



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KITALE

ELC NO. 46 OF 2010

ETHICS AND ANTI -

CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

WILSON GACHANJA.....1ST DEFENDANT

WILLIAM KIPSEREM BUSIENEL.....2ND DEFENDANT

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION.....3RD DEFENDANT

DR. ARTHUR MBULIKA USAGI.....4TH DEFENDANT

ELIZABETH WANJIRU USAGI.....5TH DEFENDANT

JOYCE KANAGA ANDEMBE.....6TH DEFENDANT

JUDGMENT

INTRODUCTION

1. This is a very old matter dating back to almost **10 years** ago. The plaintiff's claim in this matter revolves around a parcel of land that was allegedly reserved for the **Kenya National Library Services (KNLS)** by way of a **Part Development Plan (P.D.P)** way back in the year **1989**. Subsequently, the same land was allegedly allocated to the 2nd defendant vide letters of allotment dated **3/10/1995**. The 2nd defendant had the land subdivided into **8 parcels** and purported to charge some of them to the 3rd defendant and also sell some to the 4th and 5th defendants. The 6th defendant purchased her parcel in dispute from the 4th and 5th defendants.

2. Subsequently, KNLS appear to have woken up from their inaction and attempted to obtain title to the suit land whereupon they discovered that it had been allocated to the 2nd defendant who had even gone ahead and subdivided the same into the several portions referred to. In the course of their pursuit of registration and obtainance of the land in KNLS's name, various government officers swung into action and the subdivisions created by the 2nd defendant were cancelled and consolidated into one parcel which was assigned the number **LR No. Kitale Municipality Block 6/300** measuring **0.443 Ha** and a Certificate of Lease issued on **1/8/2011** in favour of KNLS. The Registry Index Map was also amended to reflect the consolidation.

3. That was not all. In the year **2010**, the Registrar of Titles had also swung into action and issued a Gazette Notice No. **15582** of **26/11/2010** nullifying the titles issued to the 2nd defendant in respect of title to plots Nos. **LR No. 2116/1145, IR No. 61520** and **LR No. 2116/1150, IR No. 61523** which had been created upon subdivision.

4. Further the plaintiff herein lodged proceedings in **Kitale HCCC No. 44 of 2010** and **Kitale HCCC No. 45 of 2010** where this court has by perusal of the original file records confirmed that the end result were orders in favour of the plaintiff therein. It is worth of note that the final orders in the above suits have never been challenged to date.

5. In light of the foregoing, it may appear to a keen observer that the instant suit would have the effect of formalizing the development on the ground arising from a continued tussle between the parties which led to the consolidation of the subdivisions into one parcel of land known

as **Kitale Municipality Block 6/300** and the issuance of title in favour of KNLS.

THE PLEADINGS

The Plaintiff

6. The plaintiff filed a plaint on 20/5/2010 against the 1st, 2nd and 3rd defendants and later filed an amended plaint dated 13th May, 2019 bringing on board the 4th, 5th and 6th defendants as the purported transferees of land subject of this suit. Against the defendants jointly and severally, the plaintiff seeks the following orders:

(i) **A declaration that the Kenya National Library Service is the lawful holder of the leasehold interest in respect to land parcel number Kitale Municipality/Block VI/300 measuring 0.443 Ha for the remainder of the term of 99 years from 1/4/1996 pursuant to the Certificate of Lease issued on 1st August 2011.**

(ii) **A declaration that the Grants made to the 2nd Defendant on or about 31st December 1994 and registered on 19th January 1994 in respect to L.R No. 2116/1144, 2116/1148 and 2116/1149 were made in excess of the statutory powers of the 1st Defendant are thus null and void ab initio.**

(iii) **A declaration that the purported charge of L.R 2116/1143 and 2116/1144 in favour of the 3rd defendant be cancelled.**

(iv) **A declaration that the charges registered against Nos. L.R 2116/1143 and 2116/1144 in favour of the 3rd defendant are for all intents and purposes null and void ab initio.**

(v) **An order to rectify the register by cancellation of the Grants and Certificates of title in respect of L.R No. 2116/43, L.R. No. 2116/1144, LR No. 2116/1148 (KITALE MUNICIPALITY BLOCK 6/82) and L.R. No. 2116/1149 (KITALE MUNICIPALITY BLOCK 6/80) made to the 2nd Defendant and all entries made subsequent thereto.**

(vi) **An order for a permanent injunction against the defendants to restrain them by themselves, their agents or assigns from trespassing upon, transferring, leasing auctioning, offering for sale, wasting and/or dealing in any manner with L.R No. 2116/43, L.R. No. 2116/1144, LR NO. 2116/1148 (KITALE MUNICIPALITY BLOCK 6/82) and L.R. No. 2116/1149 (KITALE MUNICIPALITY BLOCK 6/80).**

(vii) **Any other relief this court deems fit and just to grant.**

(viii) **Costs of the suit and interest.**

7. In the amended plaint dated 13/5/2019 the plaintiff alleged that at all material times **LR. Nos. 2116/1143, 2116/1144, 2116/1148, 2116/1149** were part of government land alienated and reserved for use by KNLS a public body established under the **Kenya National Library Act Cap 225** and were thus not available for alienation. However on or about 31/12/1993 the 1st defendant purported to issue the 2nd defendant a grant of leases over the said suit properties for a term of **99 years** with effect from 1/2/1992. Thereafter in 1995 the 2nd defendant purported to charge some of the plots to the 3rd defendant and transfer others to 4th and 5th defendants. The 4th and 5th defendants also transferred one of the plots purchased from the 2nd defendant to the 6th defendant. The plaintiff avers that since the suit properties were not available for alienation the issuance of leases to the 2nd defendant and creation of charges in favour of the 3rd defendant was fraudulent, illegal, null and void. The particular of fraud and illegality are elaborately set out in the plaint forming the basis of the prayers set above.

The Defence

8. The 2nd defendant filed his defence on 12/2/2019 where he denied all the allegations leveled against him in the plaint and averred that he was lawfully given a lease to the suit properties by the 1st defendant and that the Kenya National Library Service Board encroached on the suit property.

9. The 4th, 5th and 6th defendants filed a joint statement of defence dated 25th June 2019. They pleaded *inter alia* that they have never had proprietary interest in **LR. No. 2116/1143 IR 61522 (Kitale Municipality Block 6/85)** (hereinafter also "**Plot No. 85**") and **LR No. 2116/1144 IR 61517 (Kitale Municipality Block 6/86)** (hereinafter also "**Plot No. 86**");

10. In the defence it is also stated that the 4th defendant purchased **L.R No. 2116/1149 (Kitale Municipality Block 6/80)** (hereinafter also "**Plot No. 80**") for value and without notice of defect in title in or about the year 1999 from the 2nd defendant who was then the registered owner of the same; that the 4th defendant later transferred the said parcel of land it for value and in good faith to the 6th defendant who is the registered owner to date; it is denied that that **LR. No. 2116/1149 (Kitale Municipality Block 6/80)** was at all material times relevant to this suit government land alienated and reserved for use by the Kenya National Library Service.

11. The defendants also state that the 5th defendant purchased **LR. No. 2116/1148 (Kitale Municipality Block 6/82)** (hereinafter also "**Plot No. 82**") for value, in good faith and without notice of defect in title in or about the year 1999 from the 2nd defendant who was then the registered owner and who transferred the said parcel of land to her on 4/2/1999. It is stated that the 5th defendant is the registered owner of the said parcel of land to date;

12. The 4th, 5th and 6th defendants aver that **LR. No. 2116/1149 (Kitale Municipality Block 6/80)** and **LR No. 2116/1148 (Kitale Municipality Block 6/82)** having been allotted to the 2nd defendant on or about **31/12/1993** became private lands and were not available for allotment to the Kenya National Library Service on or about **2/4/1996** and that the alleged allotment of the said private parcels of lands to the Kenya National Library Service was illegal.

13. The 4th, 5th and 6th defendants urged the court to dismiss the plaintiff's claim against them with costs.

The Plaintiff's Evidence

14. **PW1 Gordon Odeka Ochieng**, a Senior Assistant Director, Land Administration at the Ministry of Lands adopted his witness statement filed in court on **11/9/2017** and stated that vide a **Part Development Plan (PDP)** dated **20/6/1989** and signed by the Commissioner of Lands on **10/6/1991**, the suit land was approved for allocation as a proposed site for library. He stated that the Kenya National Library Services then made payment for the land and an official receipt was issued on **16/4/1996**. He stated that parcels No. **1143-1150** were as a result of subdivision of an unsurveyed plot which had been irregularly allocated to the 2nd defendant by the 1st defendant.

15. On cross-examination, he explained the process by which land can be allocated to include identification, planning, preparation of PDP, approval of PDP, issue of letter of allotment and survey. He stated that he had not come across any PDP that created plots **1143** and **1144**.

16. **PW2. Emmanuel Mutange**, County Land surveyor, Trans Nzoia County, stated that upon receiving a request from the plaintiff for beacon re-establishment, he used a survey map which he produced as **P. Exhibit 4** and the Registry Index Map (**P. Exhibit 5**) which established that only three beacons existed in the land out of the six in respect of the original land that had been reserved for the library.

17. On cross-examination he stated that **LR. Nos. 2116/1143, 2116/1144, 2116/1145, 2116/1146, 2116/1147, 2116/1148, 2116/1149** and **2116/1150** fall within the boundaries of parcel **No. Kitale Municipality Block 6/300**.

18. **PW3, Kebaso Wycliffe**, a Government Surveyor stated that as per the letter dated **10/2/1998**, the Commissioner of Lands instructed the Director of Survey to combine land parcels **No. LR No. 80-87** (which had been one whole parcel before being transformed into **1143-1150**) to create land for Kitale library. He further stated that the combination was based on **F.R 230/146** which was an earlier survey plan within the records at the Director of Surveys Office and that the combination was done in a file **No. 54729** within the details of the combination within another survey plan **FR 464/140** which now shows the appearance and shape of the land in its post-combination stage. He stated that he prepared the survey plan **No. 464/140**. He further stated that as per the letter dated **1/9/2008** the Director of Survey wrote to the former Commissioner of Lands to confirm that titles to the sub-plots had been cancelled to pave way for the preparation of the final Registry Index Map for the library land. He stated that a response came in on **26/1/2011** confirming that the listed parcels of land had their titles cancelled. It was his testimony that pursuant to that confirmation, the Registry Index Map was done showing parcel **No. 300** had been approved by the Director of Survey for the Library land. He produced the letter of approval as **P. Exhibit 11**. **PW3** maintained that once a compilation amalgamated the parcels, the old parcels cease to exist once the new parcels came into existence. In a nutshell, the original parcel of land which had been allegedly reserved for a library was subdivided by the 2nd defendant and later the subdivisions were consolidated to revert it to its previous status.

19. **PW4** was one **Richard Rono** who identified himself as an employee of Kenya Library Services and based in Eldoret. He stated that the Kenya National Library services is the current owner of parcel **No. Kitale Municipality Block 6/300** the same having been reserved for it in **1989** by the Ministry of Local Government and the Department of Physical Planning under **P.D.P No. KTL/1089/17 (P. Exhibit 2.)** He stated that the Commissioner of Land approved the reservation as evidenced by **P. Exhibit 2** and an allotment letter dated **2/4/1996** was issued to Kenya National Library Services. KNLS accepted the allotment by paying **Kshs. 6044/-** on **16/4/1996**. Subsequently a survey was conducted on the said plot and a lease certificate issued to KNLS. The certified copy of the certificate of lease was produced as **P. Exhibit 16.**) The land was approximately **0.953 Ha**.

20. **PW4** maintained that sometime in **2010** when the KNLS wanted to obtain a title for the suit land, they discovered that the land had been encroached on. KNLS then went to court vide **Kitale HCCC No. 44/2010** and obtained orders nullifying plots referred to as **LR Nos. 2116/1145** and **2116/1150**. KNLS also went to court in **Kitale HCCC No. 45/2010** and obtained orders nullifying plots referred to as **LR Nos. 2116/1146** and **2116/1147**.

21. **PW5, Richard Kipkosgey Kilimo** an investigator at the Ethics and Anti-corruption Authority (EACC) in his testimony stated that from their investigation the suit parcels of land which had been reserved for Kenya National Library Services (KNLS) had been allocated to the 2nd defendant and that the 2nd defendant had been issued with grants for the parcels **Nos. 1143-1150**. It was his evidence that he conducted a search on the suit lands and established that the 2nd defendant had transferred **LR No. 1148** and **1149** to the 5th and 6th defendants respectively while the other four parcels had their ownership cancelled by a court decree and that as a result Kenya National Library Services was given allotment letters after the said titles were revoked vide Gazette Notice **No. 15582**. He stated that vide survey plan **No. FR 464/140**, the title that amalgamated the **8** parcels of land that comprised **Kitale Municipality Block 6/300** was issued to the Kenya National Library Services.

The Defendants' Evidence

22. **DW1, Zephaniah Kiprop Rono** the Assistant Investment manager of the 3rd defendant. He adopted his witness statement filed in court on **25/11/2019** as his evidence-in-chief. It was his evidence that in **1995**, the 2nd defendant applied to the 3rd defendant for a loan facility and provided titles for **LR. No. 2116/1143** and **LR. No. 2116/1144** as security. He further stated that the said titles were charged in favour of the 3rd defendant for **Kshs. 300,000** which he defaulted in repaying and that the 3rd defendant exercised its statutory power of sale and auctioned the said properties in order to realize its security. He stated that the 3rd defendant has no further interest in the said properties. He stated that the 3rd defendant had conducted a search at the lands office and for that reason it had no doubts about the title documents.

23. DW2 was the 6th defendant who stated that she is the current registered proprietor of LR. No. 2116/1149. She stated that she purchased the suit land from the 4th defendant. She stated that she has a title to the land and that at the time of purchase she was not aware that the suit land had been reserved for a public purpose.

24. DW3 is the 5th defendant herein and she adopted her witness statement as her evidence-in-chief. She maintained that she bought the suit land in issue, 2116/1148 from the 2nd defendant and a certificate of lease was issued in her favour. She stated that she was not aware that the suit land was reserved for Kenya National Library Services at the time of purchase. She stated that she was not aware of any fraud as the 2nd defendant had a document that was duly registered.

25. DW4 who is the 4th defendant adopted his witness statement dated 14/10/2019. He stated that he bought the land known as 2116/1149 from the 2nd defendant then later on sold it to the 6th defendant and that at the time he bought the suit land there was no indication that the same belonged to Kenya National Library Services. He maintained that he never participated in any fraud.

26. The 2nd defendant testified as DW5 and stated that he visited the Physical Planning Office in Kitale and he examined the map and found a plot that bordered the library that was free. He further stated that he applied to National Planning and was given the plot. He produced the allotment letter as D. Exhibit 6 and stated that he paid Kshs. 90,000/=. He stated that after his request for subdivision was approved, he subdivided the suit land and applied for registration of the sub-plots where titles were issued as LR Nos. 2116/1143, 2116/1148, 2116/1147, 2116/1145, 2116/1149, 2116/1146, 2116/1144 and 2116/1150. He stated that he charged LR Nos. 1143 and 1144 to the 3rd defendant and sold LR Nos. 1148 and 1149 to the 4th and 5th defendants. On cross-examination, he admitted to knowing that there was a plot for a 'proposed' library as evidenced by D. Exhibit 5.

27. The 1st defendant did not tender any evidence.

DETERMINATION

28. After the hearing of evidence, the court invited counsel for the parties to file written submissions but only counsel for the plaintiff and the 1st defendant did so. I have gone through the pleadings, evidence and submissions and in this court's view, the issues for determination by the court in this case are as follows:

(i) Whether the suit land was legally allocated to the 2nd defendant by the 1st defendant;

(ii) Whether the 2nd defendant could pass a good title over the suit property to the 4th, 5th defendants and by extension the 6th defendant;

(iii) Whether the purported charges over L.R 2116/1143 and 2116/1144 in favour of the 3rd defendant should be cancelled;

(iv) What are the orders as to costs?

29. The issues are discussed as hereunder.

(i) Whether the suit land was legally allocated to the 2nd defendant by the 1st defendant

30. On the first issue as to whether the suit land was legally allocated to the 2nd defendant by the 1st defendant. Section 2 of the Government Lands Act (Repealed), defines "unalienated land" as follows:

““Unalienated 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”.

31. PW1, PW3 and PW4 provided evidence in terms of the Registry Index Map and the PDP which showed that the suit land was reserved sometimes in 1989 for a public body, the Kenya National Library Services.

32. The 2nd defendant submitted that the suit property was available for allocation and submitted that it is the KNLS that encroached on his land. While giving evidence, the 2nd defendant admitted that he visited the Physical Planning Office in Kitale and he examined the map and found a plot that bordered the library that was free and that is how he secured ownership to the suit land.

33. PW1, PW3, PW4 and PW5 led elaborate evidence with documents to prove that the suit parcel of land had been reserved for Kenya National Library services before allocation to the 2nd defendant and that therefore it was not available for alienation.

34. Section 3 of the Government Lands Act vests the power to alienate unalienated Government land in the President. As rightfully submitted by the plaintiff, the power to alienate is delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes.

35. In the case of James Joram Nyaga & Another -vs- Attorney General & Another [2007] eKLR the court observed:

“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 unalienated 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 registrable title under the Registration of Titles Act Cap. 281 of the Laws of Kenya.”

36. The undisputable fact in this suit is that vide a part development plan prepared on 20/6/1989 a plot of land was reserved for a public purpose, namely for use by the Kenya National Library Services. That PDP was produced as **P. Exhibit 2**. The letter of allotment issued to the KNLS much later was on the strength of that PDP. In this court’s view, the land in question as mapped out in the 1989 PDP and committed for a public use and was not available for allocation to the 2nd defendant. Also, the issuance of a letter of allotment was just a part of the whole process of obtaining title for the KNLS land. No intervening action for the purpose of purporting to allocate it to the 2nd defendant could have any effect of divesting the KNLS of the interest, though yet unregistered, that it had acquired in the land.

37. From the expert evidence given by the Surveyors in the instant suit, there is no doubt that Parcels Nos. **1143, 1144, 1148 and 1149** formed part of the land reserved for KNLS in 1989 through the PDP labelled **P. Exhibit 2**. The plaintiff has also adduced evidence that no PDP was found to have been used to allocate the land to the 2nd defendant or to subdivide the suit land into smaller parcels. The absence of a PDP prepared in the defendant’s favour extremely prejudices his case. It is clear that whatever came out of his endeavours to be allocated land could not therefore defeat the interest conferred on the KNLS by the 1989 reservation through the PDP labelled **P. Exhibit 2**. Having been so reserved that land was no longer available for allocation to any other person as it was already alienated. In the instant case there was no circumstance that empowered the 1st defendant to alienate the suit property to the 2nd defendant.

38. The upshot of the foregoing is that this court is of the view that the suit land was illegally allocated to the 2nd defendant. The 1st defendant therefore had no authority to alienate the suit land to the 2nd defendant.

(ii) Whether the 2nd defendant could pass a good title over the suit property to the 4th, 5th defendants and by extension the 6th defendant

39. The general rule is that no person can pass a better title to another than what he has. It is embodied in the Latin maxim “*nemo dat quod non habet.*”

40. The 4th, 5th and 6th defendants are claiming the suit property on the strength of transfer of the same to them by the 2nd defendant for valuable consideration.

41. Having found as above that the allocation of the suit land to the 2nd defendant was irregular and illegal, it therefore follows that the subsequent transfer of the suit lands to the 4th, 5th and 6th defendants is null and **void ab initio** as the original land had been unprocedurally and fraudulently obtained and as such did not confer good title to the 4th, 5th and 6th defendants.

42. In a nutshell those titles are not protected under **Article 40 (6)** of the **Constitution** and **Section 26 (1)** of the **Land Registration Act No. 3 of 2012** as the land had been irregularly and illegally acquired by the 2nd defendant.

(iii) Whether the purported charges over L.R 2116/1143 and 2116/1144 in favour of the 3rd defendant should be cancelled.

43. The 3rd defendant has already adduced oral evidence that it has no interest in the plots known as **L.R 2116/1143 and 2116/1144**. However this court has found in this suit that the allocation of the land to the 2nd defendant is irregular and illegal as the same had been committed for a public purpose and therefore the 2nd defendant had no right or interest to charge to the 3rd defendant *ab initio*. I therefore find that the said charges should be cancelled.

(iii) What orders should then issue?

44. The upshot of the foregoing is that the plaintiff has proved its case against the defendants on a balance of probability and I hereby enter final judgment in this suit in the plaintiff’s favour against the defendants jointly and severally and I issue the following orders :-

(i) An order of permanent injunction against the defendants to restrain them by themselves, their agents or assigns from trespassing upon, transferring, leasing auctioning, offering for sale, wasting and/or dealing in any manner with L.R No. 2116/43, L.R. No. 2116/1144, LR NO. 2116/1148 (KITALE MUNICIPALITY BLOCK 6/82) and L.R. No. 2116/1149 (KITALE MUNICIPALITY BLOCK 6/80).

(ii) An order of declaration declaring that the Grants made to the 2nd Defendant on or about 31st December 1993 and registered on 19th January 1994 in respect of L.R. No. 2116/1143, L.R No. 2116/1144, 2116/1148 and 2116/1149 were made in excess of the statutory powers of the 1st Defendant are thus null and void *ab initio*.

(iii) A declaration that the charges registered against Nos. L.R 2116/1143 and 2116/1144 in favour of the 3rd defendant are for all intents and purposes null and void *ab initio*.

(iv) An order that the purported charges over L.R 2116/1143 and 2116/1144 in favour of the 3rd defendant are hereby

cancelled.

(v) An order that the Land Register shall be rectified by way of cancellation of the Grants and Certificates of title in respect of L.R No. 2116/43, L.R. No. 2116/1144, LR No. 2116/1148 (also referred to as KITALE MUNICIPALITY BLOCK 6/82) and L.R. No. 2116/1149 (also referred to as KITALE MUNICIPALITY BLOCK 6/80) made in favour of the 2nd Defendant and all entries made subsequent thereto.

(vi) A declaration that the Kenya National Library Service is the lawful holder of the leasehold interest in respect of land parcel number Kitale Municipality/Block 6/300 measuring 0.443 Ha for the remainder of the term of 99 years from 1/4/1996 pursuant to the Certificate of Lease issued on 1st August 2011.

(vii) The 2nd defendant alone shall bear the Costs of this suit.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 27th day of October, 2020.

MWANGI NJOROGI

JUDGE, ELC, KITALE.