



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**

**ELC CASE NO. 423 OF 2015**

**(FORMERLY H. C. C. C. NO. 29 OF 2010)**

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

**VERSUS**

**DR. OBURU ODINGA.....1<sup>ST</sup> DEFENDANT**

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

**JUDGEMENT**

1. The Plaintiff, Kenya Anti-Corruption Commission, commenced these proceedings against Dr. Oburu Odinga and Sammy Komen Mwaita, the Defendants, through the plaint dated 3<sup>rd</sup> March 2010 seeking for the following prayers;

- (a) **"A declaration that the issuance of a Lease by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant over Kisumu Municipality/Block 7/509 was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 1<sup>st</sup> Defendant in the first instance.**
- (b) **A declaration that the registration of the lease and issuance of a Certificate of Lease over Kisumu Municipality/Block 7/509 to the 1<sup>st</sup> Defendant was null and void and ineffectual to confer a good title upon the 1<sup>st</sup> Defendant.**
- (c) **In the alternative to (a) and (b) above, a declaration that the 1<sup>st</sup> Defendant holds registration of Kisumu Municipality/Block 7/509 in trust for the Corporation and that the land register be rectified by deleting the name of the 1<sup>st</sup> Defendant and substituting the name of Kenya Railways Corporation as the proprietor.**
- (d) **An order for rectification of the land register by cancellation of the Lease over Kisumu Municipality/Block 7/509 and Certificate of Lease issued to the 1<sup>st</sup> Defendant so as to restore the suit property to the Corporation.**
- (e) **An order for a permanent injunction against the 1<sup>st</sup> Defendant by himself, his agents, servants or assigns restraining them from leasing, transferring, charging, entering upon, developing, or in any other manner howsoever from dealing with Kisumu Municipality/Block 7/509.**
- (f) **General damages for fraud.**
- (g) **Costs of and incidental to the suit.**
- (h) **Any other or further relief the court may deem fit and just to grant."**

The Plaintiff avers that **Kisumu Municipality/Block 7/509**, the suit land, was at all material times part of a larger parcel of land vested in the General Manager of the defunct East African Railways & Harbours Administration vide L. N. No. 440 of 1963, having been surveyed and assigned L. R. no. 1148/Section LV, and set apart as a Railway reserve. That the parcel was subsequently vested in the defunct East African railways Corporation vide L. N. No. 20 of 1969 issued under the **East African Railways Corporation Act, 1967**. That following the dissolution of the East African Community in 1977, the assets of East African Railways Corporation, including the said parcel, were vested in the Kenya Railways Corporation vide, L. N. No. 24 of 1986 under the Kenya Corporation Act Chapter 397 of Laws of Kenya. That following the investigations carried out by the Plaintiff, they established that in or about 2001, the 1<sup>st</sup> Defendant wrongfully and fraudulently procured from the 2<sup>nd</sup> Defendant a lease over the suit land for private purposes, that was purportedly registered on the 12<sup>th</sup> February 2001, and that a Certificate of lease was issued without the knowledge or consent of the Kenya Railways Corporation. That the action of the 2<sup>nd</sup>

Defendant in issuing the lease was illegal, and that the 1<sup>st</sup> Defendant was vide letter dated 10<sup>th</sup> March 2009 asked to surrender the title documents for the suit land. That the 1<sup>st</sup> Defendant therefore holds the title to the suit land in constructive trust to the Kenya Railways Corporation. The Plaintiff has set out the particulars of the fraud, illegality, knowledge and constructive trust attributed to the Defendants at paragraphs 7, 8, 10 and 13 respectively.

2. The 1<sup>st</sup> Defendant opposed the Plaintiff's claim through his statement of defence filed through M/s Rachier & Amollo Advocates dated the 29<sup>th</sup> March 2010. He avers that he is a bona fide purchaser for value without notice, of the suit land and was unaware of any vesting interest over Kenya Railways Corporation, or its predecessors in title. The 1<sup>st</sup> Defendant denied having wrongfully and fraudulently acquired the suit land from 2<sup>nd</sup> Defendant. The he has been in quiet and uninterrupted possession of the suit land for over ten (10) years and that the suit is an afterthought to embarrass him, and further denied holding it in constructive trust of Kenya Railways Corporation. That the 1<sup>st</sup> Defendant prays for Plaintiff's suit be dismissed with costs.

3. The Plaintiff's claim is also denied by the 2<sup>nd</sup> Defendant vide his statement of defence filed through M/s J. K. Bosek & Company Advocates dated 15<sup>th</sup> March 2010, and filed on the 23<sup>rd</sup> March 2010. The 2<sup>nd</sup> Defendant avers that the suit land was part of the land vested with Kenya Railways Corporation or its predecessors in title, and that he wrongfully and fraudulently allocated it to the 1<sup>st</sup> Defendant for private use. That if the lease was issued as alleged, then it was by virtue of the executive powers of the President, and by the President. That the allocation and registration of the lease were regularly and procedurally done and the suit should be dismissed with costs.

4. The Plaintiff replied to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' statement of defence through their replies dated the 12<sup>th</sup> April 2010 and 29<sup>th</sup> March 2010 respectively, denying that the allocation was done through the Executive authority of, and by the President as claimed by the 2<sup>nd</sup> Defendant. The Plaintiff also denied that the 1<sup>st</sup> Defendant had ever taken possession of the suit land.

5. That the Plaintiff commenced the oral hearing of their case on the 24<sup>th</sup> October 2018 when Hassan Zakalia Mososi, Joseph Kiragu and Dedan Ochieng Okwana, Land Surveyor, Land Administrator and investigator, with Survey of Kenya Department, National Land Commission and Kenya Anti-Corruption Commission, who testified as PW1 to PW3 respectively. PW1, a land surveyor adopted his filed evidence statement and produced the map for the original land reserved in 1935. He also produced the map for Kisumu Municipality/Block 7 where the suit land, parcel 509 appears. The witness also produced the RIM for Kisumu Municipality/Block 7/567 after amalgamation of the Kenya Railways Corporation's land to include the revoked titles. PW2 testified about Kenya Railways Corporation having lodged a complaint that part of their land had been unlawfully allocated, including Kisumu Municipality/Block 7/509. He told how they wrote to the 1<sup>st</sup> Defendant to surrender the suit land's title document for cancellation, and how they followed with issuing a gazette notice revoking the unlawfully allocated parcels, the consolidation that followed resulting to amalgamated parcel 567, that was registered with Kenya Railways Corporation. PW3 took the court through the investigation he and his team carried out tracing the suit land to the 1963 July 12<sup>th</sup> L. N. No. 440 to L. N. No. 24 of 22<sup>nd</sup> February 1986 vesting the suit land to Kenya Railways Corporation. He also testified that their investigations showed that Kenya Railways Corporation had not released the land for reallocation, or approved the allocation of the suit land, to the 1<sup>st</sup> Defendant. He therefore sought that the prayers in the plaint be granted as a certificate of Search on the suit land done on the 17<sup>th</sup> October 2018 indicated the land was still in the 1<sup>st</sup> Defendant's name.

6. The Defendants did not participate in the hearing and did not present any witnesses. That after the Plaintiff closed their case, the court marked the Defendants' case closed. That subsequently the learned Counsel for the Plaintiff filed their written submissions dated the 12<sup>th</sup> February 2019.

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

**a) Whether the suit land constitutes part of the larger land set apart as Railways Reserve and vested in the Kenya Railways Corporation or conversely put, whether the suit land was available for allocation for private purposes.**

**b) Whether the Plaintiff is entitled to damages for fraud.**

**c) Whether the Plaintiff has proved its case on a balance of probability and which relief if any, should be granted.**

**d) Who pays the costs of the suit.**

8. The Court has carefully considered the pleadings filed by both sides, the oral and documentary evidence presented by PW1 to PW3, the written submissions by the Counsel for the Plaintiff and come to the following conclusions;

a) That from the documentary evidence presented to the court, starting with survey Records Map dated 24<sup>th</sup> August 1935 for Railway Reserve, Kisumu Township, Kisumu Municipality/Block 7 Map, capturing among others parcel 509, L. N. Nos 440, 20 and 24 of 12<sup>th</sup> July 1963, 13<sup>th</sup> May 1969 and 22<sup>nd</sup> February 1986 respectively among others, whose contents have not been challenged and or rebutted in any way, the court has no doubt that Kisumu Municipality/Block 7/509, the suit land, was created out of the public land set apart as Railways reserve and vested in Kenya Railways Corporation. That as PW3 confirmed that the Plaintiff's investigation had shown that the Kenya Railways Corporation had not released the land, or approved it for allocation to private purposes, then it was not available for reallocation.

b) That the finding that the suit land was not available for reallocation to private use is confirmed by the testimony of PW2 who told the court on how Kenya Railways Corporation had lodged complaints that part of its land had been carved off and allocated to private persons without its approval. That while the Defendants had averred in their statements of defences that the allocation of the suit land was through the Executive Authority of the President, and therefore lawfully and procedurally done, they failed to tender

evidence in court to challenge the Plaintiff's contentions to the contrary and support their averments or pleadings which remains therefore mere allegations.

c) That it follows from the foregoing that the allocation, and issuance of the Lease over the suit land by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant was beyond the legal and official powers of the 2<sup>nd</sup> Defendant and therefore null and void *ab initio* and ineffectual to confer any rights, interests or title upon the 1<sup>st</sup> Defendant. [See **Kenya Anti-Corruption Commission vs Online Enterprises Limited & 4 Others [2019] eKLR**]. That the Certificate of Lease obtained by the 1<sup>st</sup> Defendant over the suit land upon registration of the lease issued by 2<sup>nd</sup> Defendant is not protected under **Article 40 (6) of the Constitution 2010 and Section 26 (1) of the Land Registration Act No. 3 of 2012**.

d) That flowing from (c) above, the Plaintiff is therefore in order to file this suit as they did, for the purpose of protecting and restoring the suit land to the real title holder, the Kenya Railways Corporation. That the court is empowered by **Article 40 (6) of the Constitution and Section 26 (1) (b) of Land Registration Act No. 3 of 2012** to impugn or impeach the 1<sup>st</sup> Defendant's title to the suit land, and through an order to rectify the register, pursuant to **Section 80 (1) of the Land Registration Act**, so as to restore it to the **Kenya Railways Corporation**.

e) That on the prayer for damages for fraud the court agrees with the finding of Ongudi J in Registered Trustees of the Sisters of Mercy (Kenya) T/A "**Mater Misericordiae Hospital**" vs **John Muriithi & 2 Others [2019] eKLR at paragraph 26** that "... *corruption and fraud are criminal offences and for one to claim for damages based on the same, there must be proof of the said offences before assessment of the damages can be done. In the present case there is no evidence that the Defendants have been charged and/or convicted of any corruption or economic crimes related case. The claim for general damages for corruption and fraud cannot therefore stand.*" That in these proceedings, the evidence tendered shows that no criminal proceedings have been commenced against the Defendants, and or any of the public officers working with either Kenya Railways Corporation or the Ministry responsible for land, registration, physical planning and survey that participated in the processes of allocating and registering the suit land in the name of the 1<sup>st</sup> Defendant. That accordingly the court finds that the Plaintiff has failed to prove the prayer for damages for fraud.

f) That since costs follow the events under **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, and as the Plaintiff has substantially succeeded in their claim, the Defendants will pay the costs of the suit.

9. That the court finds in view of the foregoing, that the Plaintiff has proved its case against both Defendants and Judgment is hereby entered in favour of the Plaintiff in terms of prayers (a), (b), (d), (e) and (g) against the Defendants.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS ....26<sup>TH</sup> ...DAY OF JULY, 2019.**

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Ms. Omieni for the Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**