



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 420 OF 2015

CONSOLIDATED WITH ELC NO. 416, 421, 672, 684, 685, 711, 713, 715, 773, 776 & 777 OF 2015

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

SINDO DISTRIBUTORS LIMITED & 27 OTHERS.....DEFENDANTS

JUDGMENT

On the 1st of November 2019 the active parties in this matter agreed that the following cases to consolidated with this suit namely, ELC Case Nos. 416, 421, 684, 685, 711, 713, 715, 773, 776 & 777 of 2015.

The common thread through all of these cases is that they were brought by the Plaintiff seeking to recover several parcels of land under the registration section Kisumu Municipality Block 7. The Plaintiff alleges that the suit parcels rightly fully belong to the Kenya Railways Corporation and were illegally acquired by some of the Defendants upon the issuance of Leases or allotments by the 3rd, 16th and 27th Defendants. Some of the Defendants subsequently transferred the parcels they acquired to other Defendants.

The Plaintiff seeks in the consolidated suit a declaration that the issuance of Leases by the 3rd Defendant to the 1st Defendant over Kisumu Municipality Block 7/410; to the 8th – 12th Defendants over Kisumu Municipality Block 7/465; to the 19th Defendant over Kisumu Municipality Block 7/524; to the 20th Defendant over Kisumu Municipality Block 7/529 and to the 28th Defendant over Kisumu Municipality Block 7/511 was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 1st, 8-12th, 19th, 20th and 28th Defendants respectively in the first instance.

The plaintiff seeks a declaration that the issuance of an allotment by the 3rd Defendant to the 4th and 5th Defendants over Kisumu Municipality Block 7/467 was null and void *ab initio* and ineffectual to confer any right interest or title upon the 4th and 5th Defendants in the first instance.

Moreover, a declaration that the issuance of Leases by the 16th Defendant to the 15th Defendant over Kisumu Municipality Block 7/478; to the 22nd Defendant over Kisumu Municipality Block 7/514; and to the 23rd Defendant over Kisumu Municipality Block 7/498 was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 15th, 22nd and 23rd Defendants in the first instance.

Furthermore, a declaration that the issuance of Leases by the 27th Defendant to the 26th Defendant over Kisumu Municipality Block 7/539 was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 26th Defendant in the first instance.

The plaintiff prays for a declaration that the subsequent transfers of lease issued in respect of the suit properties and issuance of Certificates of Lease over Kisumu Municipality Block 7/410 to the 2nd Defendant; over Kisumu Municipality Block 7/465 to the 13th Defendant and thereafter to the 14th Defendant; and over Kisumu Municipality Block 7/524 to the 17th and 18th Defendants was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 2nd, 13th, 14th, 17th and 18th Defendants.

The plaintiff prays for a declaration that the subsequent informal transfer of Kisumu Municipality Block 7/467 and the issuance of a certificate of Lease over the same to the 2nd Defendant was null and void and ineffectual to confer a good title upon the 2nd Defendant.

The plaintiff prays for a declaration that the charge created and registered in favour of the 5th Defendant over Kisumu Municipality Block 7/467 on 16th July 2007 is null and void and ineffectual to confer any valid interest upon the 7th Defendant and an order of permanent

injunction restraining the 7th Defendant from selling, transferring, advertising for sale or from howsoever dealing with the suit property in exercise of any statutory power by virtue of the charge.

Subsequently the plaintiff prays for a rectification of the land register by cancellation of the leases over parcels Kisumu Municipality Block 7/410, 467, 465, 478, 524, 529, 514, 498, 539, and 511 and Certificates of Lease issued to the 2nd, 14th, 15th, 17th, 18th, 21st, 22nd, 23rd, 26th and 28th Defendants respectively as to restore the suit properties to the Kenya Railways Corporation.

Ultimately, an order of permanent injunction against the 2nd, 14th, 15th, 17th, 18th, 21st, 22nd, 23rd, 26th and 28th Defendants respectively by themselves, their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession, developing, or in any other way manner howsoever from dealing with Kisumu Block 7/410, 467, 465, 478, 524, 529, 514, 498, 539, and 511 and general damages for fraud as against the 1st, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 19th, 20th, 22nd, 23rd, 26th, 27th and 28th Defendants only and Costs incidental to the suit.

The Plaintiff made uniform pleadings concerning the suit parcels through complaints filed on various dates of June and July 2009. The Plaintiff stated that the suit parcels were part and parcel of a larger parcel which was vested in the defunct East African Railways & Harbours Administration vide Legal Notice No. 440 of 1963. That on or about 1935 the property was surveyed and set apart as a railway reserve and the relevant survey plan registered at Survey of Kenya. That the land was subsequently vested in the defunct East African Railways Corporation before finally being vested in the Kenya Railways Corporation (the Corporation) vide Legal Notice No. 24 of 1986.

The Plaintiff stated that pursuant to statutory investigation it undertook, it had established that the 1st, 8-12th, 19th, 20th and 28th Defendants wrongfully and fraudulently procured from the 3rd Defendant Leases over Kisumu Municipality Block 7/410, 465, 524, 529 and 511 respectively and Certificates of Lease issued without the knowledge or consent of the Corporation. That the 4th and 5th Defendants wrongfully and fraudulently procured from the 3rd Defendant an allotment of Kisumu Municipality Block 7/467.

The Plaintiff further stated that it was also established that the 15th, 22nd, and 23rd Defendants wrongfully and fraudulently procured from the 16th Defendant Leases over Kisumu Municipality Block 7/478, 514 and 498 respectively and Certificates of Lease issued without the knowledge or consent of the Corporation. That the 26th Defendant wrongfully and fraudulently procured from the 27th Defendant a lease over Kisumu Municipality Block 7/539 and a Certificate of Lease issued without the knowledge or consent of the Corporation, yet the suit property already comprised in title the property known as Kisumu Municipality Block 7/364 which was legally vested in the Corporation.

The Plaintiff enumerated uniform particulars of the alleged fraud of the Defendants as follows:

- a) **The Defendants knew or ought to have known that the suit properties belonged to and was in the actual possession of the Corporation.**
- b) **The 3rd Defendant issued and the 1st, 8-12th, 19th, 20th and 28th Defendants obtained the leases without the knowledge or consent of the Corporation.**
- c) **The 16th Defendant issued and the 15th, 22nd and 23rd Defendants obtained the leases without the knowledge or consent of the Corporation.**
- d) **The 27th Defendant issued and the 26th Defendant obtained the lease without the knowledge or consent of the Corporation, and without a surrender of the Corporation's existing title.**
- e) **Failing to circulate the Part Development Plan (PDP) leading to the said alienation to the Corporation.**
- f) **No application for allotment of the suit property was made, or if made, the conditions contained in the letter of allotment was not satisfied.**
- g) **The alienation was done selectively and arbitrarily without any public auction or tendering.**
- h) **The 3rd, 16th and 27th Defendants with knowledge of want of authority purported to issue the leases in the name of the President of the Republic of Kenya.**

The Plaintiff also enumerated particulars of illegality on the part of the 3rd, 16th and 27th Defendants as follows:

- a) **Knowingly and without legal authority alienating land vested in a public body for private purposes.**
- b) **Alienating land vested in a public body without following laid down legal procedures.**
- c) **Failing to circulate or adequately circulate the Part Development Plan (PDP) leading to the said alienation to the Corporation and other interested authorities for comments in accordance with the requirements of the applicable legislation.**
- d) **Alienating public land contrary to and *ultra vires* the provisions of the Government Lands Act.**

e) There was no resolution by the Board of the Corporation to surrender the said land for allocation to the Defendants.

f) There was neither approval by the responsible Minister nor the Treasury for the alienation of the suit properties to the Defendants under the State Corporations Act, 446 of the Laws of Kenya.

The Plaintiff averred that the 1st Defendant purported to transfer Kisumu Municipality Block 7/410 to the 2nd Defendant. That the 4th and 5th Defendants informally transferred Kisumu Municipality Block 7/467 to the 2nd Defendant, and the transaction was registered and a Certificate of lease issued to the 2nd Defendant. That the 2nd Defendant charged Kisumu Municipality Block 7/467 to the 7th Defendant to secure a loan of Kshs. 10,000,000/= and the said charge remained undischarged to date. That the 8th – 12th Defendants purported to transfer Kisumu Municipality Block 7/465 to the 13th Defendant who subsequently transferred the parcel to the 14th Defendant and a Certificate of Lease issued to the 14th Defendant. That the 19th Defendant purported to transfer Kisumu Municipality Block 7/524 to the 17th and 18th Defendants. That the 20th Defendant purported to transfer Kisumu Municipality Block 7/529 to the 21st Defendant.

The Plaintiff contended that these transactions were void *ab initio* and could not confer any estate, right or interest upon the Defendants concerned. The Plaintiff further pleaded that the 2nd and 7th Defendants, as holders of the title and charge to Kisumu Municipality Block 7/467 respectively, were constructive trustees in trust for the Corporation.

The Plaintiff contended that at all material times, the Defendants were actually or constructively aware of the interest of the Corporation in the suit properties. That despite demand and notice of intention to sue, the Defendants failed to admit liability and/or to restore the suit property to the Corporation.

DEFENDANTS' RESPONSES

The 1st, 8th, 13th, 27th and 28th Defendants made similar averments in their replying affidavits and statements of defence. They contended that the entire process of alienating, allocating and registration of Kisumu Municipality Block 7/410, 465, 539 and 511 was procedural, regular and lawful as per the annexed letters of allotment, official receipts of payment, letters from the Commissioner of Lands and Certificates of Lease. That the alienation process went through the proper steps leading to approval of the alienation by cabinet and accepting the delegation of the powers of the President to the Commissioner of Lands under Section 7 of the Government Lands Act. That neither the Government, cabinet, President nor board of the Corporation had complained about the process or procedure leading to the alienation and registration of the suit parcels. That there was no resolution of cabinet or instructions from the board of the Corporation to the Plaintiff to institute a suit against the Defendants. That therefore the suit was an abuse of the court process.

The 1st, 8th, 13th and 28th Defendants denied the particulars of fraud and stated that the suit was incurably defective in view of the provisions of the Limitation of Actions Act, and was an abuse of the process of the court in view of Section 7 and 136 (2) of the Government Lands Act. That the Plaintiff had not been appointed by the Commissioner of Lands under Section 130 (1) of the Government Lands Act, and was not instructed by the Corporation as required by the Kenya Railway Corporation Act. That the Counsel who filed the suit were employees of the Plaintiff and therefore lacked capacity to institute the suit for and on behalf of the Plaintiff.

The Plaintiff's reply to this was that it was carrying out its statutory mandate to investigate liability for loss of public property and take measures for their recovery. That the Plaintiff did not require separate instructions from the Corporation or Commissioner of Lands to perform those duties.

The 2nd Defendant's response was that the Plaintiff had failed to exhibit any title or document demonstrating that the Plaintiff had any proprietary right over the suit properties Kisumu Municipality Block 7/410 and Kisumu Municipality Block 7/467. That there was no nexus between the suit properties and the land vested in the East African Railways and Harbours Administration. That the Survey Map annexed by the Plaintiff dated back to 1935 and it was public knowledge that there had been several developments in land and divisions thereto to date; and there was no evidence to show that the suit property was part of the land shown on the map. That on 25th June 1993, the Corporation had expressly acknowledged and endorsed the private ownership of Kisumu Municipality Block 7/410 in an annexed letter requesting for the refund of rates paid on the property.

The 2nd Defendant contended that it had purchased Kisumu Municipality Block 7/410 and Kisumu Municipality Block 7/467 from the 1st Defendant and 4th and 5th Defendants respectively; and that the 2nd Defendant had constantly been remitting land rent and rates to the Government for the properties. That the 2nd Defendant was a bona fide purchaser for value with an indefeasible right to the suit properties.

The 7th Defendant denied the allegations of the Plaintiff regarding Kisumu Municipality Block 7/467 and stated that the charge created and registered in its favour was done after following the due process as required by the Kisumu District Lands Registry, and thereby conferred a valid interest upon the 7th Defendant. The 7th Defendant contended that it was a bona fide chargee of the suit property for valuable consideration after exercising due diligence to ensure the 2nd Defendant had a pure title and failing to find any fraud mistake or illegality in the title of the suit property. The 4th and 5th Defendants also denied the Plaintiffs allegations relating to Kisumu Municipality Block 7/467.

The 14th Defendant contended that it was a bona fide purchaser for value after acquiring the Kisumu Municipality Block 7/465 from the 13th Defendant, who had acquired the property from the 8th – 12th Defendants.

The 17th and 18th Defendants responded through a statement of defence denying the Plaintiff's allegations and stating that they bought the Kisumu Municipality Block 7/524 from the 19th Defendant after undertaking an official search and were therefore innocent purchasers for value without notice of any defect in title. That the Corporation had surrendered its interest in the suit property to the Commissioner of Lands who thereafter reallocated the same. The 17th Defendant annexed to his replying affidavit a letter dated 30th April 1998 from the Permanent

Secretary to the Cabinet to the Managing Director of the Corporation approving the allocation of some plots for alternative usage; a letter dated 21st September 1998 from the Managing Director of the Corporation to the 3rd Defendant effectively relinquishing ownership of the plots; and a letter dated 17th February 1999 from the 3rd Defendant to the Director of Surveys amending the Registry Index Map for Kisumu Block 7 to reflect parcels 491 – 530.

The Plaintiff's reply was that the Permanent Secretary to the Cabinet had no role to play in law in the alienation of public land vested in the Corporation since such duty was reserved for the responsible Minister and the Treasury under the State Corporations Act.

The 23rd Defendant denied the allegations of fraud and illegality, averring that Kisumu Block 7/498 was lawfully acquired with a Part Development Plan circulated and a Certificate of Lease issued to her. That the Commissioner of Lands (the 16th Defendant) had the authority to confer title upon her and the failure of the Corporation or any other statutory body to issue a notice of caveat emptor estopped them from challenging the transaction. The Plaintiff's reply was that there was no obligation on the part of the Corporation to publish any notice of caveat emptor, and that estoppel cannot apply or operate as to perpetuate fraud and illegality so as to contravene express statutory provisions.

The 3rd Defendant averred that during his appointment as Commissioner of Lands, he undertook his duties and responsibilities faithfully and diligently with due care to the statutory provisions on his mandate as under the Government Lands Act. That he was a stranger to the interest held by the Corporation or any of the Defendants. That in the process through which unoccupied Government land may be divested to the public, the Commissioner of Lands would be a mere generator of documentation and was not possessed with the requisite capacity to confer a benefit to a third party. The 3rd Defendant denied any knowledge of fraud and/or illegality on suit properties and conveyance thereof. That the suits were brought in bad faith, constituted false misrepresentation, and depicted the Plaintiff's dishonesty and connivance as the Plaintiff omitted to enjoin the Corporation whom it alleged to be the bona fide owner.

The 16th Defendant denied that Kisumu Municipality Block 7/478, 498 and 514 were part of the larger parcel vested in the Corporation. The 16th Defendant denied the allegations of fraud and illegality against him. He averred that if Certificates of Lease were issued then the parcels were properly applied for, properly allotted, requisite payments made and the Certificates of Lease were valid and indefeasible. That the suit was time barred and offended the mandatory provisions of the law thus the reliefs sought could not issue. That the Plaintiff purported to challenge the functions of the President and usurp the role and functions of other government institutions.

The 26th Defendant averred that the allocation of Kisumu Municipality Block 7/539 was done lawfully and within the knowledge of the Corporation. That it was within the powers of the Commissioner of Lands under the Government Lands Act to cause any portion of a township which is not required for public use to be divided into plots suitable for business or residential development. That the Plaintiff was acting in bad faith by suing the 27th Plaintiff in her personal capacity yet the actions leading to the claim were lawfully done in her official capacity as Commissioner of Lands; creating the impression that the 26th and 27th Defendants jointly participated in fraud yet they were strangers to each other; and knowing that the suit property had long been abandoned by the Corporation and was under occupation by third parties. That the Plaintiff lacked the *locus standi* or authority to bring the suit.

The 19th, 21st, 22nd and 24th Defendants did not enter appearance and interlocutory judgment was entered against them. Further, the matter regarding Kisumu Municipality Block 7/512 was settled by consent on 19th September 2019 after the 25th Defendant surrendered title to the property.

PLAINTIFF'S CASE

In ELC Case No. 777 of 2015 concerning Parcel 511, Hassan Zakaria Mosotsi, a land Surveyor at the Department of Survey, testified as PW1 (hereinafter PW1A). PW1A produced a copy of a survey plan registered on 24th August 1935 indicating the extent of land reserved for the Railways. PW1A stated that the suit parcel was found to be within the Railways land. PW1A produced copies of a survey plan and a Registry Index Map showing the positions of the suit parcel in Kisumu Municipality Block 7. That they received a copy of a letter dated 12th June 2011 from the Commissioner of Lands to the Managing Director of the Corporation to the effect that the titles for plots allocated within Kisumu Block 7 had been revoked vide Gazette Notice No. 15577 and that the entire area was to be resurveyed. That they subsequently wrote to the Commissioner of Lands to the effect that the Registry Index Map had been amended to consolidate the entire area of the Railways reserve into one new number Parcel 567.

On cross-examination, PW1A explained the process of creating a new parcel in the Registry Index Map and stated that all the processes were done to create Parcel 511, and that he did not see any evidence of fraud. That when they amalgamated the parcels they did not hear from the owner of the suit parcel. PW1A stated that Varsity Plaza on Parcel 532 was originally Railways land but did not fall within Parcel 567 but he did not know why it was not consolidated and given different treatment. On re-examination PW1A stated that Varsity Plaza belonged to Maseno University which was a public institution while Parcel 511 was created within land reserved for Kenya Railways. PW1A stated he did not come across an objection by the Corporation to the creation of Parcel 511 and that he did not know who participated in creating Parcel 511.

Dedan Ochieng Okwama, an investigator at the EACC testified as PW2 (hereinafter PW2A). He stated that in the course of his work, they discovered that the suit parcel was part of the encroachment of the Railway reserve. PW2A produced a letter from the Plaintiff to the Provincial Physical Planner at Kisumu requesting for certified PDPs for a number of parcels including Parcel 511; and the reply from the Ministry of Lands to the effect that there were no PDPs related to the parcels. That he obtained a copy of the lease, green card and white card indicating a certificate of lease was issued to the 28th Defendant. That a demand letter was sent to the 28th Defendant and there was no response. That the 28th Defendant never made an application for the suit property, and there was no approval from the Corporation or Treasury for the alienation and allocation of the property.

On cross-examination, PW2A stated that he personally went to the Survey of Kenya and obtained a computation file for Parcel 511 and also went to the Registry in Kisumu but the file was missing. He stated that there was no letter from the Corporation complaining about the

creation of Parcel 511. That they did not see a grant or lease in favour of the Corporation with respect to Block 7. That the Defendant was not heard before the suit property was revoked. That they did not go to the headquarters of the Physical Planning Department and did not know whether the PDPs that they were looking for were at the headquarters. That they did not take a statement from the surveyor involved in the creation of Parcel 511, and that nobody had been prosecuted for the same.

In this consolidated suit, Joseph Kiragu Kariuki, a Principal Land Officer at the National Land Commission, testified as PW1 (hereinafter PW1B). He stated that the suit parcels were within land reserved for use by the Corporation. PW1B stated that they revoked the allocations and did a gazette notice No. 15577 to that effect. PW1B produced letters from the Commissioner of Lands to the allottees of Parcels 465, 539, 514, 512, 478, 524, 529, 511, 524, and 539 informing them of the revocation and directing them to surrender the original title. That what followed was the issuance of a letter of allotment to the Corporation with respect to the consolidated parcel as Parcel 567 and the amendment of the Registry Index Map to reflect Parcel 567. That the Corporation was subsequently issued a lease. PW1B stated that they had established that the land belonged to the Corporation and due to omissions the land and was allocated to private persons.

On cross-examination, PW1B stated that the omissions were that the officer did not check the records when the applications were made and the survey department ignored the existing maps and should not have surveyed the land. That the land was issued to the East African Railways Corporation in 1932 vide title number LR 1148/1184 but he had not seen the original title. He stated that the original title was with the Corporation although he had never seen it. PW1A conceded that they did not call the Defendants before cancellation of titles; they did not go to court to revoke the titles; and that they did not compensate the Defendants.

Isaiah Ouma, the Surveyor at the Kisumu County lands office testified in the consolidated suit as PW2 (hereinafter PW2B). PW2B produced a survey plan for Kisumu Township prepared on 24th August 1935 indicating the railway reserve, stating that the land belonged to the Corporation. PW2B also produced a Registry index map for Kisumu Block 7 indicating the suit parcels location within the area designated as the railway reserve as per the survey plan, and another Registry Index Map indicating Kisumu Block 7 after the suit parcels had been revoked. On cross-examination, PW2B stated that a private individual has no role in the making of entries in the Registry Index Map or amendment of the same; that he did not see any Part Development Plan for the Railway land; and that he did not know when the title was issued.

Dedan Okwama, an investigating officer with the Plaintiff, testified as PW3. PW3 detailed how the Plaintiff had written to the Kisumu Provincial Physical Planner requesting for copies of the Part Development Plans for the suit parcels, and that it was established that no PDPs or correspondences relating to the suit parcels were found. PW3 also produced a certified copy of a Short Term Development Plan for Kisumu dated 1st April 1969 indicating the location of the railway reserve. PW3 also produced certified copies of leases, letters of allotment and green cards relating to Parcels 410, 467, 465, 539, 511, 478, 524, 529, 514, and 498.

PW3 produced the legal notices that vested the land in the East African Railways and Harbours Administration; the East African Railways Corporation and finally the Kenya Railways Corporation. He also produced copies of letters from the Executive Chairman of the Corporation to the Commissioner of Lands dated 5th March 1991 and 22nd May 1991 questioning the allocation of Parcel 410 citing the need of the approval of the Board of Directors. PW3 produced the demand letters sent to the Defendants and stated that there was no reply to these letters.

On cross-examination, PW3 stated that they obtained the relevant files from Survey of Kenya and the Commissioner of Lands and they found that there was no letter of allotment to the 1st Defendant.

DEFENDANTS' CASE

Navichandra Lalji a Director of the 2nd Defendant testified as DW1. DW1 described the process through which the 2nd Defendant purchased Parcel 410 from Sindo Distributors for Kshs. 3,000,000/=; and purchased Parcel 467 from the 4th and 5th Defendants. DW1 produced copies of correspondences, a certificate of official search, bank statement and receipts for payment of rates and rent. DW1 stated that the Lands office should reimburse the 2nd Defendant for Parcels 410 and 467 at a market value of Kshs. 50,000,000/= and 70,000,000/= respectively based on the valuation reports produced.

The 4th Defendant testified as DW2. He testified as to how the 4th and 5th Defendant acquired Parcel 467, producing copies of the Kisumu Part Development Plan, a letter of allotment to Dasahe Investment and receipt of payments to Commissioner of Lands. DW2 also produced copies of the relevant documents relating to their transfer of Parcel 467 to the 2nd Defendant.

On cross-examination, DW2 stated that Dasahe Investment was a registered company but he did not have the Certificate of Incorporation. That Dasahe Investment in whose name Parcel 46 was allotted was different from Dasahe Investment Ltd. That application for allocation of the parcel was lost but the original and the acceptance of the offer was at the Lands office.

PLAINTIFF'S SUBMISSIONS

Counsel for the Plaintiff submitted that the suit properties were part of land reserved to the Corporation and were therefore not un-alienated government land available for allocation by the Commissioner of Lands as under the Government Lands Act. Counsel cited *Kipsirgoi Investments Ltd v Kenya Anti-Corruption Commission* for the proposition that reservation for a particular purpose renders that land alienated. That even if the land were available, the Commissioner of Lands had only been delegated power to alienate unalienated government land for purposes set out under the Government Lands Act. That none of those exceptions empowered the 3rd, 6th and 27th Defendants to alienate the suit properties to the other Defendants, citing *James Joram Nyaga & another v Attorney General & another [2007] eKLR*. Counsel asserted that, as per Section 7 of the Government Lands Act, it was only the President with the sole discretion of alienating unalienated government land.

Counsel submitted that had an examination of the land records been done, it would have been clear that the land was not available for alienation, and further that the Corporation was not a party to the alienation of the suit properties. That this was a clear indication that the suit properties were unlawfully alienated. Counsel also submitted that the 20th Defendant was allocated land even before it was legally in existence, pointing to fraud. That the 4th and 5th Defendants could not legally transfer Parcel 467 to the 2nd Defendant and the 2nd Defendant could not charge Parcel 467 to the 7th Defendant.

Regarding whether the 2nd, 13th, 14th, 15th, 17th, 18th, 21st, 22nd, 23rd, 26th, and 28th Defendants were innocent purchasers for value without notice of any defect in title, Counsel submitted that the alienation of the suit properties to those Defendants was through a corrupt scheme in that the Corporation was not involved or consulted; the Corporation questioned the alienation of Parcel 410; and the 20th Defendant was allocated Parcel 529 even before it had legal existence.

Counsel contended that the acts of the 3rd, 16th and 27th Defendants were illegal and did not bind their office or the government. That their liability was personal, and the terms of their employment did not include acting contrary to the law. Counsel relied on the case of **KACC v Sammy Komen Mwaita and another Nakuru HCCC No. 43 of 2008.**

2ND, 6TH, 7TH AND 14TH DEFENDANTS' SUBMISSIONS

Counsel for the 2nd, 6th, 7th and 14th Defendants submitted that there was no evidence to prove that the 2nd, 6th and 14th Defendant participated in or facilitated the acquisition of the suit parcels through fraud, illegality or corrupt practice. That the particulars of illegality in the relevant complaints were against the 1st and 3rd Respondents in respect of Parcel 410; against the 4th and 5th Defendants in respect of Parcel 467; and against the 8th -12th Defendants over Parcel 465.

Counsel submitted that as per Section 27 of the repealed Registered Land Act, the 2nd, 6th and 14th Defendants acquired all rights and privileges appurtenant to the suit properties. That the Defendants are *prima facie* absolute and indefeasible owners of the suit parcels as provided by Section 26(1) of the Land Registration Act. Counsel contended that the 2nd, 6th and 14th Defendants only had a duty to conduct a land search at the Lands Registry to discover the ownership of title and validity thereof. That there was nothing in the registers to show that the titles were under challenge or that they were fraudulently acquired there for the 2nd, 6th and 14th Defendants should be afforded the protection under Section 39 (1) of the repealed Registered Land Act. Counsel relied on the case of **Elizabeth Wambui Githinji & 28 others v Kenya Urban Roads Authority & 4 others [2019] eKLR.**

Counsel submitted that the complaint filed disclosed no cause of action against the 2nd, 6th and 14th Defendants notwithstanding the requirement of Order 2 Rule 10 (1) of the Civil Procedure Rules.

Counsel contended that were the 2nd, 6th and 14th titles to be impeached, the Defendants must be indemnified since they purchased the suit parcels for valuable consideration without notice of any defect in title of the previous proprietors and because they have been paying rents and rates since acquiring ownership of the properties

4TH AND 5TH DEFENDANTS' SUBMISSIONS

Counsel for the 4th and 5th Defendants began by submitting that the issue of the ownership of Dasahe Investment Limited ought to have been raised as a preliminary objection and not at final hearing.

Counsel submitted that all the relevant due processes were followed to the letter in the acquisition and subsequent transfer of the property.

Counsel submitted that the allegation that the 3rd Defendant singlehandedly colluded with the 4th Defendant to defraud the Corporation to alienate and allocate was unfounded as the Commissioner of Lands at the time of allocation was one P.N. Mutwiwa and the documents were signed and countersigned by various officers at the Commissioner of Lands.

Counsel contended that a first registration under the Registered Land Act was accorded the same protection under the Torrens system and was indefeasible. Counsel relied on the cases of **Kuria Greens Limited v Registrar of Titles & another [2011] eKLR** and **Republic v Kisumu District Lands Officer & another [2010] eKLR.** Counsel cited several other cases where courts upheld the protection under the Torrens system.

On the Presidential power to alienate unalienated government land under Section 7 of the Government Lands Act, Counsel submitted that the Plaintiff tabled no evidence to demonstrate that at the material time, the 3rd Defendant had no authority to alienate the suit property. Counsel asserted that the "general or specific directions from the President" under Section 7 of the GLA meant giving the Commissioner of Lands the authority to act, which authority can be express or implied. That by virtue of holding the office of the Commissioner of Lands, the 3rd Defendant had the authority to act in allocating the suit property. That the GLA did not define how the general or specific directions from the president was to be expressed, be it oral or in writing.

ISSUES FOR DETERMINATION

1. WHETHER THE SUIT PROPERTIES CONSTITUTE PART OF LAND SET APART AS A RAILWAY RESERVE AND VESTED IN THE KENYA RAILWAYS CORPORATION

It is clear from the gazetted Legal Notices produced by the Plaintiff through PW1A and PW2B that land reserved for use by the defunct East

African Railways and Harbours Administration was vested in its General Manager through Legal Notice No. 440 of 1963. The land was later transferred and vested in the defunct East African Railways Corporation vide Legal Notice No. 20 of 1969, and finally conveyed to and vested in the Kenya Railways Corporation vide Legal Notice No. 24 of 1986. The Plaintiffs also produced Survey Plan F/R No. 43/53 dated 24th August 1935 indicating the area comprising the railway reserve in Kisumu Township, and a Short-Term Development Plan dated 1st April 1969 indicating the area to comprise Railway Housing in Kisumu. It is therefore clear that the area indicated in the survey plan had been set aside and reserved as a public utility land.

The evidence of PW1A and PW2B and the Registry Index Map of Kisumu Municipality Block 7 sufficiently established that the suit parcels as indicated in the Registry Index Map were located within the area indicated as the railway reserve in the Survey Plan F/R No. 43/53. As the evidence was uncontroverted, the conclusion to be drawn is that the suit properties constituted part of land vested in the Kenya Railways Corporation.

2. WHETHER THE 3RD, 16TH AND 27TH DEFENDANTS LAWFULLY ALIENATED THE SUIT PROPERTIES TO THE 1ST, 4TH, 5TH, 8TH – 12TH, 15TH, 19TH, 20TH, 22ND, 23RD, 26TH AND 28TH DEFENDANTS

Having established that the suit properties were within land set aside for public use, the onus was on the 1st, 4th, 5th, 8th – 12th, 15th, 19th, 20th, 22nd, 23rd, 26th and 28th Defendants to prove that the suit properties were lawfully alienated in their names.

Section 2 of the repealed Government Lands Act defines “unalienated Government land” as:

“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.”

Section 3 of the repealed Government Lands Act provides that:

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may

—
(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”

The Act qualifies this power as follows:

“The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—

(a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;”

Section 7 of the Act provides that:

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute or and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act.”

In *James Joram Nyaga & Another v the Hon. Attorney General & Another* [2007] eKLR, the court, in reference to sections 3 and 7 of the Government Lands Act stated;

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

Reaching a similar finding, the Court of Appeal in *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR stated:

“The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v. Shariff Mohammed Shatry, (1940) 19 (1) KLR 9*, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity.”

The evidence adduced by the Defendants did not demonstrate that the President had authorised the Commissioner of Lands to alienate the suit properties, be it orally or in writing. The Commissioner of Lands could not purport to pass any valid title to the Defendants through the Letters of Allotment and Leases produced in evidence. The alienation of the suit properties to the 1st, 4th, 5th, 8th – 12th, 15th, 19th, 20th, 22nd,

23rd, 26th and 28th Defendants was unlawful and unprocedural.

On the 4th and 5th Defendants' contention that their title was indefeasible being a first registration, the court in **Henry Muthee Kathurima v Commissioner of Lands & another [2015] eKLR** held that:

“...we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired. Further, it is our view that the Government’s title to an un-alienated public land stems from the concept of radical title or eminent domain. Based on radical title, the government has superior title to all un-alienated public land and the appellant cannot challenge radical or eminent title.”

On the other hand, the Plaintiffs failed to prove the allegations of fraud against the Defendants. In **Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR**, the court stated:

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” (Emphasis ours)

In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularise it, but also lay a basis by way of evidence, upon which the court would make a finding.”

The fact that the Defendants' application letters for allocation and the PDPs relating to the suit properties were missing from the records of the Lands Registry and Department of Physical Planning was not conclusive proof of the fraud or illegality on the part of the Defendants. The failure to circulate the relevant PDPs cannot be blamed on the office of the Commissioner of Lands. Under the Physical Planning Act, the responsibility of generating and publication of approved local physical development plans lay with the Director of Physical Planning and the relevant Minister. There was no evidence to suggest that the 3rd, 16th and 27th Defendants were the authors of the Registry Index Map that was the basis of the existence of the suit properties within the railway reserve. The protestations of the Corporation regarding Parcel 410 only came to the attention of the 3rd Defendant after the allotment and Lease had been issued in the name of the 2nd Defendant.

3. WHETHER THE 2ND DEFENDANT LAWFULLY CHARGED PARCEL 467 TO THE 7TH DEFENDANT

As the 2nd Defendant did not obtain a valid title on Parcel 467 from the 3rd Defendant, there was no valid title capable of being charged to the 7th Defendant. The charge is therefore null and void and ought to be cancelled.

4. WHETHER THE 2ND, 13TH, 14TH, 17TH AND 18TH DEFENDANTS WERE BONA FIDE PURCHASERS FOR VALUE WITHOUT NOTICE OF DEFECTS IN TITLE

Katende v. Haridar & Company Limited [2008] 2 E.A.173 describes a *bona fide* purchaser as follows:

“...it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine, (he) must prove that:

- a. he holds a certificate of title;
- b. he purchased the property in good faith;
- c. he had no knowledge of the fraud;
- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud.

A *bona fide* purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

The 2nd, 13th, 14th, 17th and 18th Defendants purchased their respective parcels on the strength of undertaking an official search which revealed that the Vendor Defendants had apparent good title. Nothing in the evidence on record points to these Defendants having

participated in any action or omission amounting to fraud or illegality when acquiring their respective suit parcels, as alleged by the Plaintiff.

Section 2 of the repealed Registration of Titles Act provides that:

“fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration;”

Nothing in the suit properties’ green cards would have possibly alerted the Defendants of the Government’s competing claim to title. No evidence was adduced to show that there were any distinguishing marks, signage, buildings or other developments on the properties that would have indicated that the parcels were within a railway reserve belonging to the Corporation, as seen in **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR**. The Defendants acted in good faith and purchased the parcels for valuable consideration. These Defendants can only therefore be viewed as *bona fide* purchasers.

In **Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR** the Court of Appeal reasserted the unimpeachable nature of titles of bona fide purchasers for value who carried out sufficient due diligence before acquiring land:

“The law has never intended to punish the innocent as to punish the innocent would break down all the trust and respect for the law and legal system... It has long been accepted beyond debate that the land registration process in Kenya is a product of the **Torrens system**... Under that system, the title of a bona fide purchaser for value without notice of fraud cannot be impeached; that the land register must mirror all currently active registrable interests that affect a particular parcel of land; that the Government, as the keeper of the master record of all land in Kenya and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world; and that in case of loss arising from an error in registration, the Government guarantees the person affected of compensation. Finally, the statutory presumption of indefeasibility and conclusiveness of title based on the register can be rebutted only by proof of fraud or misrepresentation which the buyer is himself shown to have been involved...

In order to discharge the burden on them and for them to secure their titles, it was enough for the appellants to show that they acquired interests to their properties from the vendors who were registered owners; that they did so in good faith, without notice and did not participate in any fraud. This burden was discharged. It was not their duty to ensure the accuracy of the information contained in the register.”

The origin of the error in the form of the existence of a register relating to the suit parcels, complete with a Registry Index Map indicating the existence of the parcel within the railway reserve can only be traced back to the Government. As per Section 18 and 20 of the Registered Lands Act, the preparation and maintenance of registry maps was the responsibility of the Director of Surveys and the Registrar. It is this error that caused the Defendants to purchase the suit properties in good faith and without notice of defects in title. In order to correct the error and revert the suit properties back to the Government, the 2nd, 13th, 14th, 17th and 18th Defendants are entitled to indemnity from the state but not in this suit.

Section 81 (1) (b) of the Land Registration Act provides that any person suffering damage by reason of any error in a copy of or extract from the register or in a copy of or extract from any document or plan certified under this Act, shall be entitled to indemnity. A similar provision for indemnity is also found in Section 144 (1) (c) of the repealed Registered Land Act.

5. RELEVANT ORDERS

The declaratory orders sought ought to all be granted and are granted as follows namely:-

a - That the issuance of Leases by the 3rd Defendant to the 1st Defendant over Kisumu Municipality Block 7/410; to the 8th – 12th Defendants over Kisumu Municipality Block 7/465; to the 19th Defendant over Kisumu Municipality Block 7/524; to the 20th Defendant over Kisumu Municipality Block 7/529 and to the 28th Defendant over Kisumu Municipality Block 7/511 was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st, 8-12th, 19th, 20th and 28th Defendants respectively in the first instance.

b - That the issuance of an allotment by the 3rd Defendant to the 4th and 5th Defendants over Kisumu Municipality Block 7/467 was null and void ab initio and ineffectual to confer any right interest or title upon the 4th and 5th Defendants in the first instance.

c - That the issuance of Leases by the 16th Defendant to the 15th Defendant over Kisumu Municipality Block 7/478; to the 22nd Defendant over Kisumu Municipality Block 7/514; and to the 23rd Defendant over Kisumu Municipality Block 7/498 was null and void ab initio and ineffectual to confer any right, interest or title upon the 15th, 22nd and 23rd Defendants in the first instance.

d - That the issuance of Leases by the 27th Defendant to the 26th Defendant over Kisumu Municipality Block 7/539 was null and void ab initio and ineffectual to confer any right, interest or title upon the 26th Defendant in the first instance.

e - That the subsequent transfers of lease issued in respect of the suit properties and issuance of Certificates of Lease over Kisumu Municipality Block 7/410 to the 2nd Defendant; over Kisumu Municipality Block 7/465 to the 13th Defendant and thereafter to the 14th Defendant; and over Kisumu Municipality Block 7/524 to the 17th and 18th Defendants was null and void ab initio and ineffectual to confer any right, interest or title upon the 2nd, 13th, 14th, 17th and 18th Defendants.

f - That the subsequent informal transfer of Kisumu Municipality Block 7/467 and the issuance of a certificate of Lease over the same to the 2nd Defendant was null and void and ineffectual to confer a good title upon the 2nd Defendant.

g - That the charge created and registered in favour of the 5th Defendant over Kisumu Municipality Block 7/467 on 16th July 2007 is null and void and ineffectual to confer any valid interest upon the 7th Defendant and an order of permanent injunction restraining the 7th Defendant from selling, transferring, advertising for sale or from howsoever dealing with the suit property in exercise of any statutory power by virtue of the charge.

h - Subsequently it is ordered that there be a rectification of the land register by cancellation of the leases over parcels Kisumu Municipality Block 7/410, 467, 465, 478, 524, 529, 514, 498, 539, and 511 and Certificates of Lease issued to the 2nd, 14th, 15th, 17th, 18th, 21st, 22nd, 23rd, 26th and 28th Defendants respectively as to restore the suit properties to the Kenya Railways Corporation.

i - Ultimately, a permanent injunction is hereby issue against the 2nd, 14th, 15th, 17th, 18th, 21st, 22nd, 23rd, 26th and 28th Defendants respectively by themselves, their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession, developing, or in any other way manner howsoever from dealing with Kisumu Block 7/410, 467, 465, 478, 524, 529, 514, 498, 539, and 511 and general damages for fraud as against the 1st, 3rd, 4th, 5th, 8th, 9th, 10th, 11th, 12th, 15th, 16th, 19th, 20th, 22nd, 23rd, 26th, 27th and 28th Defendants only and Costs incidental to the suit...with the exception of prayer e. which involves the Defendants who were bona fide purchasers.

j - The charge on Kisumu Municipality Block 7/467 is hereby cancelled.

k - The prayer for General damages for fraud ought to be, and is hereby dismissed.

l - Costs – Plaintiff ought to be paid costs of the suit by 1st, 3rd, 4th, 5th, 8th – 12th, 15th, 16th, 19th, 20th, 21st, 22nd, 23rd, 26th, 27th and 28th Defendants.

In conclusion, this court appreciates the dedication and input of the Ethics and Anti- Corruption Commission through their able and learned counsel Koskey Arap Bii and Grace K. Omweri and the firm of L. G Menezes and company through their able and learned counsel Mr Maganga and the firm of Onsongo and Company through their able and learned counsel Mr Onsongo and the firm of Migos Ogamba and company advocates through their able counsel Mr Ogamba, that assisted the court to reach this decision.

Dated and delivered at Kisumu this 10th Day of December 2020.

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE