



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 46 OF 2017

[Formerly Nairobi Hccc No. 882 of 2006]

KENYA ANTI CORRUPTION COMMISSION..... PLAINTIFF

VERSUS

LIMA LIMITED.....1ST DEFENDANT

WILSON GACANJA.....2ND DEFENDANT

TRANS-NATIONAL BANK LIMITED.....3RD DEFENDANT

JUDGMENT

(1) Plaintiff's Case

The plaintiff commenced this suit by way of plaint which was filed on 16th August 2006 seeking a declaration that the allocation and issuance of leases to the 1st defendant of land parcel Eldoret Municipality Block 4/129, 4/52,4/53, 4/54 and 4/55 is null and void and incapable of conferring any estate interest or right, the creation and registration of a charge over those parcels is null and void, that the registration of the 1st defendant as the lessee be cancelled, the charges registered against those land parcels be cancelled and that a permanent injunction be issued against the 1st and 3rd defendants from entering into any dealings concerning the said properties.

The plaintiff in the plaint avers that the suit parcels of land comprised government lands reserved for use by the Eldoret Municipal Council as a fire station in respect of land parcel Eldoret Municipality Block 4/129, an administration police camp for the rest. The said properties are fully developed with occupation and use of the public as aforesaid. According to the plaintiff on diverse dates, between 1995 and 1998, the 2^d defendant without any legal authority, purported to allocate and issue long term leases in respect of the land comprised in the suit properties to the 1st defendant. The plaintiff contends that the suit properties had been alienated for public use and therefore were not capable of being allocated and that the purported allocation to the 1st defendant by the 2nd defendant was illegal, fraudulent null and void and ultra vires the statutory powers and functions of the 2nd defendant. The fraud and illegality is particularized as required by law. The plaintiff alleges that the 2nd defendant being the custodian of the government land held a fiduciary duty and by allocation of the said land for private use was in breach of fiduciary duty. It is further stated that the 3rd defendant wilfully and recklessly advanced the 1st defendant a loan of Ksh 21,000,000 against the security of a charge over the suit properties.

(2) Defendants' Case

The 1st defendant states in his defence that the suit properties were transferred to Lima Ltd by the Commissioner of Lands on diverse dates for various sums as per the letters of allotment. They were then issued with certificates of lease. The defendant maintains that the plots were rightfully acquired and in accordance with the law.

The 2nd defendant filed a statement of defence wherein he avers that the suit premises were unalienated land. He maintained that the land was allocated within the clear statutory provisions of the Government Lands Act. He maintained that the suit property was not alienated prior to the allocation and consequently he acted intra vires. The then users were consulted and they offered no objection to the allocation. He further denied all the particulars of fraud and illegality.

(3) Evidence on Record

PW1. George Ojowi an investigator with Ethics and Anti-Corruption Commission states that he was appointed by the director of investigations under section 23 of the Ethics and the Anti-Corruption Act and his duties include investigation of Corruption and economic

crimes cases analysis of evidence obtained and making recommendation in regard to investigations. He investigated the loss of the suit properties and recorded a statement which was adopted by this court as evidence in chief. He produced the area map showing that the properties were along Oginga Odinga street and Elgeyo road and Uganda road and the road between Zion Mall and Uasin Gishu district hospital that connects to Uganda road. Parcel no 56 houses the judiciary buildings high court, the children's court, and the Environment and land court. Parcel number 159 is the current fire station the remainder is the A.P camp. The first entry on the map was made on 21st March 1980 and the last amendment for the area map was on 17TH June 2010 whilst the parcels of land in dispute were made on 20th July 1993. The letter of allotment to plot no 53 was issued on 29th December 1995 by the commissioner of lands through one C.O Onyango. There was a board of survey for the property held on 11th November 1996 chaired by the district commissioner. The plots had government houses. **PW2, Johannes Chitechi Luta** testified that the suit properties house government structures thus the district hospital, the fire station the court and the A.P Camp.

DW1, Stephen Kirwa Mutei testified that he works in the accounts department of the 1st defendant and has knowledge of the suit properties. That parcels of land numbers parcel Eldoret Municipality Block **4/129, 4/52,4/53, 4/54 and 4/55** were allocated or transferred upon the 1st defendant paying the prerequisite consideration whereupon the 1st defendant was issued with certificates of lease and therefore the plots were acquired rightfully and certificates of lease issued in accordance with the law and hence the 1st defendant became the lawful owner of the suit properties.

(4) Submissions by The Parties

The plaintiff submits that they proved to the required standards that the suit properties were reserved for public utility and in actual use of public bodies. They referred to P-exhibit 1. P-exhibit 2 and the evidence of PW1 and submitted that they demonstrated that the block of land comprised within Uganda Road, Oginga Odinga Street, Elgeyo Road and the road connecting Uganda Road at the Zion Mall Junction was reserved for public utilities. Exhibit 2 showed that the area described was planned for DCs office, Law Court, Fire Brigade and AP line. As per exhibit 11, there was a meeting of Board of Survey for Government offices and houses held on 7th September, 1995 and 11th January, 1996 where it was agreed that all government houses on the suit property be boarded paving way for allocation except Eldoret Municipality Block 4/157.

The allocation of the suit properties to private entities did not make sense since the buildings could have been repaired. The plaintiff submitted that there were pertinent facts established during the hearing of the suit. These were that no presidential authority was sought prior to the alienation of the suit properties, the properties were not available for alienation, they are still in use by public institutions to date and the properties were not alienated as envisaged under section 3 or 11 or 12 of the Government Lands Act.

The commissioner of lands had no authority to alienate the land as under section 3 of the Government Land Acts the power to alienate unalienated government land lay with the president. The power to delegate was delegated to the commissioner of lands in limited circumstances which did not apply to the current suit property. the plaintiff relied on NBI HC. Misc. Appl. 1732 of 2004, James Joram Nyaga & Another v Attorney general & Another (unreported) on the authority of the Commissioner of Lands and further referred to Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others [2014], eKLR on the same. The plaintiff claims that he has proven that the land was not available for alienation and that the 2nd defendant had no authority to make the alienation and this it conferred no benefit to the 1st defendant.

The plaintiff submitted that the actions of the commissioner of lands were illegal and the government cannot be vicariously liable for the illegal acts of its servants. The government cannot be vicariously liable for the acts of its servants when the abuse committed is against the government. The 2nd defendant acted illegally and in abuse of his office to benefit the 1st defendant bad he is personally liable. The 1st defendant has all but conceded that the suit properties were public properties and surrendered claim to the same. This is borne out by the following facts;

(1) On 8th October 2008, the commissioner of land forfeited the lease in respect to block 4/53, 55 and 56. The 1st defendant challenged the forfeiture vide JR No. 10 of 2008; Republic vs the Commissioner of Lands and Another ex parte Lima Ltd. and the forfeiture was quashed on 27th January 2011. The orders quashing the forfeiture were set aside on 13th April 2011 on the basis of concealment of material facts.

(2) On 1st October 2010 the land registrar, Uasin Gishu revoked the titles to the suit properties.

The plaintiff also recorded a consent with the 3rd defendant cancelling the registration of the charges. The plaintiff maintained that it had proven its case against the defendants.

The 1st defendant on the other hand submits that he is the registered proprietor of the suit properties and therefore indefeasible and absolute owner whose rights can only be defeated on evidence of fraud misrepresentation to which the plaintiff was proved to be party.

The Defendant relies on sections 24, 25, and 26 of the Land Registration Act that provide as follows: -

Section 24 of the Land Registration Act provides that subject thereto: —

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease,

together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

Section 25 of the Land Registration Act states as follows: -

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject: —

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

Section 26 states as follows; -

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

(5) Analysis and Determination

It is evident that the properties are along Oginga Oginga street and Elgeyo road and Uganda road and the road between Zion Mall and Uasin Gishu district hospital that connects to Uganda road. Parcel no 56 houses the judiciary buildings thus; the High Court, the children’s court, and the Environment and Land Court. Parcel number 159 is the current fire station the remainder is the administration police camp. The first entry on the area map was made on 21st March 1980 and the last amendment for the area map was on 17TH June 2010 whilst the parcels of land in dispute were made on 20th July 1993. The letter of allotment to plot no 53 was issued on 29th December 1995 by the commissioner of lands through one C.O Onyango. There was a board of survey for the property held on 11th November 1996 chaired by the district commissioner. The plots had government houses. The issues for determination are;

(a) Whether the suit property (land parcel no’s Eldoret Municipality Block 4/129, 4/52, 4/53, 4/54, 4/55) comprised government land reserved for public utility.

(b) Whether the 2nd defendant validly alienated the land to the 1st defendant.

WHETHER THE SUIT PROPERTY COMPRISED GOVERNMENT LAND FOR PUBLIC UTILITY

The plaintiff provided evidence in terms of the registry index map and the PDP as exhibits 1 and 2 clearly shows that the suit land was planned for public utilities. Further, they were actually occupied by the high court, lands offices, survey offices, the fire station and administration police camp. They were in actual use of public bodies and still are to this day.

The 1st defendant submits that the suit property were available for allocation and therefore he obtained good title from the government agency. This court finds that the suit property was public land with public property and therefore not available for allocation for private purposes.

WHETHER THE 2ND DEFENDANT VALIDLY ALIENATED THE LAND TO THE 1ST DEFENDANT

According to section 2 of the Government Lands Act (Repealed), the following is the definition of unalienated land;

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

Section 3 of the Physical Planning Act, Cap 286 of the Laws of Kenya defines unalienated land in similar fashion.

The court of appeal in **High Court Civil Appeal No. 288 of 2010, Kipsirgoi Investments Limited vs Kenya Anti-Corruption Commission** relied on section 2 of the Government Lands Act and Section 3 of the Physical Planning Act when it found that the suit property was planned as an open space and held that the subsequent lease under section 3 of the GLA was irregular as the land was already alienated.

Under section 3 of the Government Lands Act (Repealed), it states;

3. 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 further states;

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;

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.

The land in dispute was already alienated for public utilities and was fully developed with a High Court Station, district hospital, fire station and administration police Camp and therefore it could not be deemed unalienated. The 2nd defendant therefore had no authority in law to make the alienation and therefore no interest could be conferred upon the 1st defendant. The 1st defendant did not procedurally obtain title as the Suitland was public land. Section 26 states as follows; -

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.

CONCLUSION.

In a nutshell, the 1st defendant un-procedurally obtained title to the properties in issue as the same had been alienated as public land with public utilities and not available for conversion to private land. This court finds that the allocation and issuance of leases to the 1st defendant of land parcel Eldoret Municipality Block 4/129, 4/52,4/53, 4/54 and 4/55 is null and void and incapable of conferring any estate interest or right.

Moreover, that the creation and registration of a charge over those parcels is null and void, that the registration of the 1st defendant as the lessee be and is hereby cancelled

Furthermore, that the charges registered against those land parcels be and are hereby cancelled.

No orders as to costs as there is no evidence of fraud on the part of the 1st defendant. The 2nd defendant who never came to court to give evidence despite being served is liable to pay costs of the suit as he knew or ought to have known that the property was not available for allocation.

Dated and delivered at Eldoret this 11th day of April, 2019.

A. OMBWAYO

JUDGE