defendant.

(bb) In the alternative to (a) and (b) above, a declaration that the 1<sup>st</sup> defendant holds registration of Kisumu Municipality/Block 7/520 in trust for the Corporation and that the land register be rectified by deleting the name of the 1<sup>st</sup> 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 7/520 and Certificate of Lease issued to the 1<sup>st</sup> Defendant so as to restore the suit property to the Corporation.

(d) An order for a permanent injunction against the 1<sup>st</sup> 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 7/520.

(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.”

2. The Plaintiff avers that land parcel Kisumu Municipality/Block 7/520, the suit property, was at all material times part of a larger parcel surveyed in 1935 and assigned L. R. No. 1148/Section LV and set apart as railway reserve. That it was later vested with the General Manager of the default East African Railways and Harbours Administration vide Legal Notice No. 440 of 1963, thereafter later to East African Railways Corporation under Legal Notice No. 20 of 1969, and after the dissolution of the East African Community in 1977, it was vested with Kenya Railways Corporation, the Corporation, through Legal Notice No. 24 of 1986. That their investigation of 2001 disclosed that the 1<sup>st</sup> Defendant had wrongfully and unlawfully obtained allocation of, and registration with a lease over the suit property for private purposes from the 2<sup>nd</sup> Defendant illegally, fraudulently and in full knowledge that the land belonged to the Corporation. The Plaintiff has set out the particulars of fraud, illegality, and knowledge at paragraph 7, 8 and 10 of the Amended plaint. That the Plaintiff further avers that the 1<sup>st</sup> Defendant was holding registration of the suit land in trust for the Corporation. The Plaintiff has set out the particulars of constructive trust at paragraph 12A of the Amended plaint.

3. The 1<sup>st</sup> Defendant opposed the Plaintiff's claim through the Amended statement of defence dated the 26<sup>th</sup> June, 2010. He avers that the suit is defective and an abuse of the process of the court. That he acquired the suit land legally, procedurally and is therefore not holding it in trust for the Corporation. He prays for the Plaintiff's suit to be dismissed with costs.

4. The 2<sup>nd</sup> Defendant also opposed the Plaintiff's claim through the statement of defence dated the 7<sup>th</sup> August, 2009 among others denying knowledge that the suit property had been set apart and vested in the Corporation. He further avers that the allocation of the suit property had been done through the Executive powers of the President and was processed procedurally. He prays for the Plaintiff's suit to be dismissed with costs.

5. The Plaintiff called Dedan Ochieng Okwama, an investigator with the Plaintiff, Victor Wahome, a surveyor with Corporation, Joseph Kiragu Kariuki, a Land Administrator with National Land Commission and Hassan Moshoshi, a Government Surveyor, who testified as PW1 to PW4 respectively. That it is the Plaintiff's case from the oral and documentary evidence adduced before the court that the suit property was part of the land surveyed in 1935, and set apart as railway reserve and in 1963 vested to the East African Railways and Harbours and currently with the Corporation. That as the suit property had not been surrendered for allocation to any other person by the time the 2<sup>nd</sup> Defendant allocated it to the 1<sup>st</sup> Defendant, that transaction was unlawful, fraudulent and unprocedural and the title held by the 1<sup>st</sup> Defendant is in trust for the Corporation.

6. The learned Counsel for the 1<sup>st</sup> Defendant participated, in the hearing of the Plaintiff's case. That both Defendants did not call evidence or file written submissions. The learned Counsel for the Plaintiff filed their submissions dated the 9<sup>th</sup> August, 2019.

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

(a) **Whether the suit property was part of the land set apart and vested in the Corporation.**

(b) **Whether the suit property was available for alienation when the 2<sup>nd</sup> Defendant allocated it to the 1<sup>st</sup> Defendant.**

(c) **Whether the transactions around the suit property by the Defendants was unlawful and fraudulent.**

(d) **Whether the Plaintiff suffered loss and damages and if so, to what extent?**

(e) **Who pays the costs?**

8. The court has after carefully considering the pleadings, the oral and documentary evidence by PW1 to PW4 and the submissions by the learned Counsel for the Plaintiff come to the following determinations:

(a) That the documentary evidence in terms of the copies of title document for L. R. No. 1148/1184 [I.R. 23354] of 16<sup>th</sup> February 1970, register (white card) for Kisumu Municipality/Block 7/365, and survey map produced as exhibits and the testimonies of PW1 to PW4 confirms that the suit property was part of the land that was set apart in 1935 for railway reserve, and currently vested in the Corporation. That as there is no evidence adduced to rebut or challenge that adduced by the Plaintiff, the court finds that the suit property was at the time it was allocated by 2<sup>nd</sup> Defendant, then the Commissioner of Lands, to the 1<sup>st</sup> Defendant for private purposes, unavailable for alienation.

(b) That the claim by the defendants that the allocation was through the President's Executive powers, and that it was procedurally done is a mere allegation as the Defendants failed to offer evidence in support of their averments.

(c) That the 2<sup>nd</sup> Defendant, as the Commissioner of Lands then, ought to have confirmed that the Corporation had surrendered the suit land in accordance with **Section 14(4) and (5) of the Kenya Railways Act Chapter 397 of Laws of Kenya** before allocating it to the 1<sup>st</sup> Defendant. That the 2<sup>nd</sup> Defendant ought to have known that the suit land having been part of the land vested with the Corporation, was already alienated and hence not available for allocation. [See the ***Court of Appeal Eldoret, decision in Civil Appeal No. 288 of 2010 Kipsirgoi Investments Ltd Vs Kenya Anti-Corruption Commission*** at pages 26 and 27].

(d) That further to the finding in (b) above, that the Defendants did not call evidence in support of the **averments** in their statements of defence, the provision of **Section 3 of Government Land Act Chapter 280 of Laws of Kenya** on the power delegated to the Commissioner of Land to alienate land is clearly limited to educational, charitable, sports and other purposes set at the foot of page 8 of the Act. That none of the said purposes were available to the 2<sup>nd</sup> Defendant to alienate the suit land to the 1<sup>st</sup> Defendant. [See ***James Joram Nyaga & Another Vs the Hon. Attorney General & Another [2007] eKLR*** on the limited delegated powers of the Commissioner of Lands].

(e) That as the suit land was not available for alienation, and the 2<sup>nd</sup> Defendant was without powers to allocate it, the title given to the 1<sup>st</sup> Defendant was unlawfully obtained in terms of **Section 40(6) of the Constitution** and therefore not protected under **Section 26 of Land Registration Act No. 3 of 2012**. [See ***Republic Vs District Land Registrar, Mombasa & 5 Others Ex parte Super Nova Properties Ltd [2016] eKLR, Milankumarn 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 Limited & Another Nairobi Hccc No. 3063 of 1996***].

(f) That the Plaintiff failed to adduce any evidence to guide the court in determining what loss and damages they suffered as a result of the transactions over the suit property by the Defendants. That though the Defendants did not offer any evidence, the Plaintiff

failed to discharge their legal obligation under **Section 107 of the Evidence Act Chapter 80 of Laws of Kenya** and no damages are allowed.

(g) The Plaintiff having substantially succeeded in their claim against both Defendants is entitled to costs in accordance with **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**.

9. That flowing from the foregoing, the court finds the Plaintiff has proved its case against the Defendants and enters judgment for it in terms of prayers (a), (b), (bb), (c), (d) and (f) of the Amended plaint dated the 22<sup>nd</sup> June, 2010.

Orders accordingly.

**Dated and signed at Eldoret this 3<sup>rd</sup> day of February, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**Delivered and signed this 6<sup>th</sup> 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 Defendant.

Court Assistant: Joanne