



**Ethics and Anti-Corruption Commission v Okum & another (Environment & Land Case 31 of 2018) [2024] KEELC 7232 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7232 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 31 OF 2018  
E ASATI, J  
OCTOBER 24, 2024**

**BETWEEN**  
**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**  
**AND**  
**PATRICK MAHULO OKUM ..... 1<sup>ST</sup> DEFENDANT**  
**SAMMY KOMEN MWAITA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. By the plaint dated 22<sup>nd</sup> June 2018 the Ethics and Anti-Corruption Commission, the Plaintiff, sued the Defendants herein for the recovery of a parcel of land known as Kisumu Municipality Block 12/422, herein called the suit land. The plaintiff sought for the following relief: -
  - a. A declaration that the allocation and issuance of lease over land parcel number Kisumu Municipality Block12/422 by the 2<sup>nd</sup> Defendant and subsequent transfer to the 1<sup>st</sup> Defendant is null and void ab initio and incapable of conferring any estate, interest or right.
  - b. An order that the registration of lease over land parcel number Kisumu Municipality Block12/422 and all entries subsequent thereto be and is hereby cancelled.
  - c. An order that the registration of the 1<sup>st</sup> Defendant as lessee of land parcel number Kisumu Municipality Block 12/422 be and is hereby cancelled.
  - d. A mandatory injunction directing the 1<sup>st</sup> Defendant, his servants, agents or assigns to vacate land parcel number Kisumu Municipality Block 12/422 forthwith.
  - e. A permanent injunction to restrain the 1<sup>st</sup> Defendant by himself, his agents, servants, assignees or any other person whatsoever from charging, trespassing, leasing, wasting entering,



developing, sub-dividing, occupying and/or dealing in any manner with land parcel number Kisumu Municipality Block 12/422.

- f. Costs of this suit.
2. In response to the Plaintiff's claim the 1<sup>st</sup> Defendant filed the 1<sup>st</sup> Defendant's Statement of Defence dated 14<sup>th</sup> August, 2018.
- The 2<sup>nd</sup> Defendant filed no response to the Plaintiff's claim.

### **Concise Statement of the Case**

3. The Plaintiff's case as can be gathered from the plaint and the evidence adduced by the plaintiff is that the suit land originated from land parcel known as Kisumu Municipality Block12/302 at Milimani area of Kisumu County being one of the pieces of land planned and reserved for government housing. That land parcel number Kisumu Municipality Block12/302 was at some point sub-divided to create, inter alia, parcel number Kisumu Municipality Block12/419. That on 10/2/1999 parcel number Kisumu Municipality Block12/419 was illegally and/or irregularly sub-divided to create parcel numbers Kisumu Municipality Block12/420, 421, 422 and 423. That on 23<sup>rd</sup> February 1999 the 2<sup>nd</sup> Defendant caused to be issued a Letter of Allotment for an un-surveyed Residential plot in Kisumu Municipality measuring 0.15 Hectares despite the fact that the property was at all material times planned and set aside for use as a public utility reserved for government housing. Further that on 18<sup>th</sup> April, 2000, the 2<sup>nd</sup> Defendant fraudulently and/or illegally caused a lease to be issued over the suit land measuring 0.3665 acres and comprising of Government House No. KISU/HOU/HG/3 which was built in 1961 to be registered in favour of Raymond Ndong pursuant to the Allotment Letter. That on or about 26<sup>th</sup> April, 2000 barely one week after the lease was issued the suit land was registered in the name of 1<sup>st</sup> Defendant as proprietor pursuant to a transfer by the said Raymond Ndong (now deceased).
4. It was the plaintiff's case that the issuance of lease by the 2<sup>nd</sup> Defendant in favour of the deceased, Raymond Ndong, and the subsequent transfer and registration of the same in the name of the 1<sup>st</sup> Defendant was fraudulent and illegal. The plaintiff contended that alienation of government land in contravention of the law is null and void ab initio and could not be cured by validation and urged the court to grant the relief sought.
5. The Case of 1<sup>st</sup> Defendant, as can be gathered from the 1<sup>st</sup> Defendant's Statement of Defence and the evidence placed before court, is that the process of alienation of L.R. No. Kisumu Municipality Block 12/422 was initiated, carried out and completed with the full and active participation of the relevant Agencies, Ministries and Departments of the Government of the Republic of Kenya. That the relevant, necessary and required steps in the process of alienation of the said parcel of land were taken/ carried out and all the terms and conditions for the exercise met, complied with and/or obeyed. That the 1<sup>st</sup> Defendant is an innocent purchaser of the suit land for the valuable consideration in an overt market without notice, whose title to the same is indefeasible. That under the statutes, previous and/or current, the 2<sup>nd</sup> Defendant was an agent, servant and/or employee of the Government of the Republic of Kenya duly executing his mandate/authority/power. That the Plaintiff has instituted the suit out of malice, ill-will and spite. That the Government and its agents including the plaintiff herein were estopped from denying their actions, commissions and or deeds which led to the alienation of the suit property in favour of the 1<sup>st</sup> Defendant. That the suit was sub-judice, res judicata, and unconstitutional. The 1<sup>st</sup> Defendant denied the plaintiff's claim and urged the court to dismiss the suit.



## **The Evidence**

6. On behalf of the plaintiff, 5 witnesses testified and produced exhibits. And on behalf of the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant testified and produced exhibits. Their evidence will be analyzed and referred to in the analysis and determination herein. No evidence was adduced by the 2<sup>nd</sup> Defendant.

## **Submissions**

7. At the close of the evidence Counsel for the plaintiff and the 1<sup>st</sup> Defendant filed written submissions on the case pursuant to directions given on 31<sup>st</sup> January 2024. Written submissions dated 3<sup>rd</sup> April, 2024 were filed on behalf of the plaintiff by Koskey Robert Kimutai Bii Advocate for the plaintiff. Written submissions dated 19<sup>th</sup> March 2023 were filed by Richard B.O Onsongo Advocate for the 1<sup>st</sup> Defendant. I have read and taken into account the detailed submissions.

## **Points for Determination**

8. From the pleadings filed, the evidence adduced and the submissions made, the following emerge as the points for determination herein: -
  - a. Whether or not the suit is res judicata.
  - b. Whether or not the suit land was public property.
  - c. Whether or not the allotment of the suit land to Raymond Ndong, deceased, and subsequent transfer thereof to the 1<sup>st</sup> Defendant was fraudulent and irregular.
  - d. Whether or not the lease held by the 1<sup>st</sup> Defendant was validated by government.
  - e. Whether or not the plaintiff is entitled to the relief sought.
  - f. What orders to make on costs of the suit.

## **Analysis and Determination.**

9. Order 21 Rule 4 Civil Procedure Rules requires that judgments in defended suits consist of the issues for determination, the decision on each issue and the reasons for the decision.
10. The first issue for determination is whether or not the suit is res- judicata.
11. The 1<sup>st</sup> Defendant in paragraph 5(1) of his defence pleaded that one of the particulars of malice, ill-will and spite on the part of the plaintiff in filing the suit is that the plaintiff instituted the suit without disclosing that the suit land namely Kisumu Municipality Block 12/422, had been the subject matter in Kisumu HCCC No. 233 of 2000 and Kisumu ELC Misc Application No. 5 of 2017. In paragraph 8 of the same defence the 1<sup>st</sup> defendant gave notice of intention to raise a preliminary point of law against the entire suit on the grounds, inter alia, that the suit was res judicata.
12. It was submitted on behalf of the 1<sup>st</sup> defendant that the suit as well as Kisumu HCCC No. 233 of 2000(the former suit) relate to the same parcel of land namely; the suit land herein. That the 1<sup>st</sup> Defendant was the plaintiff in the former suit and that the issue of ownership of the suit land was determined. That the material placed before this court and the evidence by the witnesses show that all the elements of res judicata have been met. That the plaintiff seeks to revisit the decision of the High Court in Kisumu HCCC No. 233 of 2000 and hence the plaintiff is asking the court to sit on appeal against its decision in a former suit.



13. Counsel relied on the case of John Florence Maritime Services Limited & Another -vs- Cabinet Secretary for Transport and Infrastructure and 3 others (205) eKLR where the court of Appeals held that; -

“...the ingredients of res judicata are firstly, the issue in dispute in the former suit between the same parties must be directly and substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be between the same parties or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally.”

14. Document number 16 on the plaintiff's list of documents dated 22<sup>nd</sup> June 2018 was the plaint in Civil Suit Number 233 of 2000 in the High Court at Kisumu. Perusal of the plaint shows that the plaintiff in the former suit was the 1<sup>st</sup> Defendant herein and the Defendant one Benson O. Akungo. The subject matter was land parcel Known as Kisumu Municipality Block 12/422 the suit land herein. The prayers sought were eviction of the Defendant from the suit land, mesne profits and costs of the suit. Document No. 22 in the plaintiff's list of documents was a court order in the former suit which read in part: -

“... Upon reading the Judgment it is hereby ordered: -

- a. The Defendant be evicted from plot No. Kisumu Municipality Block 12/422
- b. That the Defendant do pay mesne profits of Kshs 8,500/= per month from May 2000 until the date of eviction and surrender the said parcel of land in vacant possession.
- c. That costs and interest on (b) above.”

15. On cross examination in the present suit, PW5 admitted the existence of the suit and the outcome thereof.

16. The ingredients of the doctrine of res judicata are spelt out and explained in section 7 of the Civil Procedure Act which provides that; -

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”

17. Perusal of the plaint in the former suit shows that the government or government agency was not a party. The Defendant in the former suit was sued in his individual capacity as a person who had trespassed onto the suit land and who needed to vacate and /or be evicted so as to give the plaintiff (1<sup>st</sup> Defendant herein) liberty to renovate the house on the suit land. The Defendant in the former suit is not a party herein. In the present suit, the plaintiff seeks to recover land (the suit land) that is alleged to have been illegally, irregularly or fraudulently transferred and registered in favor of the 1<sup>st</sup> Defendant.

18. Some of the documents produced by the plaintiff show that indeed the Summons to Enter Appearance and plaint in the former suit were forwarded to the government by Mr. Benson O. Akungo. They also show that the Defendant in the former suit sought legal assistance or intervention from the



government. See exhibits p.40 and p.41. But the government did not get involved in any way in the former suit.

19. My finding is that although the former suit concerned the suit land in the present suit and although the 1<sup>st</sup> defendant in the present suit was a party in the former suit further, that although the court that heard the former suit was competent to do so and did give a final decision, the ingredients of res judicata have not been demonstrated. This is because the issues in dispute are different, the parties are not the same and the cause of action is different.

The next issue is whether or not the suit property was public land.

35. The Plaintiff's case as pleaded in paragraphs 5, 6 and 7 of the plaint is that the suit land was a product of an unlawful sub-division of land parcel No. Kisumu Municipality Block12/419 which in turn was a produce of sub-division of land parcel No. Kisumu Municipality Block12/302 which was public land planned, reserved and used for government housing. It was submitted on behalf of the plaintiff that the suit property was public land reserved for public utility and was being used as such as at the time of the purported allocation. That the allottee one Raymond Ndong, deceased, had acknowledged in exhibit P.1 that the suit land was government land. That in the absence of a Part Development Plan (PDP) the allocation to the deceased was not even envisioned and planned for by the physical planning Department and that the assertion that the department confirmed the availability of the land is untrue. Counsel referred the court to the pleadings in the plaint on how the land morphed from Kisumu/ Municipality Block 12/302 to the present suit land.
36. PW5 who is an investigator with the plaintiff testified that the land now constituting the suit property was reserved for the use of public servants and had a government house thereon occupied by a public officer one Benson Akungo who was a Provincial Physical Planner. Counsel for the plaintiff submitted that the suit land was reserved for public utility. He relied on exhibit P 1, 19, 20, 21 and 24 on this point.
37. Exhibit p.1 is the application by Raymond Oloo Ndong for allocation of a plot L.R No. 12/302 Kisumu which he identified as government land. The application was dated 22/5/1997. The remarks on exhibit p.1 show that it was approved on 30/10/1997.
38. I have considered the evidence and the submissions on this issue. The plaintiff's case was that the suit land was a product of sub-division of a land parcel known as Kisumu Municipality Block12/302 that was government land. That the land was sub-divided to ultimately create the suit land and other parcels. This was not contested. Under the Governments Lands Act, now repealed, government land was defined as "land for the time being vested in the government by virtue of sections 204 and 205 of *the Constitution* (as contained in schedule 2 to the Kenya Independence order council (1963) and sections 21, 22, 25 and 26 of *the Constitution* of Kenya (amendment) Act 1964."
39. The original allottee Mr Raymond Ndong did acknowledge in his application for allotment that the land was public land and applied for allocation of the same.  
I find that the suit land was originally public land.
40. The next issue for determination is whether or not the allotment of the suit land to Raymond Ndong, deceased, and the subsequent transfer thereof to the 1<sup>st</sup> Defendant was fraudulent and irregular.
41. The Plaintiff pleaded in paragraph 9 of the plaint that on 23<sup>rd</sup> February 1999 the 2<sup>nd</sup> Defendant caused to be issued a Letter of Allotment for un-surveyed Residential plot- Kisumu Municipality measuring 0.15 hectares despite the fact that the property was at all a material time planned and set aside for use a public utility reserved for Government housing. That the Letter of offer had attached conditions which included acceptance and payment of various costs by way of Banker's Cheque within 30 days.



That Raymond Ndong purportedly accepted the letter of offer through a letter dated 10<sup>th</sup> April, 2000 which was more than 1 year 2 months from the date of the letter of offer.

42. In paragraph 12 of the plaint the plaintiff pleaded that the 1<sup>st</sup> Defendant entered into an agreement with Raymond Ndong on 18<sup>th</sup> February 2000 for the purchase of Raymond Ndong's interest in the un-surveyed residential plot- Kisumu Municipality measuring 0.15 hectares being of part of Kisumu/ Municipality Block 12/302 knowing very well that he had no transferable interest. That on 18<sup>th</sup> April 2000, the 2<sup>nd</sup> Defendant fraudulently and/or illegally caused a lease to be issued over the suit land measuring 0.3665 acres and comprising of government house No. KISU/HOU/HG/3 to be registered in favour of Raymond Oloo Ndong. That the 1<sup>st</sup> Defendant was registered as proprietor of the suit land pursuant to a transfer by the Raymond Ndong.
43. The plaintiff further pleaded in paragraph 16 of the plaint that the property was not available for alienation to Raymond Ndong or to any other person and that the issuance of lease to Raymond Ndong and transfer to the 1<sup>st</sup> Defendant was fraudulent illegal, null and void. The particulars of fraud on the part of Raymond Ndong and the 2<sup>nd</sup> Defendant were itemized as: -Raymond Ndong misrepresented that the land was available for alienation.purporting to accept the offer of the suit property and make payments after the offer lapsed.conspiring to alienate the suit property with knowledge that it was not available for alienation.aliens the suit property without establishing its actual status.aliens government land with knowledge that the same had been planned for public purposes.acquiring government land with knowledge that the same had been planned for public purpose.acquiring the suit property with knowledge that it was alienated.acquiring the suit property with knowledge that it was reserved for public purposes.falsifying records to facilitate alienation of public property.falsifying record to facilitate acquisition of public property.that the defendant knew of to have known that the suit property was reserved for public purposes and was therefore unavailable for alienation.that the 2<sup>nd</sup> defendant willfully or recklessly failed to make such inquiries as an honest and reasonable man in his position could make to satisfy himself that he was acting in further name of a fraud.
44. Particulars of illegality on the part of the 1<sup>st</sup> defendant were itemized as
  - unlawfully acquiring public property,
  - dealing with suspect property,
  - procuring transfer of the suit property to himself without the consent of the Commissioner of Lands in contravention of the terms of the lease.
45. The particulars of illegality on the part of the 2<sup>nd</sup> defendant were itemized as: -alienating the suit property in blatant disregard of the law governing alienation of government land.aliens government property without following the laid down procedures for conveying and carrying our boards of survey on disposal of government buildingpurporting to exercise power that he did not havepurporting to allocate land that was not available for alienationfailing to have regard to public interest in alienating the suit propertyalienating land without regard to the physical planning Act.aliens land without regard to the existing approved part development planusing his office to improperly confer a benefit to the said Raymond Ndongunlawfully disposing of public propertyarbitrarily alienating government land in abuse of his office to the prejudice of the government.
46. The 1<sup>st</sup> Defendant's position was that he acquired the suit land lawfully. He testified that he is the current registered owner of the suit land which he purchased from Raymond Ndong. The sale agreement was produced as exhibit p. 14.



47. That upon purchase, Raymond Ndong surrendered to him copies of letter of Allotment dated 23/2/1999, lease with a deed plan and the Original certificate of lease.
48. That the land was transferred in his favour upon payment of the requisite charges. That a certificate of official search issued to him on 25<sup>th</sup> April, 2000 showed that he was duly registered as owner and proprietor of the suit land.
49. I have considered the pleadings, the evidence and the submissions on this point. The court has already found that the suit land was originally government land.
50. Although the plaintiff pleaded that the sub-division of the land that created the suit land was unlawful, no evidence was tendered as to the unlawfulness of the sub-division and whether or not Raymond Ndong took part in the said unlawful sub-division
51. PW5 who was the plaintiff's officer tasked to investigate the matter stated in his witness statement dated 18/4/2018 that Raymond Ndong deceased had applied to the Commissioner of Lands to be allotted plot L.R No. 12/302 located at Kisumu and that on 18/2/2000 Raymond Ndong entered into a Memorandum of sale with the 1<sup>st</sup> defendant for sale of a portion of allotment reference number Kisumu Municipality Block 12/302 on Tom Mboya Drive Milimani for Ksh 2, 500,000/= It is common ground that the 1<sup>st</sup> defendant acquired the suit land from one Raymond Ndong by way of purchase.
52. The plaintiff challenges the lease held by Raymond Ndong deceased on two grounds:
53. Firstly, that the suit land being public land was not available for allocation to Raymond Ndong as the same was alienated and designated for public utility namely; for government housing.
54. Secondly, that Raymond Ndong, deceased did not comply with the special conditions in the allotment letter dated 23<sup>rd</sup> February 1999 which allotment letter lapsed hence the lease issued to him was irregular.
55. On whether or not the land was available for allocation, Counsel for the plaintiff submitted that the property was government property. That the drawing attached to Mr. Ndong's application for allocation of land was a mere drawing and does not constitute a Part Development Plan (PDP). That in the absence of a PDP allocation was not even envisioned and planned for by the physical planning department and that the assertion that the department confirmed availability of the land was untrue. That the property was reserved for the Ministry of Housing and in actual use by public officers, the physical planning planner Mr. Benson Akungo.
56. It is not denied by the 1<sup>st</sup> Defendant that there was a house on the suit land and that the house was at some point occupied by one Benson Akungo whom the 1<sup>st</sup> Defendant had to sue and obtain eviction orders so as to be able to gain vacant possession. However, no evidence was adduced that the suit land was reserved for public utility and therefore unavailable for alienation. From the documents produced by the plaintiff it appears the government was yet to plan and allocate the parcel of land. For instance, exhibit p.19 was a letter written by R.K Mbwagwa to the permanent Secretary Ministry of Housing dated 29/8/2000 ref. PPP/9/5/VII/ (32). In the letter the author acknowledged that efforts were being made to have the land planned, allocated and registered in favour of government but that their efforts were overtaken by events and the land had already been registered in the name of Raymond Ndong who had subsequently caused the plot to be transferred in favour of Patrick Mahulo Okumu, the 1<sup>st</sup> defendant herein. The letter confirmed that the plot was allocated by the Commissioner of Lands who may have done so without knowing that there was a government house on it.



57. Further exhibit P. 20 is a letter by the permanent secretary Ministry of Lands to the Director KACA dated 7<sup>th</sup> April, 2000. The letter indicated partly that the author thereof had asked the Director of Physical planning under separate cover to prepare a PDP to facilitate preparation of a title deed in favour of the permanent secretary Ministry of Finance to hold it on behalf of government. The letter also confirmed that Mr. Raymond Ndong had earlier secured approval for allocation of land and that the Commissioner of Lands in his wisdom had decided to allocate him only 0.27 Hectares which excluded the government house.
58. These documents and the entire of the plaintiff's evidence do not show that the land was already alienated and set aside. I find no evidence in support of the plaintiff's assertion that the land was unavailable for alienation or allocation.
59. On whether or not there was compliance with the special conditions in the allotment letter and the lease, the allocation of the suit land and issuance of the lease to Raymond Ndong happened before promulgation of *the Constitution* of Kenya 2010. Hence the law governing the transactions was the former Constitution, the Government Lands Act, now repealed, and the Registration of Title Act. Section 4 of the Government Lands Act provided that: -
- ‘All conveyances, lease and licenses of or for the occupation of Government Lands and all proceedings, notices and documents made taken, issued or drawn shall serve as otherwise provided be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act’
60. Section 3 and 9 placed the power to allocate public land in the President and the Commissioner of Lands respectively. Section 9 empowered the Commissioner of Lands to:
- “Cause any portion of a township which is not required for public purpose 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” “township” was defined in section 2 of the Act to mean ‘Municipality or any area reserved for a township’
61. Section 10, 11, and 12 provided for the duration of the interest that could be allotted in public land and the procedure of the allotment or disposal of public land. According to the provisions of the Government Lands Act, the process of allotment of government land was to start from the Government which is to identify and offer the land for allotment. Section 11 provided for actions that the Commissioner of Lands had to determine before allotment.
62. In the present case, the process of the impugned allotment was initiated by Raymond Ndong, deceased who applied for allotment of the land vide the application letter dated 22<sup>nd</sup> may 1997 addressed to the Commissioner of Lands. The letter read in part: -
- ‘ReAllocation of A Plot L.R No. 11/302 Kisumu’
- I wish to apply for the allocation of a plot in Kisumu Municipality as indicated in the amended plan I have checked with the physical planning Department and they have confirmed to me that the government plot is available for allocation.”
63. The application was approved. The remarks on the letter were; “Approved” there a signature against the remarks and a date of 30/10/97
64. Subsequently an allotment letter dated 23<sup>rd</sup> February 1999 was issued to the deceased. The letter was signed by one Kilimo J for Commissioner of Lands. The allotment was in respect of an UNS.



Residential Plot Kisumu Municipality. The offer was conditional upon the allottee's "formal written acceptance" of the conditions in the letter and payment of a sum of Ksh 323,640 being standard premium, Rent and other charges within 30 days from the date of the postmark.

The letter contained a proviso to the effect that

"If acceptance and payment respectively are not received within the said thirty (30) days from the date hereof the offer herein contained shall be considered to have lapsed."

65. It is not disputed that the deceased's response to the Allotment Letter was vide his letter dated April, 2000 forwarding Cheque No. 863014 of 7<sup>th</sup> April, 2000 for Kshs 335,840 being payment in respect of the allotment letter ref No. 30973 LXIX dated 23<sup>rd</sup> February 1999 in respect of Residential Plot Kisumu Municipality.

66. This payment was obviously out of the time stipulated in the Allotment Letter. The effect of non-compliance with the conditions in the letter as spelt out in the proviso quoted hereinabove is that the offer contained in the letter was considered to have lapsed. The Allotment Letter was dated 23<sup>rd</sup> February 1999 and 30 days from then elapsed sometime in the month of March 1999. The payment done in April 2000 more than 1 year from the date of the allotment letter was therefore done on an Allotment Letter that had already lapsed. Could the payment or act of acceptance of the late payment by the relevant government department revive the lapsed letter of allotment? The answer is in the negative.

67. In the Supreme Court decision in Torino Enterprises Limited -vs- Hon. Attorney General it was held that

"Suffice it to say that an allottee, in whose name the Allotment Letter is issued must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a Standard Premium and Ground Rent within prescribed timelines."

68. Also in Dr. Joseph N. K Arab Ngok Vs Justice Moiyo Ole Keiywa & 4 others that

"It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offer and the offeree and does not confer an interest in land at all"

69. Subsequent to the payment, a lease, produced by the plaintiff as exhibit p.13 was issued to the deceased. The same had special conditions. There is no evidence that the deceased ever complied with the special conditions.

Special condition No. 9 of the lease prohibited the Lessee from;

"Sell, transfer, sublet, charge or part with possession of the land or any part thereof or any building thereon except with prior consent in writing of the Commissioner of Lands. No application of such consent (Except in respect of a loan required for building purposes will be considered until special condition No. 2 has been performed"

70. Special condition No. 2 of the lease required the lessee to submit to the Local Authority and the Commissioner of Lands plans showing the position of the buildings and the system of drainage for the disposal of sewage among other requirements. There is no evidence that this was done.



71. The case of the 1<sup>st</sup> Defendant is that he bought the suit land from the deceased for value without notice of any irregularity. A land sale agreement titled Memorandum of Agreement was produced by the plaintiff as exhibit P.14.
72. The Memorandum of sale was dated 18<sup>th</sup> February 2000. This was before the acceptance letter dated 10/4/2000 and the payment of the Standard Premium Ground Rent and the charges demanded in the Allotment Letter to the deceased was done.
73. My finding is that the registration of the suit land in the name of the deceased was irregular as the provisions of the Government Lands Act, the conditions in the Allotment Letter and the conditions of the lease particularly special conditions 9 and 2 had not been complied with. The deceased had no valid title to pass to the 1<sup>st</sup> Defendant.
74. In *Mbau Saw Mills Ltd -vs- Attorneys General for and on behalf of Commissioner of Lands & 2 others* (2014) eKLR it was held that
- “The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were all a nullity in law”
75. I find that the acquisition of the suit land by the deceased and subsequent transfer to the 1<sup>st</sup> Defendant was irregular.
76. Whether or not the lease held by the 1<sup>st</sup> defendant was validated by the government.
77. It was the case of the 1<sup>st</sup> Defendant that subsequent to his acquisition of the land there was a process initiated by the government meant to validate irregular acquisition of government property vide which his acquisition and title to the suit property were validated
78. The 1<sup>st</sup> Defendant testified that in a circular referenced CSHSF/EST/01/2/Vol. 11 (41) dated 24<sup>th</sup> January 2007 the government informed all relevant state offices and agencies of the government decision to sell non- strategic government owned houses/parcels of land on which the houses stood. That the suit land was among the houses set out in the schedule and listed at No. 51 among validation cases- that is to say houses which had been acquired prior to the date of the circular and which were due for sale to the persons in whose names they were. That for purposes of validation, the 1<sup>st</sup> Defendant was required to pay Kshs 3,320,000 as the recommended value in order for his acquisition of the suit property to be validated. That a letter from the Ministry of Housing confirmed that the process of validation was a continuing exercise.
79. The circular dated 24<sup>th</sup> January 2007 was produced by the 1<sup>st</sup> defendant as exhibit D.11. Part G thereof was titled “validation of irregularly alienated government houses.” It read; -
- “In respect of irregularly alienated government houses, the following terms and conditions will apply.
- i. Where the house identified for sale has remained intact but the occupant is a:
    - a. non-civil servant the allottee compensate the government for the loss of rent, the cost of the building and market value of the land at the time of the alienation plus interest on loss of capital.



- b. civil servant who has been paying rent to the government but the allocation was to a non-civil servant the government responses the house and sell to the occupying civil servant.
    - ii. Where the property has been alienated to a civil servant who has:
      - a. a title deed and is up to date in rent, the allottee to pay the sale price at the time of sell less the alienation cost paid.
      - b. obtained a title deed to the house and stopped paying to the government, the allottee pays the market value of the property, rent and interest thereon less alienation cost paid.
      - c. More than one allocation condition (a) and (b) apply to one property but pays market value for the other property (ies) as at the time of alienation plus loss of interest on market value.”
80. The case of the plaintiff was that the sale of non-strategic government houses and the validation exercise were cancelled by a subsequent circular. That the payment of Kshs 3,320,000/= by the 1<sup>st</sup> Defendant was not authorized. That the process of validation required that an application be made to the permanent secretary in charge of housing.
81. From the evidence it emerges that the government listed the suit property as one of the properties to be validated. The effect of the validation process, if successfully undertaken, was to regularize the irregular acquisitions/allocations of the properties listed in the circular.
82. Though the plaintiff claims that the process was stopped by a subsequent circular, there was no evidence that the circular was brought to the attention of the 1<sup>st</sup> Defendant.
83. PW5 testified that there was a process called validation sanctioned by the government and that he did not know whether it was acted upon by people. PW4 stated that he did not know whether the circular dated 24/1/2007 was communicated to the public. That he was not sure whether the 1<sup>st</sup> Defendant was aware of the deadline of 31/3/2007 at 5.00pm for payment of the validation charges.
84. It was the 1<sup>st</sup> Defendant case that the validation was a continuous process. That the 1<sup>st</sup> Defendant paid for validation of the houses a sum of Kshs 3,320,000/= was not denied by the plaintiff. The plaintiff's contention is that the payment was not authorized. If indeed the payment was unauthorized, no explanation was tendered why the government received it and issued receipts. Subsequent lists of and correspondence from the government and its agencies on of government property irregularly acquired or allocated do not include the suit land or the house thereon. The 1<sup>st</sup> Defendant demonstrated this letter by referring to the letter dated 19/4/2017 by the County Director of housing requesting that the house be removed from the list of properties that the plaintiff was investigating. The letter was addressed to the Deputy Director of the plaintiff. Secondly, another letter by the District Land Registrar one George Nyagweso dated 13<sup>th</sup> June 2017 addressed to the plaintiff indicating that the proprietor had validated his ownership of the property and requesting to remove the restriction placed on the property. And a Kenya gazette by the National Land Commission dated 17<sup>th</sup> July 2017 on determination of review of grants and disposition of public land does not include the suit land as one of the lands illegally acquired. It is clear that the National Land Commission recognized the validation hence did not include the suit land in its list of illegally acquired government property.
85. The plaintiff accused Raymond Ndong, deceased, of misrepresenting that the land was available for alienation, purporting to accept the offer of the suit property and making payments after the offer



had lapsed and other particulars of irregularities. However, no representative of Raymond Ndong was sued herein. There is no evidence that the 1<sup>st</sup> Defendant was party the particulars of illegality pleaded against the deceased.

86. Further, most of the actions and/or omissions complained of by the plaintiff in the plaint and the Plaintiff's evidence were actions and/or omissions of officers of the government acting within the scope of their authority. Apart from the 2<sup>nd</sup> Defendant, none of the officers was joined in the suit. The Attorney General was not joined in the suit on behalf of the various officers faulted by the plaintiff for the actions and/or omission. The Ministry of Transport and infrastructure, Ministry of Housing and the National Land Commission were not joined in the suit.
87. PW5, the plaintiff's investigator stated, on cross examination, that in the course of his investigations he did not find a document that was a forgery. That he confirmed that the officers who are said to have signed the documents indeed did sign them.
88. The 1<sup>st</sup> defendant sued an occupier of the premises in the former suit. There is evidence that the occupier communicated to the government that he had been sued by the 1<sup>st</sup> Defendant who was seeking his eviction but no step was taken by government. The letter dated 9/8/2000 was by B.O Akungo complaining about imminent eviction and seeking legal assistance. The letter was reinforced by a letter dated 13<sup>th</sup> September 2000 addressed to the Permanent Secretary Ministry of Lands by the Director of Physical Planning. The author requested that the allocation be revoked. It also forwarded summons and plaint in the former suit. The case was decided in the 1<sup>st</sup> defendant's favour.
89. Taking into account all this evidence, I find that acquisition of the suit land and the lease held by the 1<sup>st</sup> Defendant in respect of the suit property was validated by the government.
90. The next issue is whether or not the Plaintiff is entitled to the relief sought.
91. On the basis of the findings herein, the plaintiff is not entitled to the relief sought.

### **Conclusion**

92. The court has made findings that the suit is not res judicata, that the suit property was originally public land, that there was no evidence that the suit land was unavailable for allocation/alienation, that the acquisition of the suit land by Raymond Ndong and subsequent transfer thereof to the 1<sup>st</sup> Defendant were irregular, that the irregularity was however cured through the process of validation initiated by government vide which the 1<sup>st</sup> Defendant paid Kshs 3, 320,000/- to the government, that hence the 1<sup>st</sup> Defendant holds a good title and that the plaintiff is not entitled to the relief sought.
93. On costs of the suit, this being a matter brought in public interest, it is in the interest of justice that each party bear own costs of the suit.
94. The upshot from these findings is that the suit fails and is hereby dismissed. No order as to costs.  
Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 24<sup>TH</sup> DAY OF OCTOBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.**

**E. ASATI,**

**JUDGE.**

**In the presence of:**

Maureen: Court Assistant.



Bii for the Plaintiff.

Onsongo for the 1<sup>st</sup> Defendant.

No appearance for the 2<sup>nd</sup> Defendant.

