



**Kenya Railways Corporation v Ali & another; Chief Land Registrar (Interested Party)
(Environment & Land Case 633 of 2015) [2024] KEELC 1814 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 1814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 633 OF 2015**

**OA ANGOTE, J
APRIL 11, 2024**

BETWEEN

KENYA RAILWAYS CORPORATION PLAINTIFF

AND

ADAN INTALO ALI 1ST DEFENDANT

ADAN ABDIRAHMAN HASSAN 2ND DEFENDANT

AND

CHIEF LAND REGISTRAR INTERESTED PARTY

JUDGMENT

Background

1. By way of a Plaint dated 6th July 2015, the Plaintiff instituted this suit and sought the following orders:
 - a. A Declaration that the Plaintiff is the rightful, lawful and valid owner of the suit property being part of Former Kenya Railways Corporation Plant Depot Managers Officers (DPM) Building Off Kitui Road containing by measurement 0.9722 hectares or thereabouts and situated in the city of Nairobi in NAIROBI AREA and now purportedly known as L.R. No. 209/6228.
 - b. A Declaration that the Grant No. IR 105175 issued to Adan Intalo Ali and Adan Abdirahman Hassan is null and void and incapable of vesting any legal title or interest in the Defendants herein.
 - c. A permanent injunction restraining the 1st and 2nd defendants, their agents, servants, employees, assigns or otherwise howsoever from trespassing on the suit property and/or interfering in any way with the Plaintiff's quiet enjoyment, possession and use of the suit property and/or the developments thereon and/or from offering for sale, selling, transferring,



alienating or in any way disposing of the suit property being part of Former Kenya Railways Corporation Plant Depot Managers Office (DPM) Building Off Kitui Road containing by measurement 0.9722 hectares of thereabouts and situated in the city of Nairobi in NAIROBI AREA and now purportedly known as L.R. No. 209/6228.

- d. An order directing the Chief Land Registrar (Interested Party) to cancel Title L.R. No. 209/6228 in the names of Adan Intalo Ali and Adan Abdirahman Hassan.
 - e. Costs.
 - f. Any other reliefs the honorable court may deem fit to grant.
2. The Plaintiff's case is that it is the lawful proprietor of all that piece of land being part of Former Kenya Railways Corporation Plant Depot Managers Office (DPM) Building, off Kitui Road containing by measurement 0.9722 hectares in Nairobi, now purportedly known as L.R. No. 209/6228 (the suit property).
 3. The Plaintiff asserts that it has constructed buildings and other developments on the suit property, which it has leased out to rent-paying tenants, and that at all material times, it has been and continues being in possession of the suit property.
 4. The Plaintiff's claim is that the suit property previously belonged to its predecessor, the East African Railways and Harbours Administration, which acquired the suit property vide Legal Notice No. 440 of 1963 by the then Governor Malcolm McDonald and that the property was later vested in it vide a Legal Notice No. 24 of 1986 by the then Minister of Transport and Communication, in exercise of the powers conferred by the Kenya Railways Corporation (Vesting of Land) Order.
 5. The Plaintiff averred in the Plaint that it subsequently discovered that vide a letter dated 25th August 1998, the Commissioner of Lands, without lawful justification, purportedly issued a letter of offer of allotment of the suit property to the 1st and 2nd Defendants; that on 31st March 2006, it discovered that the Defendants purported to accept the offer of allotment and that on 5th March 2007, the Commissioner of Lands purported to issue the Defendants a Grant in respect of the suit property.
 6. According to the Plaintiff, the purported letter of allotment and acceptance were null and void ab initio; that the alienation did not comply with the mandatory requirements under Section 9 of the Government Lands Act (repealed) and that there was no valid letter of offer of allotment capable of acceptance as the stipulated 30-day period had lapsed before acceptance.
 7. The Plaintiff averred that the Defendants knew that the Plaintiff was the rightful owner of the suit property because on 27th April 2009, the Defendants made an application to it to be considered for issuance of a commercial lease and that the Defendant filed Nairobi CMCC No. 2662 of 2008 praying for the Plaintiff's eviction, alleging that sometime on 1st September 2007, they had discovered some illegal structures on the suit property that were occupied by trespassers.
 8. It was deposed that the parties negotiated an out of court settlement on the terms that the Defendants would surrender the fraudulently acquired title in exchange of a lease to be issued by the Plaintiff and that the Defendants subsequently reneged on this promise.
 9. Through an Amended Statement of Defence dated 10th September 2021, the Defendants averred that the Defendants are the legal and registered proprietors of the suit property. They claim that the suit property being unalienated Government land then, was properly and procedurally allocated to them and that the then Commissioner of Lands had legal and constitutional authority to grant the allocation, process and issue the title to them.



10. The Defendants assert that the Plaintiff only occupied the land as licensees of the Government, which did not require to give the Plaintiff any notice prior to allocation of the land to them as asserted and that any irregularity in the issuance of the title to them could only be answered by the Government but cannot defeat their title.
11. According to the Defendants, CMCC No. 2662 of 2008 was filed by them to gain vacant possession of the suit property from trespassers, who had been hoodwinked to believe that the land belonged to the Plaintiff; that in recognition of their title, the Plaintiff offered to negotiate with the trespassers to move out, hence withdrawal of the suit and that as the legal owners of the suit property, they have every right to deal with the land as they deem fit.
12. In their counterclaim, the Defendants averred that they are the registered proprietors of the suit property; that the suit property is a leasehold for a term of 99 years from 1st September 1998 from the Government of Kenya, and that they were allotted the same through a letter of allotment dated 25th August 1998.
13. It is their case that the Plaintiff trespassed into the suit property and carried out some developments without their consent; that upon realizing the situation on the ground, they filed CMCC No. 2662 of 2008, whereby they obtained eviction orders against third parties illegally leasing the property from the Plaintiff; and that the suit was withdrawn after assurance that the Plaintiff will facilitate their exit from the suit property.
14. The Defendants averred that the Plaintiff has continued to benefit from profits from the illegal structures to their detriment. The Defendants therefore seek judgement against the Plaintiff for:
 - i. An order of eviction against the Plaintiff, his agents, servants, employers and/or assignees from land parcel known as L.R. Number 209/6228.
 - ii. An order of permanent injunction against the Plaintiff, his agents, servants, employees or assignees from trespassing, possessing, entering, developing, alienating, transferring and/or disposing off in any way land parcel L.R. No. 209/6228.
 - iii. An order for recovery of mesne profits from the Plaintiff from 15th March 2007 until vacant possession is granted to the Defendants.
 - iv. Costs of this suit.
15. In their Defence to the Counterclaim, the Plaintiff denied that the suit property was unalienated government land and reiterated that the land was vested upon it in 1986 by the then Minister for Transport and Communication and that the allotment to the Defendants was void ab initio as the purported alienation and allotment did not comply with the requirements of the Government Lands Act.
16. The Plaintiff averred that it has been in possession of the suit property since 1963. It denied that it had made any promises to the Defendants with respect to CMCC No. 2662 of 2008, and averred that the Defendants abandoned the case on their own motion.

Hearing and Evidence

17. The Plaintiff's witness, the Principal Land Surveyor, PW1, relied on his witness statement dated 15th June 2022, in which he reiterated the facts of the case as set out in the Plaint. PW1 produced a bundle of documents dated 16th November 2018 as PEXB1.



18. It was the evidence of PW1 that they have documents showing that the land was vested in the Plaintiff in 1963 even before the legal notice was issued; that they only realized that the land was allocated to the Defendants around 1990 and that other than the legal notice, the Plaintiff had drawings done in 1957 for the developments on the land.
19. It was the evidence of PW1 that the documents show that the Plaintiff has always been on the land and that they have a survey plan for LR No. 209/6228 in their favour and the lease document between the Plaintiff and a tenant Echo Kenya Ltd dated 12th June 2007.
20. The 1st Defendant, DW1, relied on his statement dated 26th February 2018 and the documents filed on 31st May 2018 which he produced as DEXB1. He testified that they were given an allotment letter in 1998 and that they paid for the land in 2006 and the title was issued to them in 2007. According to DW1, he paid all the requisite land rent and rates, which were accepted by the Commissioner of Lands.
21. In cross-examination, he clarified that the witness statement was signed by the 2nd Defendant, who was sick; that he did not have in his possession a Part Development Plan (PDP); that he did not have the letter of allotment and that he never took possession of the land because the Plaintiff has put squatters on the land.
22. According to DW1, he withdrew the earlier case based on advise to negotiate the matter; that the Plaintiff offered them a 50 year lease in exchange for the title and that the Plaintiff filed this suit after the 1st Defendant signed the lease.

Submissions

23. Counsel for the Plaintiff submitted that pursuant to Section 3 of the Government Lands Act, the President could make grants only in respect of unalienated government land; that the suit property was not unalienated at the time of its purported allotment to the defendants in 1998 and that the suit property being within the Industrial Area of Nairobi was part of a township and the provision of Section 9 of the Government Lands Act was applicable, which provides that only land which was not required for public purposes could be allotted.
24. Counsel relied on Kenya Industrial Estates Limited vs Anne Chepsiror & 5 Others [2015] eKLR, where the court held that Government land that is held by institutions and in towns is meant for use of the public and such land could not be allocated to private individuals. Counsel relied on the Court of Appeal cases of Nelson Kazungu Chai & 9 Others vs Pwani University College [2017] eKLR and Munyu Maina vs Hiram GathihaM Aina [2013] eKLR and the Supreme Court case in Dina Management Limited vs County Government of Mombasa & 5 Others.
25. With respect to the Defendant's title, the Plaintiff's Counsel submitted that the Commissioner of Lands did not follow the procedure laid down in Part III (Disposal of Lands within Townships) of the Government Lands Act. He submitted that there was no gazettelement of the place and time of sale of the suit property, and that there must have been a Part Development Plan before the land could be allocated as was held in Nelson Kazungu Chai & 9 Others vs Pwani University College [2017] eKLR.
26. The Defendant's counsel submitted that in accordance with Sections 107, 108 and 109 of the [Evidence Act](#), whoever asserts a legal right or liability is vested with the burden to prove; that the burden of proof lay on the Plaintiff to prove the allegations of fraud and that the suit property was not available for allocation.
27. The Defendants' counsel submitted that the suit property was not public property neither was it reserved for public purposes; that the land was at all material times available for alienation or allotment



- to the Defendants and that the Plaintiff failed to exhibit any title documents to demonstrate that it had proprietary rights over the suit property.
28. Counsel argued that the legal notices adduced by the Plaintiff are not proof of ownership of the suit property, and that had there been an order vesting the suit property in the Plaintiff, it would have been lodged for registration in the official register of the suit property.
 29. Counsel submitted that the Leases exhibited by the Plaintiff are disputed as the Leases were not stamped in accordance with Section 19 of the *Stamp Duty Act* and cannot be used as evidence; that the Lease Agreements were not duly registered in violation of Clause 4 of the *Registration of Documents Act*; and that the Leases are neither dated, nor do they make a reference to the suit property. Counsel relied on the case of *South Nyanza Sugar Co. Ltd vs Shadrack Manga* [2020] eKLR.
 30. It was Counsel's submission that the Land Secretary at the Ministry of Land, Housing & Urban Development confirmed that the suit property was allocated to the 1st and 2nd Defendants and that the Defendants accepted the terms, paid the requisite fees and a grant was processed, executed by the Commissioner of Lands on 5th March 2007 and registered at the land titles registry.
 31. Counsel submitted that the Plaintiff failed to show that the Defendants fraudulently colluded to acquire public property. He relied on the Court of Appeal case of *Kuria Kiarie & 2 Others vs Sammy Magera* [2018] eKLR.
 32. Counsel also contended that the Defendants' title was indefeasible being the first registration, and was protected under Section 26 of the *Land Registration Act* and Section 23 of the Registration of Titles Act (now repealed). He relied on the cases of *Wreck Motor Enterprises vs Commissioner of Lands & 3 Others* [1997] eKLR and *Gladys Wanjiry Ngacha vs Teresa Chepsaat & 4 Others* [2008] eKLR.

Analysis and Determination

33. Upon consideration of the pleadings, evidence and submissions of the parties herein, the following issues arise for determination:
 - a. Whether the suit property was lawfully vested in the Plaintiff
 - b. Whether the Commissioner of Lands lawfully allotted the suit property to the Defendants.
34. The fundamental question underlying this suit is who, between the Plaintiff and the Defendants, is the true and legitimate owner of the suit property. The Plaintiff has asserted that the property was vested in its predecessor, the East African Railways and Harbours Administration, vide Legal Notice No. 440 of 1963 by then Governor Malcolm McDonald.
35. According to the Plaintiff, the suit property was later vested in the Plaintiff vide a Legal Notice No. 24 of 1986 by the then Minister of Transport and Communication, in exercise of powers conferred to him by the Kenya Railways Corporation (Vesting of Land) Order.
36. The Plaintiff has challenged the letter of allotment dated 25th August 1998 issued to the Defendants by the Commissioner of Lands. The Plaintiff has argued that the suit property was not unalienated government land available for allotment; that the payment of stand premiums and charges indicated in the letter of allotment were not made within 30 days, and that the Defendants' acceptance of the offer was therefore void and the title issued to them was unlawful.
37. The Defendants, on the other hand, claim that the letter of allotment was lawfully issued to them and that they duly satisfied the conditions set out in the letter of allotment and obtained indefeasible title upon their registration as the proprietors of the suit property.



38. In the counterclaim, the Defendants assert that the Plaintiff has built illegal structures on the suit property and continues to enjoy profits by renting the said structures. The Defendants have sought for eviction orders and for an order of recovery of mesne profits from the Plaintiff.
39. The Kenya (Vesting of Land) Regulations 1963, published as Legal Notice No. 40 of 1963 vested certain parcels of land in the General Manager of the East African Railways and Harbours Administration. Schedule 1 of the Regulations prescribed that:
- “ All land which immediately before the 1st June 1963 either was unalienated Crown Land or was vested in the Trust Land Board, and which was then in use, or reserved for use, by the East African Railways and Harbours Administration for-
- (a) Premises used for the administration and control of the services provided by the Administration;
 - (b) Railway lines (including marshalling yards and sidings);
 - (c) Railway stations;
 - (d) Workshops and training schools;
 - (e) The operation of ports and harbours including the berths, wharves, piers, jetties and other installations comprised therein;
 - (f) The navigation of vessels, and aids thereto, in respect of any part or harbour, together in each case with the curtilage thereof or other land then enjoyed therewith.”
40. The question is then whether the suit property, L.R. No. 209/6228, fell under the above classification. The Plaintiff has presented Drawing Plans No. 7977 for East African Railways and Harbours Nairobi Industrial Area Signals and Telegraphs workshops dated 18th June 1957; Drawing No. 8918/1 dated 27th April 1960 and a Deed Plan of the suit property dated 13th October 1961, identifying the suit land as L.R. No. 209/6228. The Deed Plan clearly indicates that there were buildings and structures on the suit property.
41. It is apparent from the mentioned drawing plans and deed plan that the suit property, at the date of publication of the Legal Notice No. 440 of 1963, was surveyed land, which was reserved for use and was indeed being utilized as the Industrial Area Signals and Telegraphs Workshop for the East African Railways and Harbours. The suit property was therefore lawfully vested in the East African Railways and Harbours through Legal Notice No. 440 of 1963.
42. The suit property was later vested in the Plaintiff by operation of the Kenya Railways (Vesting Land) Order 1986 contained in legal Notice No. 24 of 1986 which replaced and revoked vesting of Land Regulations 1963 (L/N440/1963). This court is thereby satisfied that the title with respect to the suit property was lawfully vested in the Plaintiff, which has occupied the same since 1957.
43. Having found that the suit property was lawfully vested in the Plaintiff, the issue that arises is whether the said land was available for allocation to the Defendants, or at all in 1998.
44. It is not disputed that the Commissioner of Lands issued to the Defendants a letter of allotment dated 25th August 1998. The Defendants’ claim is that the suit property was unalienated Government land, which was properly and procedurally allocated to them. In addition, it was the argument of the



Defendants that the Commissioner of Lands had the legal and constitutional authority to grant the allocation, process and issue the title to the Defendants.

45. The Plaintiff has asserted that the suit property was at that time already alienated to it and was therefore not available for further alienation to the Defendants its their consent. This court is in agreement with that legal and factual position.
46. Indeed, as at 13th October 1961, the suit property was already allotted a land reference number, and was in active use by the Plaintiff's predecessor. The process of alienating government land is well articulated in the case of Nelson Kazungu Chai & 9 Others vs Pwani University College (2014) eKLR where this court held as follows:

“It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a Certificate of Lease. This procedural survey was confirmed by the Surveyor, PW3. The process was also reinstated in the case of African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:

“Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot.”

47. The letter of allotment adduced by the Defendant indicates that it is with respect to L.R. No. 209/6228. The letter of allotment does not indicate the Part Development Plan (PDP) subject to which it is made, nor was any PDP adduced in evidence by the Defendants.
48. The unavailability of the suit property for allocation, the same having been reserved for the Plaintiff on or about 1957 is supported by the case of Kenya Industrial Estates Limited vs Anne Chepsiror & 5 Others [2015] eKLR where the court held that:

“There is a reason why the Government holds certain land and does not give it away to private individuals. There is also a reason why the Government assigns certain land to its own institutions. These institutions could be State Corporations, Schools and other educational institutions, or hospitals. Such land is meant for use by the public. It could be land for recreational purposes, or land reserved for a school or hospital, or a road, or for research purposes, or to maintain a forest. In so far as town plots are concerned, it is my view that unless such land ceased to serve a public function, then such land, could not be issued to private individuals. That to me, is the import of the provisions of Section 9 of the GLA which was drawn as follows :-

GLA S. 9. The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner (emphasis mine).

53. There would be no legitimate reason, to hand over to private hands, land which is still required for a public purpose or which is held and occupied by a public institution for a public purpose. If public land had to revert to private hands, then the procedure of offering the said land by way of public auction had to be



followed. But even then, the Commissioner of Lands ought not to have offered such land to private individuals if the public purpose for which the land was reserved still existed. That position has been affirmed by various decisions. In the recent case of Republic v Commissioner of Lands & 4 others ex parte Associated Steel Limited, High Court at Nairobi, Misc. Civil Suit No. 273 of 2007, (2014) eKLR, there was a dispute on whether certain land that had been allocated to a private individual was a public road. The court held that the land was a public road and was therefore not available for allocation or alienation. The court held that in order to convert the public utility to private hands, the Commissioner of Lands needed to follow the provisions of Sections 12 and 13 of the GLA and further hold consultations from all stakeholders. It held that the Commissioner of Lands held the land as trustee on behalf of the public and affirmed as follows :-

“It is thus our holding that the disputed plot having already been set aside as a public utility plot the same was held in trust by the 1st respondent (Commissioner of Lands) for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot.”

49. The upshot of the above is that the Commissioner of Lands did not lawfully allot the suit property to the Defendants because the same was not unalienated government land.
50. In conclusion, this court has found that the Plaintiff has established that the suit property was vested in itself, and that the title to the Defendants was irregularly issued. The Plaintiff's suit has therefore succeeded and the Defendants' Counterclaim has failed in toto.
51. For those reasons, the court makes the following orders:
 - a. A Declaration be and is hereby issued that the Plaintiff is the lawful owner of the suit property being L.R. No. 209/6228.
 - b. A Declaration be and is hereby issued that the Grant No. IR 105175 issued to Adan Intalo Ali and Adan Abdirahman Hassan is null and void and incapable of vesting any legal title or interest in the Defendants herein.
 - c. A permanent injunction be and is hereby issued restraining the 1st and 2nd Defendants, their agents, servants, employees, assigns or otherwise howsoever from trespassing on the suit property and/or interfering in any way with the Plaintiff's quiet enjoyment, possession and use of the suit property and/or the developments thereon and/or from offering for sale, selling, transferring, alienating or in any way disposing of the suit property being L.R. No. 209/6228.
 - d. An order be and is hereby issued directing the Chief Land Registrar (Interested Party) to cancel Title L.R. No. 209/6228 in the names of Adan Intalo Ali and Adan Abdirahman Hassan.
 - e. Costs of the suit and the counter claim to be paid by the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF APRIL, 2024.

O. A. ANGOTE

JUDGE

In the presence of;



Mr. Ndambuki for Defendants

No appearance for Plaintiff

Court Assistant: Tracy

