



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 156 OF 2015

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

VERSUS

KAPSOEN ESTATES LIMITED.....1ST DEFENDANT

WILSON GACHANJA.....2ND DEFENDANT

JUDGMENT

1. The plaintiff brought this suit against the defendants on **14th December 2015** by way of a plaint. In its plaint, the plaintiff averred that it was a body corporate established under the **Anti-Corruption and Economic Crimes Act, No. 3 of 2003 (ACECA)** and that it had brought this suit under the provisions of the said Act.

PLEADINGS

The Plaint

2. The plaintiff averred that at all material times the suit properties known as Title No. **Kitale Municipality Block 4/87 and 4/88** measuring about **0.1524 and 0.1513 Ha** or thereabouts respectively (hereinafter "*the suit properties*") comprised and or was part of alienated government land with developments thereon namely government houses referred to as **Kitale Middle Grade Houses Numbers 15 A and B and 16 A and B**.

3. The plaintiff averred that on or about **16/9/1997** the 2nd defendant acting in purported exercise of statutory powers conferred upon the then Commissioner of Lands under the **Government Lands Act** now repealed) and the **Registered Land Act** (now repealed) issued and/or caused to be issued to the 1st defendant a lease in respect of the suit properties for **99 years** with effect from **16/9/1997**, on terms and conditions set out on the lease instrument dated **16/9/1997** and registered on the same date at the Lands Registry, Kitale.

4. The plaintiff averred that the suit properties were not available for alienation in any manner whatsoever to the 1st defendant or any other person and the issuance of a lease to the 1st defendant was fraudulent, illegal, null and void for all intents and purposes. Particulars of illegality and fraud were levelled against the defendants in **paragraph 6** of the plaint were *inter alia*: that the defendants knowingly alienated and or assisted in alienating government land with developments thereon and occupied by civil servants without following due process and procedures for disposal of government houses; that the 2nd defendant acted without any authority whatsoever, and finally, that there was no declaration by the relevant agencies that the houses were condemned and/or no longer needed by the user department hence available for sale.

5. The plaintiff averred that by reason of the matters aforesaid, the purported issuance of a lease to the 1st defendant by the 2nd defendant was in excess of the 2nd defendant's statutory power and is void *ab initio* for being *ultra vires* his statutory authority and could not thus confer on the 1st defendant any estate, interest or right in the suit properties and therefore the 2nd defendant's actions amounted to abuse of office. The plaintiff further averred that the 2nd defendant purported to act in the name of the President of Kenya without authority, that he knowingly favoured the 1st defendant in contravention of **Section 82** of the then Constitution of Kenya and that he dishonestly dealt with the suit properties.

6. The plaintiff averred that its investigations have established that the suit property with the developments was and is still housing public servants and the alienation of the same to the 1st defendant was made in disregard to public interest and the relevant laws, procedures and guidelines.

7. The plaintiff sought judgment against the defendant for:-

(i) A declaration that the lease made to the 1st defendant on or about 16/9/1997 and the certificate of lease issued on 16/9/1997 in respect to Kitale Municipality Block 4/87 and 4/88 was made in excess of statutory powers of the 2nd Defendant and is thus null and void *ab initio*.

(ii) An order to rectify the register by cancellation of the lease and certificate of lease in respect of Kitale Municipality Block 4/87 and 4/88 made to the 1st defendant.

(iii) An order for permanent injunction against the 1st defendant to restrain its servants, employees, agents or assigns from trespassing upon, transferring, leasing, wasting and or dealing with the suit property, otherwise other than by way of transferring to the government of Kenya.

(iv) General damages;

(v) Costs of and incidental to the suit;

(vi) Interest on (iv) and (v) above at court rates;

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

The Defence

8. The 2nd defendant filed a statement of defence on 2/2/2016. The 2nd defendant denied the allegations levelled against him by the plaintiff and averred that all that land known as **Kitale Municipality Block 4/87 and 4/88** measuring **0.1521 Ha** and **0.1513 Ha** or thereabouts respectively was neither part of public land nor alienated and reserved for public use and occupation by government officials.

9. The 2nd defendant averred further that the issuance of lease to the 1st defendant was *intra vires* and that the due procedure was followed during the acquisition of the suit property by the 1st defendant.

10. The 2nd defendant further averred that the suit herein against him is a gross violation of constitutional rights to a fair trial since he left office in **1999** and therefore has no access to any documents to be able to defend himself; that he is wrongly enjoined in this suit since the proper party should have been the National Land Commission; that the suit is incompetent, bad in law and an abuse of the court process. The 2nd defendant urged the court to dismiss and/or strike out the suit with costs.

11. The 1st defendant filed its statement of defence on 31/5/2016 and denied all the allegations by the plaintiff. It maintained that at all material times since **16/9/1997** the 1st defendant has been and remains the sole registered owner of the suit properties after having legally, lawfully and dutifully followed the laid down procedures.

EVIDENCE

12. The matter was then set down for hearing at which the parties called a number of witnesses. The plaintiff's first witness was **Patrick Mwenda Bucha (PW1)**. **PW1** testified that he was a Housing Secretary with the Ministry of Transport, Infrastructure, Housing and Urban Development at the time of giving evidence. **PW1** told the court the estate management is one of the directorates of which he is in charge and that it deals with the placement of tenants. **PW1** stated that if a government institution decides to dispose of a house, his ministry has to have a request from the institution requesting that that house be acted on; that an individual cannot make that application; that the application has to come from the District Housing Allocation Committee; that once received through the Ministry officer who doubles up as the District Allocation Committee Secretary, a board of survey is formed; that the Principal Secretary (Housing), if satisfied, makes a recommendation to the Treasury who are the owners of Government Houses; that if the Treasury approves of the recommendation by writing to the PS Housing; then the approved recommendation is forwarded to **PW1's** office through the Chairman of the Allocation Committee or the County Commissioner and then **PW1's** office constitutes a Board of Survey; the Board of Survey then makes a recommendation that the facility be sold, transferred to another institution or rehabilitated; that before a transfer is made, the PS for Housing through **Form 058** which all board members sign sends the said recommendations to Treasury. **PW1** explained further that if the recommendation is to the effect that government houses be disposed of, then it must be within the **Public Procurement and Disposal Act**; that it must be in accordance with the **Financial Regulation and Procedures on Disposal of Houses**; that the Treasury may agree with the proposal and that approval is communicated to **PW1's** officers on the ground for the appropriate action; the disposal process must be conducted in an open tendering system, and as long as the individual meets the advertised requirement of sale, the property may be disposed of to him.

13. **PW1** stated that he is the custodian of the inventory on all government houses; that houses No. **MG 15A, MG 15B, MG 16A** and **MG 16B** form part of the Government inventory of Trans Nzoia district. He produced the inventory as at **September 2012** as **P. Exhibit 1** which showed the persons occupying the said houses and identified them as Catherine Apondi Obuon (**MG15A**) Fred W. Simiyu (**MG15 B**) Dr. Nancy N. Kegode (**MG 16A**) and Martin Oyunga (**MG16B.**) He stated that they were civil servants and that they pay rent through the check-off system. **PW1** stated that a Board of Survey is formed so as to ascertain the status of the house and if the Board finds that the house is to be sold, then the same is condemned.

14. According to **PW1**, government houses are not allocated to companies as they belong to civil servants; also, a government house can not be condemned and still have a rent-paying civil servant occupying it. It was **PW1's** contention that the 1st defendant has never made any payment for the houses and that the houses in issue still belong to the Government. He stated that once a house is sold, the same is deleted from the inventory, yet the suit properties are still contained in the inventory.

15. **PW2** was **Silvester Musera Osodo** a Land Administration Officer working for National Land Commission. He stated that his duties include land administration, issuance of letters of allotment, consideration of development applications, preparation of titles, revenue collection amongst others. He admitted to knowing the procedure to be followed when land is being allocated to an individual. He explained that the process entailed: identification of a parcel of land, then the lodging of an application by a person which application was then taken to the then Commissioner of Lands and if the Commissioner approved of the application, he would issue the relevant instructions; if the area is planned, he would call for a valuation and then return the same to **PW2's** office for allocation vide issuance of a letter of allotment. **PW2** explained that if the subject land is developed, a letter is written to the Board of Survey in the District who would consider the house(s) and come up with a report pertaining to their condition. He stated that the status of **Kitale Municipality Block 4/87 and 4/88** is that they have some government houses standing on them and that they would be available for allocation *subject* to the proper procedure being followed. **PW2** averred that it would have been the proper procedure if they had been condemned, valued and later disposed of. According to **PW2**, the 1st defendant paid for the parcels of land which was regular but the process was not completed as the buildings were never paid for.

16. **PW3** was **Wycliffe Were Olunga** the Acting County Director of Housing, State Department of Housing and Urban Development in the National Government. He detailed his duties to include managing government houses in the County, manage and retain a housing inventory for the Government and allocation of houses to civil servants through the Housing Committee and any other duties assigned to him by the Permanent Secretary. His testimony was that as per **P. Exhibit 2(a) and (b)**, which is an extract of a folio from the Government Housing Register, the **Kitale/Hou/MG/15A and 15B** and **Kitale /Hou/MG/16A and (B)** are contained therein. He reiterated **PW1** and **PW2's** testimonies that the tenants pay rent via a check-off system. He produced **P. Exhibit 4**, a compilation of names of persons who had paid rent for government houses as at the month of **October 2014**. They included a Dr. Nancy Kegode and a Mr. Fred Simiyu. **PW3** also stated that a director of the 1st defendant company came to **PW3's** office in **2014** and produced a certificate of lease over the suit land. Later a notice threatening eviction dated **16th October 2014 (P. Exhibit 5)** was served by Samba & Co. Advocates on behalf of the 1st defendant company upon the government's tenants occupying the subject houses. Upon receipt of the eviction notice **PW3** wrote to the Principal Secretary Ministry of Land, Housing and Urban Development, notifying him of the 1st defendant's claim over the suit land on which the subject houses stood.

17. **PW3** also outlined the procedure for disposal of government houses and stated that the same had not been complied with in respect of the suit properties.

18. **PW4, PW5** and **PW6** were tenants in the houses sitting on the suit properties and all of them were civil servants in different Ministries and they confirmed to having been paying rent through the check-off system as the houses are government houses. They also testified that they received the letter notifying them of eviction (**P. Exhibit 5**).

19. **PW7** was **Mr. Richard Kipkosgei Kilimo** who identified himself as a forensic investigator with the plaintiff. His testimony was that he investigated the issue at hand upon a complaint being lodged that government servants living in government houses in Kitale had been instructed to vacate; that he visited the site where the houses were and it was then that it was established that they were sitting on the suit land; that they found that the houses were being occupied by civil servants; that upon visiting the Lands Registry, it was established that the suit lands were registered in the names of the 1st defendant. **PW7** averred that he relied on the white card and the green card. He further stated that as per the white card, the owner of the suit lands was the 1st defendant and the lease which was signed by the 2nd defendant, was issued on **16/9/1997**. According to **PW7**, on cross examination by Mr. Akenga, the allotment of the land to the 1st defendant lacked a prior status or ground report of the land showing that the lands were free for allocation. If there had been a ground report, the suit lands would not have been allocated to the 1st defendant. However he admitted that during his investigations into the acquisition of the suit lands by the 1st defendant, he had noted some documents in the lands file evidencing a survey of the suit plots. He also noted the discrepancy in numbering, saying that the survey requisitions bore plot numbers **44** and **45** and yet the numbers of the plots are **87** and **88**.

20. After the close of the plaintiff's case, the defendants advanced their case. **DW1** was **Lt. Gen. Augustine Kipsongor Arap Cheruiyot** a retired military officer. He stated that he is one of the directors of the 1st defendant and that the 1st defendant is the registered owner of the suit lands. He stated that the plots were originally unregistered when they were offered in the initial letter of offer by the Government of Kenya and that the due process of registration was followed in getting the Land Reference Numbers. He maintained that he obtained the letter of allotment for the suit lands dated **3/10/1995** which he produced as **D. Exhibit 1** and which refer to the lands as plots numbers **44** and **45**. He stated that after a survey had been done, they were assigned new references being **Kitale Municipality Block 4/87** and **Kitale Municipality Block 4/88**.

21. **DW1** stated that the plots were unsurveyed and he produced a copy of a letter dated **11th October 1995** from the Director of Surveys then writing to the District Surveyor, Trans Nzoia directing him to survey the 2 pieces of land, then referred to by their old reference stated hereinabove, to be surveyed as **D. Exhibit 2**. He further stated that a letter was written by the District Surveyor Trans Nzoia, confirming that a survey was conducted which had a copy of the map attached and he produced them as **D. Exhibit 3(a) and 3(b)** respectively. **DW1** contended that he got a copy of the letter dated **15/9/1997** written by one FRS Onyango, Chief Land Registrar on **15th September 1997** to the Land Registrar, Kitale which was to the effect that the lease was to be registered and he produced a copy of that letter as **D. Exhibit 4**.

22. The 2nd defendant did not avail himself to give his testimony and his case was deemed as closed.

23. After the conclusion of evidence, the parties made closing submissions in writing. The plaintiff filed its submissions on **13/3/2020** while the 1st and 2nd defendant filed their submissions on **22/6/2020**.

SUBMISSIONS

The Plaintiff's Submissions

24. In its submissions, the plaintiff argued that the suit property was public property and that the procedure laid down in law for the disposal

of public property was not followed in relation to the sale of the property to the 1st defendant.

25. The plaintiff submitted that the provisions of **Section 3 (a)** of the **Government Lands Act, Chapter 280 Laws of Kenya** (now repealed) and the **Local Government Act**, provided that the President may, subject to any other written law, make grants or dispositions of any estates, interests or rights in or over *unalienated government land*. In support of this submission, the plaintiff cited **Karen Roses Ltd vs Attorney General & Others, Eldoret High Court ELC No. 179 of 2012** and quoted therefrom as follows:

“The Government Lands Act Cap 280 Laws of Kenya (now repealed), gives the Commissioner of Lands power to allocate ‘unalienated Government land.’ The said Act goes on to provide the procedure for the same. Unalienated Government land is defined in the Act as: ‘Government land which is not for the time being leased to any other person, or in respect of which the Commissioner had not issued any letter of allotment.’ There was evidence from the defendant that this land was not available for alienation and that the land has government houses which are occupied by Civil servants who include Deputy County Commissioners of Soy Sub County and Ainabkoi and other civil servants. The defendant established that the houses were built in 1949 and have been government houses since then.”

26. The plaintiff submitted that the 1st defendant’s director, **DW1** applied for allocation of land that was already committed by the Government and developed and that the property was not available for allocation due to prior government commitment. To buttress this position, the plaintiff cited **Kipsirgoi Investment Ltd vs KACC Civil Appeal No. 288 of 2010**, **NBI C.A No. 349 of 2012**, **Chemey Investment Ltd Vs Attorney General & Others** and **ELD ELC No. 856 of 2012**, **Square Deal Kenya Vs Kenya Forest Service & Others**.

27. In the **Square Deal Case** (supra) the subject land was found to have a government house constructed thereon and which was in use. The court (Hon. Odeny J.) held that government land reserved for a public purpose is not available for alienation for private use unless due process is followed.

28. The plaintiff submitted further that **DW1**’s testimony stated that he applied for allocation of the suit land after he observed that the government houses thereon were old and disused, and in the plaintiff’s opinion, that could not have been a ground for allocation of a government house to an individual. In this regard, the plaintiff submitted that **DW1** abused his office to influence the allocation. It was also submitted that the registration of the property in the company’s name and not his is a clear indication of his intention to conceal his identity.

29. The plaintiff submitted further that the suit property was not available for alienation either at the instance of the President nor the Commissioner of Lands in terms of **Section 3 of GLA**. According to the plaintiff, **Section 3 of GLA** gave the President power to allocate *un-alienated* Government Land and that the allocation of the suit land to the 1st defendant was therefore unlawful and invalid since the land was not *“un-alienated Government land”* capable of being allocated under **Section 3 of GLA**.

30. The plaintiff submitted that since the procedures outlined under the Government Financial Regulations and Ministry of Works and Housing, **Circular No. 2/58 of 1958** were not followed in the allocation of the suit property to the 1st defendant, the alleged allocation of the suit property was illegal, null and void.

31. Lastly, the plaintiff submitted that neither the former **Constitution** nor the **Constitution of Kenya 2010** offers any constitutional protection to property which was illegally acquired.

32. The plaintiff urged the court to find that the plaintiff had proved its case against the defendants jointly and severally and to grant judgement as prayed for in the plaint.

The 1st Defendant’s Submissions

33. In its submissions in dated **22/6/2020**, the 1st defendant reiterated its evidence at the trial and submitted that by dint of the provisions of the **Government Lands Act** (now repealed) and the **Physical Planning Act**, the suit land was unalienated as the process of survey was conducted at the time when he expressed his intention to purchase it. Government land after delineation; therefore the Commissioner of Lands had authority under **Section 3** of the **GLA** to allocate it to the 1st defendant, and therefore execute the allocation on the President’s behalf.

34. The 1st defendant averred that since the suit properties were therefore alienated, then the President had delegated powers to the Commissioner of Lands who had powers to make grants or disposition of any interest in land. The 1st defendant submitted distinguished the case of **Kipsirgoi Investment Ltd vs KACC Civil Appeal No. 288 of 2010** cited by the plaintiff by stating that though the said authority is true and binding, ideally the overriding words are *“reservation for a particular purpose.”*

35. According to the 1st defendant, the suit land was and had never been proved to have been reserved for a particular purpose either through the production of a gazette notice or other evidence to warrant the court to make a conclusion that it was reserved for government houses and therefore that the mere calling of evidence of witnesses who claim to live in the houses on the land *per se* is not sufficient evidence.

36. The 1st defendant submitted that the allegations of fraud by the plaintiff were mere allegations without any proof. It was submitted that the plaintiff never at all proved that the illegal/fraudulent acts as contained in the plaint as set out in **paragraph 6**. Accordingly, the 1st defendant stated that **Section 2 of Repealed Registration of Titles Act**, required that for proof of fraud, *‘a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person whose interest be knowingly and wrongfully defeats by that registration’*.

37. The 1st defendant submitted that it is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable. In support of this submission, the 1st defendant relied on **Bullen and Leake and Jacob's Precedents of pleading 13th Ed** at page 427 where it was stated that general allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud which any court ought to take notice.

38. The 1st defendant also cited **HCCC No. 135 of 1998 Insurance Company of East Africa vs Attorney General & others, Civil Appeal No. 246 of 2013 Arthi Highway Developers Limited Vs West End Butchery Limited & Others** and in the case of **Dr. Joseph Arap Ngok vs Justice Moiwo Ole Keiwa & 5 others** in support of his submission that the law on fraud and indefeasibility of title has been settled.

39. The 1st defendant submitted further that the certificate of lease issued to it on **16/9/1997** in respect to the suit property is valid for all intents and purposes and that the 1st defendant is entitled to enjoyment of the property by dint of **Article 40** of the **Constitution of Kenya, 2010** as read together with **Section 26(1)** of the **Land Registration Act** unless the lessee surrenders the lease or the lease lapses because of the effluxion of the term.

40. The 1st defendant submitted that being the registered proprietor of the suit property, it is entitled to protection of the law by virtue of **Section 26(1)** of the **Land Registration Act**. It submitted further that he was a *bona fide* purchaser and its title was indefeasible.

41. The 1st defendant submitted it had obtained a good title on the suit properties and that the process used to acquire the certificate of lease issued was in accord with the relevant laws and procedures. In conclusion, the 1st defendant averred that the plaintiff is not entitled to the orders sought since it had not proved its case at all and urged the court to dismiss the suit with costs to the 1st defendant.

2nd Defendant's Submissions

42. The 2nd defendant in response to the plaintiff's submissions submitted that the present suit did not disclose a course of action against him as he was a public officer acting in his capacity as a Commissioner of Lands. He cited **Kenya Anti-Corruption Commission vs Judith Marilyn Okungu & Another (2013) eKLR**.

43. The 2nd defendant submitted further that the present suit is discriminative and biased. It was the 2nd defendant's contention that the alienation and/or allotment of land is a result of several stages and processes undertaken, processed, vetted and approved by different cadre of officers in the then office of the Commissioner of Lands.

44. The 2nd defendant submitted that his role was to issue title based on recommendations of those officers who are not parties in this suit. To buttress this position, the 2nd defendant cited **Joshua Okungu & Another vs CMS Court, Anti-Corruption Court & Another (2014) eKLR**.

45. The 2nd defendant submitted that the plaintiff had failed to discharge its burden of proof by failing to substantiate and/or prove the particulars of fraud, illegality and irregularities attributed to him. It was stated that the particulars of those allegations and fraud must be specifically pleaded and evidence led to prove the same. It was further submitted that the plaintiff did not adduce any evidence to prove that indeed the 2nd defendant knowingly or intended to fraudulently and illegally issue a certificate of lease to the suit properties and in urging this proposition the 2nd defendant cited **Mbuthia Macharia V Annah Mutua Ndwiga & Another (2017) eKLR** and **Urmila S/O Mahendra Shah Vs Barclays Bank International Ltd & Another (1976-80) 1 KLR 1168**.

46. The 2nd defendant further submitted that there was no relief sought by the plaintiff against him and as such he was wrongly impleaded in this suit. The 2nd defendant submitted that his presence in this suit could not help determine the legality or otherwise of the said allocation as that can only be determined by records from the Ministry of Lands (Office of the Commissioner of Lands) which the 2nd defendant has had no access to for over **20** years.

47. It was the 2nd defendant's submission that the present suit is discriminative, unconstitutional and an abuse of the court process and is tantamount to the violation of his rights under the provisions of **Articles 25,27,47** and **50** of the **Constitution** which provides for the right to a fair & expeditious trial, guarantees equal protection of the law and the right to administrative action for reasons that this suit was filed almost **16** years after he left office; that these proceedings were brought against the 2nd defendant in his personal capacity instead of being filed against the office of the Commissioner of Lands.

48. The 2nd defendant cited the case of **Githunguri vs Republic KLR (1986) 1** in support of this averment.

49. The 2nd defendant urged the court to dismiss the plaintiff's case against him.

DETERMINATION

50. I have considered the pleadings, the evidence tendered and the submissions by the advocates for the parties. I find that the dominant issue arising for determination in this suit is whether the suit properties were available for allocation to the 1st defendant.

51. It is not disputed that the certificate of lease which the 1st defendant holds was issued at the instance of the 2nd defendant. It is also not in dispute that government houses sit in the suit property. **PW5, PW6** and **PW7** tendered evidence to the effect that they are civil servants

currently residing in the said houses and that they pay rent by way of the check off system and their evidence was corroborated by other witnesses for the plaintiff.

52. **PW1** and **PW2** while giving evidence explained the standard procedure for disposal of houses belonging to the government. The validity or otherwise of the allocation by the 2nd defendant to the 1st defendant must therefore be considered in light of the said procedures.

53. **PW1** explained that the disposal of government houses, is normally conducted in compliance with the **Procurement and Disposal Act**; it must be in accordance with the financial regulations and procedures on disposal of houses; it must be done in an open tendering system so long as the individual meets the advertised requirement of sale. According to **PW1**, government houses are not allocated to companies as they belong to civil servants; that it is not possible to have a house that has been condemned and still have a civil servant occupying it and paying rent. It was **PW1's** contention that the 1st defendant has never made any payment for the house and that the subject houses still belong to the government. He averred that once a house is sold, the same is deleted from the inventory. **PW2** had confirmed that though the land was allocated, the houses had never been paid for.

54. The 1st defendant responded to all these allegations. Concerning the occupation of civil servants in the houses sitting on the suit land, the 1st defendant contended that the production of evidence of occupation of the said houses by civil servants *per se* was not sufficient evidence to support the plaintiff's case.

55. The strength and weakness of the plaintiff's case and the defendants' respective cases may lie in the question whether the suit lands were "alienated" by the time the 2nd defendant purported to allocate them to the 1st defendant, and whether a status report was obtained and circulated in various offices concerned apprising them of the presence of government departments on the land before the allocation. It is also pendent on the issue whether the proved user, the Ministry of Housing consented to the allocation of the suit lands to the 1st defendant and whether the requisite procedure for disposal of government houses was adhered to. Proof of these matters can be sought in the evidence of the parties.

56. First, this court has to delve into the issue whether failure to produce a letter of allotment or a gazette notice declaring the land as reserved for use by the government as accommodation for civil servants is fatal to the plaintiff's claim that the land was already alienated at the time the 1st defendant came along.

57. It has already been seen from the case law cited before herein, and especially the **Karen Roses** case, that the circumstances the 1st defendant finds itself in are not novel at all. Though the 1st defendant touts the non-production of evidence of a letter of allotment or a gazette notice as a clear indicator that the land was not already alienated by the time he acquired title documents, there have been instances where no title or gazette notice may have issued and yet the land was held to have been alienated.

58. In this court's view, in days of yore there was a clear difference between alienation to a government department and alienation to an individual and in many cases government departments lost land reserved for their use simply because they lacked documents of allocation or title to it. On the other hand, individuals with no letter of allocation committing the land to them could not possibly establish that the land belongs to them.

59. It is observable that the possible reason no titles were issued in favour of government departments and institutions in times past was the presumption that the land belonged to the government anyway and there was no need for documents, but then came an era described in the case of **Chemey Investments** (supra) as follows:

"There was a time in the history of this country, not too long ago, when public officers appeared to have been bitten by a bug that infested them with a malignant and shameless craving to acquire for themselves, their friends or relatives, public property in respect of which they were trustees or custodians."

60. The mere reservation for a public purpose was not a guarantee therefore that it was beyond the reach of ravenous officials bitten by the "bug" described in the **Chemey case**. The **Constitution of Kenya 2010** came up with provisions in **Article 62** to safeguard public land among which was this specific sub-article:

"62. Public land

(1) Public land is-

(a)

(b) land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease;"

61. **Article 62(1) (b)** recognised that land could be occupied by a public body or state organ in circumstances where it was not private land and a title had not issued to the public body or state organ. The Article is in this court's opinion an indicator that the framers of the **Constitution** were aware that public land, whether held under a title or merely under a reservation remained public land that it needed protection.

62. The upshot of the above discussion is that the 1st defendant's claim that non-production of any letter of allotment or gazette notice shows that the land was not alienated is therefore not correct.

63. The next issue is whether, even assuming that the suit premises were available for alienation to the 1st defendant or any other private entity, the appropriate procedure was complied with. This court agrees with the plaintiff that there were procedures for allocation of land and procedures for disposal of government houses. The evidence of PW1 was quite elaborate on the steps to be followed in disposal of Government houses and in my view the intricacy and number of stages involved was calculated to deter the disposal of public assets willy nilly by public officers into whose hands the management of those houses had been entrusted. The suit premises were comprised of both land and buildings and allocation to the 1st defendant can not be deemed to have required only the participation and action on the part of the office of the Commissioner of Lands and the Director of Surveys who were primarily involved in allocation of land, but also the Housing Department in which **PW 1** worked and was in charge of. Indeed, the evidence of **PW2, Silvester Musera Osodo**, was that the land on which the houses stood could be allocated just like any other land but since there were houses standing thereon, the proper procedure for the disposal of those houses would have to be followed for any allocation to take effect. That procedure primarily involves PW1's office and the Board of Survey, the Treasury and the District Allocation Committee (D.A.C.).

64. The plaintiff's evidence comprised in part of revelations that **PW1's** office was not involved in the allocation or disposal of the suit premises and in fact learnt of the disposal when **DW1** appeared in the Housing Directorate Office armed with purported title documents claiming the land. These are allegations **DW1** did not refute by calling relevant evidence to show that the directorate was involved and that the purported acquisition of the premises was procedural. Indeed there is not an iota of evidence to prove that the process outlined by **PW1** was begun and was only subsequently faced with some irregularities to warrant possible equitable intervention by this court. Not even one stage was observed.

65. In this court's view there must have been a site visit by someone, and **DW1** admitted that he made an assessment of the structures on site and assumed that they were old and dilapidated and fit for disposal and therefore applied that they be allocated to him, whereupon a letter of allotment was issued in his name, the land was surveyed and title issued in the name of the 1st defendant. The issuance of title in the 1st defendant's name supports the plaintiff's suspicion that **DW1** who was in the military forces or had been, tried to conceal his identity by way of proxy registration. However despite **DW1's** personal and subjective valuation of the premises, civil servants continued dwelling in the houses.

66. It is not possible that land could be allocated to the 1st defendant and at the same time have government continue to house civil servants thereon unless there was a great gap in the procedure employed in allocation whereby one department of Government did not know what another department was doing. In this case the Housing Directorate appears to have been left in the dark regarding the allocation by the Commissioner of Lands office.

67. The plaintiff having demonstrated that the suit land was not vacant and that there were government houses still in use by civil servants, and the 1st defendant having admitted that by his issuance of an eviction notice, and that there having been detailed procedures required to be followed prior to disposal of the suit property, it was incumbent upon the defendants and especially the 1st defendant to adduce sufficient evidence to show that the procedures were followed. The defendants did not demonstrate that the requisite procedures were followed.

68. In the face of so much bureaucracy - though in this court's view quite well intended and clearly meant to stem the bleeding of public assets-the implied report by **DW1's** one man board of survey regarding the status of the premises must be rejected by this court. This court must proceed on the premise that the proper procedure for disposal of government houses was not followed in respect of the houses in question and the land they are attached to.

69. Further, the 1st defendant's argument that the Commissioner of Lands had delegated power to allocate land can not in this court's opinion apply to the suit land which had already been developed by the Government for use by civil servants as that land can not be deemed to be "*unalienated government land*" within the most elastic limits of that term. The presence of unvalued and uncondemned government houses on the suit land vitiates the Commissioner's allocation to the 1st defendant and renders the whole procedure an unjust enrichment of the allottee which is contrary to law and public policy.

70. Having found that the allocation of the land and the lease issued and registered in the 1st defendant's name was unprocedurally obtained, it therefore follows that the 1st defendant did not obtain good title to it, and the purported title in its name is therefore void *ab initio*; as such the title is therefore not protected under **Article 40 (6)** of the **Constitution** and **Section 26 (1)** of the **Land Registration Act No. 3 of 2011**.

71. In **Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR** the court stated that:

"...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein."

72. I am satisfied that the plaintiff has proved its case against the 1st defendant. The titles to the suit lands issued in the name of the 1st defendant are not clean, having been obtained in breach of established procedure and they should be cancelled.

73. The suit against the 2nd defendant was not proved on a balance of probability as there was no cause of action against him personally.

74. With regard to general damages, I have no evidence before me that the plaintiff suffered loss or damages as a result of the sale of allocation of the property to the 1st defendant, and there is evidence that the subject houses are still in use by civil servants to date.

75. Consequently I dismiss the suit against the 2nd defendant and I enter judgment for the plaintiff against the 1st defendant and issue the following orders:

(i) An order of declaration, declaring that the lease made to the 1st defendant on or about 16/9/1997 and the certificate of lease issued on 16/9/1997 in respect to Kitale Municipality Block 4/87 and Kitale Municipality Block 4/88 was made in excess of statutory powers of the 2nd defendant and is thus null and void *ab initio*.

(ii) An order of permanent injunction against the 1st defendant to restrain its servants, employees, agents or assigns from trespassing upon, transferring, leasing, wasting and or dealing with the suit property that is Kitale Municipality Block 4/87 and Kitale Municipality Block 4/88, otherwise other than by way of transferring to the Government of Kenya.

(iii) An order that the Land Register shall be rectified by cancelling the lease and certificate of lease issued in respect of Kitale Municipality Block 4/87 and Kitale Municipality Block 4/88 in favour of the 1st defendant.

(iv) The 1st defendant alone shall meet 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 NJOROGE

JUDGE, ELC, KITALE