



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 5 OF 2008**

**ETHICS AND ANTI-CORRUPTION COMMISSION..... PLAINTIFF**

**=VERSUS=**

**WILSON GACANJA .....1 ST DEFENDANT**

**ROCKVILLE LIMITED.....2 ND DEFENDANT**

**STANDARD ASSUARANCE KENYA LIMITED.....3 RD DEFENDANT**

**WILSON KIPKOITI.....4 TH DEFENDANT**

**AND**

**NAIROBI CITY COUNCIL ..... INTERESTED PARTY**

**JUDGMENT**

**Introduction**

1. The dispute in this suit revolves around the legality of **Grant Number IR 74856** (expressed as comprising **Land Reference Number 209/6238**) made to Rockville Limited (**2nd defendant**) on 19/11/1997 by the then Commissioner of Lands, Mr Wilson Gacanja [**1st defendant**]. The Grant was subsequently registered as **Number IR 74856/1** on **21/11/1997**. On 15/7/2002, the Grant was transferred to Standard Assurance Limited (**3rd defendant**).

2. Prepared and authenticated on the same day, 19/11/1997, was Survey/Deed Plan No 215822, delineating the said Land Reference Number 209/6238 measuring approximately 0.3890 of a hectare. What is intriguing about the uncontroverted evidence presented to the court in relation to the above survey details is that the same parcel of land had been surveyed as a sub-division of an existing title, LR 209/298, in 1962 under the same Land Reference Number, 209/6238, and a title, IR 19103 in respect of the land (sub-division) was registered on **11/9/1962** in the name of **East African Common Services Authority** (formerly the **East Africa High Commission**). The 1962 Survey Plan Number 79163 which was annexed to Grant Number 19103 indicated the acreage of the land as 0.961 of an acre.

3. At the time of the impugned alienation of the suit property and issuance of the impugned Grant in 1997, the land was developed and served as the official residence of the Principal of the Kenya School of Law. The alienation was made at the written request of the 2nd defendant, signed by its two Directors, Retired Justice Leonard Njagi (then serving as Principal of the Kenya School of Law and residing on the suit property) and Mr Wilson K Kipkoti.

4. Pursuant to its statutory mandate, the predecessor of the current **Ethics and Anti-Corruption Commission** brought this suit

challenging the alienation and the Grant. Through a plaint originally dated 14/1/2008 and amended on 15/4/2009, they sought the following verbatim orders against the defendants:

- a) *A declaration that the letter of allotment dated 3/11/1997 allocating the 1st defendant the land parcel referred to as LR No 209/6238 is null and void;*
- b) *A declaration that Grant No IR 74856 registered on 21/11/1997 in respect of LR No 209/6238 in the name of the 2nd defendant is null and void;*
- c) *A declaration that the transfer of land parcel LR No 209/6238 to the 3rd defendant and the subsequent charge registered against the suit property are null and void;*
- d) *Cancellation and/ or revocation of the letter of allotment dated 3/11/1997 and Grant No IR 74856 registered on 21/11/1997 in respect of LR No 209/6238 in the name of the 2nd defendant;*
- e) *Cancellation and/ or revocation of the title documents/certificates of lease issued to the 2nd and 3rd defendants in respect of Land Parcel LR No 209/6238;*
- f) *A permanent injunction restraining the defendants, their servants and/or agents from alienating, encumbering, disposing off, wasting, and trespassing upon or in any other way interfering with the land parcel referred as LR No 209/6238;*
- g) *The costs of this suit.*

#### **Plaintiff's Case**

5. The Plaintiff's case was contained in its amended plaint dated 15/4/2019, oral evidence presented by its five witnesses, and written submissions dated 30/7/2020. In summary, its case was that on or about 25/7/1962, the then Acting Commissioner of Lands allocated two parcels of land namely **LR No 209/6237** and **LR No 209/6238** to the **East African Common Services Organization**. The two parcels of land were sub-divisions out of **LR No 209/298**. The Organization duly accepted the allotments. Subsequently, on 10/9/1962, the Acting Commissioner of Lands executed Grant Numbers **IR 19102** and **19103**, in which the two parcels of land were respectively comprised in the name of **East Africa Common Service Authority** (formerly the **East Africa Commission**). Annexed to the two Grants were Survey Plan Numbers 79162 and 79163 respectively. The two Grants were registered on 11/9/1962 as Title Numbers 19102/1 and 19103/1 respectively. Each of the two Grants was for a period of 99 years. The suit property herein relates to Grant Number 19103 in which LR No 209/6238, measuring approximately nought decimal nine six one of an acre (0.961 acres) is comprised. On the two parcels of land were two Government Houses, namely **House Numbers HG 612** and **HG 613**.

6. Upon the collapse of the East African Community in the late 1970s, the two parcels of land and the two houses thereon were vested in the Government of Kenya. The two houses were registered as Government Houses and entered in the Government Buildings Register. They were at that point classified as pool houses, meaning that they were available for occupation by officers of the General Public Service. In 1993, the Ministry of Public Works re-classified the houses as institutional houses and assigned them to the Attorney's General's Chambers for occupation by the Staff of the Kenya School of Law which was located on the adjacent parcel of land.

7. Despite the fact that the suit property (LR No 209/6238) was not available for allotment or alienation, the 1st defendant purported to allocate it to the 2nd defendant on or around 3/11/1997. Subsequent to that, on or about 19/11/1997, the 1st defendant illegally purported to execute Grant No IR 74856 relating to the suit property in favour of the 2nd defendant, for a period of 99 years running from 1/11/1997. Annexed to the said new Grant was Deed Plan Number 215822 comprising LR No 209/6238, indicated to have been authenticated on 19/11/1997 and further indicated to have been surveyed on 19/11/1997.

8. On 15/7/2002, the 2nd defendant purported to transfer the suit property to the 3rd defendant who subsequently charged it to Diamond Trust Bank Kenya Limited on 26/6/2003 for Ksh 10,000,000/-. The encumbrance was discharged in 2005.

9. The plaintiff contended that the suit property having been alienated way back in 1962, it was not available for allocation in 1997

and the purported allocation by the 1st defendant to the 2nd defendant was illegal, fraudulent, null and void, and *ultra vires* the statutory powers and functions of the 1st defendant. The plaintiff further contended that the purported subsequent transfer of the suit property to the 3rd defendant and the charge registered against the suit property in favour of Diamond Trust Bank of Kenya Limited were illegal, fraudulent, null and void.

**10.** The plaintiff itemized the following verbatim particulars of fraud against the defendants:

*a) Allocating and issuing grant to land not available for allocation contrary to the provisions of the Government Lands Act, Chapter 280, Laws of Kenya.*

*b) Allocating and issuing a grant to Government land allegedly on the authority and/or approval of the President when there was no such, or any valid authority and/or approval;*

*c) Allocating and issuing a grant to Government land without due regard to use and/or the purpose for which the parcel of land was reserved;*

*d) Allocating and issuing a grant to Government land without the consent of the Government;*

*e) Allocating and issuing a grant to Government land arbitrarily and in breach of fiduciary duties towards the people and/or Government of Kenya;*

*f) Acquiring or alienating Government land without due regard to the law applicable and in particular the Government Lands Act, Chapter 280, Laws of Kenya;*

*g) Colluding to defeat Government's interest in or title to the suit property;*

*h) Transferring title to the suit property when there was no title capable of being transferred or conferred to the 3rd Defendant by the 2nd Defendant;*

*i) Charging and/or encumbering the suit property when there was no interest or title capable of being charged and/or encumbered legally or at all;*

*j) Allocating, issuing a Grant No IR 74856, registering interest, issuing a certificate of lease, transferring, charging and/or registering encumbrances in respect of land parcel LR No 209/6238 when the defendants knew or ought to have known that the suit property was Government property not available for alienation, allocation, transfer and registration of any interest adverse to that of the Government; and*

*k) Disposing off Government property contrary to Government Rules and Regulations on disposal of such property.*

#### **1st Defendant's Case**

**11.** The 1st defendant filed a defence dated 18/2/2008 in which he contended that the allocation of the suit property was done lawfully and in accordance with the provisions of the Government Lands Act (Cap 280). He added that any issue arising from any allocation done during his tenure should have been addressed to the Office of Commissioner of Lands and not to himself in his personal capacity as he ceased to hold the Office in 1999 and he had no access to documents that would clarify any of the alleged irregularities. He urged the court to dismiss the suit against him.

#### **2nd Defendant's Case**

**12.** The 2nd defendant filed a statement of defence dated 13/2/2008. They contended that the re-classification of the suit property to institutional quarters did not confer any title or proprietary interest in the Government. They admitted the suit property was allocated to them and they legally sold and transferred it to the 3rd defendant. They added that prior to the allocation, the suit property was an unalienated Government land and the allocation to them extinguished any rights which the Government or any

other person may have had in the land. They denied illegality and/or fraud in the allocation. Lastly, they contended that, having sold and transferred the suit property to the 3rd defendant, they had no interest in it.

### **3rd and 4th Defendant's Case**

**13.** The 3rd and 4th defendants filed a statement of defence on 19/11/2018. They averred that the suit property did not have any infrastructure. They denied the particulars of fraud and illegality itemized by the plaintiff. They further averred that the 2nd defendant was allocated the suit property vide an allotment letter dated 3/11/1997 by the Government of Kenya and he duly paid the requisite fees and was issued with a title. The 2nd defendant subsequently sold the suit property to the 3rd defendant for a consideration of Kshs 50,000,000. The 3rd defendant registered a charge against the suit property in favour of Diamond Trust Bank. The charge was later discharge. It was further contended that the right procedure was followed in the allocation of the suit property to the 2nd defendant. They added that the plaintiff's suit did not disclose any reasonable cause of action against them; was scandalous, frivolous, vexatious and an abuse of the court process; and the same should be dismissed.

### **Interested Party**

**14.** The interested party was joined in this suit by the 3rd and 4th defendants who alleged that the interested party had claimed ownership of the suit property. However, the interested party stated through written submissions that it did not have any claim on the suit property. It stated that its claim against the 3rd defendant was payment of rates.

### **Plaintiff's Evidence**

**15.** At the trial, the plaintiff called five witnesses. The plaintiff's first witness was **Julius Waweru Mwangi - PW1**. He stated that he was a Senior Assistant Director working in the State Department of Housing & Urban Development. He adopted his witness statement dated 13/10/2017 as part of his evidence-in-chief. He told the court that there were two government houses designated as HG 612 and HG 613. The two houses belonged to the defunct East African Community. According to their records, LR No 209/6237 had a maisonette designated as HG 613 whereas LR No 209/6238 (the suit property) had a maisonette known as HG 612. When the East African Community collapsed, the two houses were taken by the Government of Kenya and registered as Government Houses in the Government Buildings Register in 1980. He added that the two Houses were classified as pool houses meant for occupation by general civil servants. the two houses were later re-classified by Mr Lesirma, the then Permanent Secretary, Ministry of Public Works, as institutional houses and assigned to the Attorney General's Chambers for occupation by the Staff of Kenya School of Law. When the impugned alienation came to the fore, the Chief Building Surveyor wrote a letter dated 1/8/2005 to the Principal, Kenya School of Law, indicating that the suit property had been irregularly alienated and a title deed had been issued. The letter also confirmed that the house formed part of the stock of government houses and had never been deleted from the register of Government Houses. He produced a bundle of 39 documents.

**16. Amos Kabue Mwangi** testified as **PW2**. He said he was a former Finance Manager at the Kenya School of Law. He adopted his written witness statement dated 16/10/2017 as part of his sworn evidence-in-chief. He told the court that the suit property had a house and was initially owned by the East African Community. After collapse of the Community, the suit property was taken over by the Kenya Government and registered as a Government House. Through a letter dated 21/11/1993, Mr Lesirma, the then Permanent Secretary, Ministry of Public Works, communicated that the house had been re-classified as an institutional house assigned to the Attorney General's Chambers for occupation by Staff of the Kenya School of Law. The Chief Building Surveyor wrote a letter dated 1/8/2005 to the Principal Kenya School of Law indicating that the suit property had been irregularly alienated and a title deed had been issued. The letter also confirmed that the suit property formed part of the stock of government houses and had never been deleted from the register. He added that, upon application for a grant, the Directors of Rockville Limited were issued with a Grant in respect of the suit property by the Commissioner of Lands. Investigations by the plaintiff revealed that the Grant issued to the 2nd defendant was a nullity. The Commission demanded that the title to the suit property be surrendered for cancellation. He produced a bundle of 3 documents.

**17.** On cross examination, he stated that the Commissioner of Lands dealt with all land matters. He said that he started working at the Kenya School of Law in 2010. The letter dated 1/8/2005 was addressed to the Principal of Kenya School of Law.

**18. Zakayo Mwendwa Mwenga** testified as **PW3**. He stated that he was a land surveyor in the Ministry of Lands. He had worked in the land titles division for 35 years. His work involved examining and making decisions on land survey files submitted to the Directorate of Surveys, among other duties. He adopted his witness statement dated 3/11/2017.

**19.** In summary, PW3's evidence was that LR No 209/6237 and LR No 209/6238 were subdivisions out of LR No 209/298. The subdivision was carried out in 1962. The two parcels measured 0.933 acres and 0.961 acres respectively. The subdivision was approved on 25/1/1962 and Deed Plan Numbers 79162 and 79163 were duly issued and forwarded to the Commissioner of Lands in 1962. A resurvey was carried out on LR No 209/6238 and authenticated by a Mr Thomas Kirui on 19/11/1997. The resurvey indicated the land measured 0.3890 hectares. The resurvey was carried out by a private surveyor by the name **S N Wabaru**. Deed Plan Number 215822 was prepared and authenticated on 19/11/1997 following the resurvey.

**20.** He added that according to records at Survey of Kenya, Deed Plan Number 79163 dated 1962 and Deed Plan Number 215822 dated 19/11/1997 represent the same parcel of land, LR No 209/6238. He added that the allocating authority did not do proper due diligence regarding the history of the suit property because had he done so, he would have established that the suit property was not available for survey and new grant in 1997

**21. Pauline Nyangutu Murithia** testified as **PW4**. She adopted her witness statement dated 24/10/2017. She stated that she was a Deputy Chief Land Registrar in Charge of Land Registration. She was the Acting Chief Land Registrar at the time of testifying. In summary, her evidence was that LR No 209/6238 was registered on 11/9/1962 as Inland Registry (IR) Number 19103 vide Deed Plan Number 79163 for a term of 99 years from 1/7/1953. She added that LR No 209/6238 had another IR Number, namely 74856, for a term of 99 years effective from 1/9/1997. This second Grant was issued against Survey Plan Number 215822 on 19/11/1997 by Wilson Gacanja. The second Grant was registered on 21/11/1997. The second Grant was later transferred to Standard Assurance Limited on 15/7/2002 and charged to Diamond Trust Bank Kenya Limited on 26/6/2003. On 12/7/2005, a variation of the charge was registered against the second Grant. On 28/9/2005, a discharge of charge was registered against the said second Grant.

**22.** PW4 added that the suit property was allocated to East African Services Authority, a Government body, and was not available for allocation and/or alienation in 1997. Upon collapse of the East African Community, the suit property should have been surrendered to the Government through an instrument of surrender prior to the issuance of a new grant. She added that the issuance of Grant No 74856 for LR No. 209/6238 was not procedural because the land had not been surrendered to the Government and there was an existing grant bearing the same land reference number.

**23. James Kithinji** testified as **PW5**. He stated that he was a valuer and an investigator with the Ethics and Anti-corruption Commission. He adopted his written statement dated 7/11/2017. His evidence was that he carried out investigations into the impugned alienation and Grant. The findings of his investigations were that the suit property was alienated, surveyed and titled in the name of **East African Common Services Authority** in 1962 and was not available for alienation, survey and titling in the name of Rockville Limited in 1997. Consequently, the title processed and issued to Rockville Limited in 1997 and the subsequent charge registered against it were all null and void. It was PW5's further evidence that public land would be allocated under the Government Lands Act only if it had been planned, surveyed, serviced and guidelines for its development prepared. He added that the Commissioner of Lands could only alienate unalienated Government land as defined in the Constitution and the repealed Government Lands Act and had no authority to alienate land that had already been set aside for public purpose through issuance of title to East African Common Services Authority (formerly East Africa High Commission), a public body. He added that for any grant or allocation to be effected, the existing title had to be surrendered to the Government before issuance of a new grant.

#### **Plaintiff's Submissions**

**24.** The plaintiff filed written submissions dated 30/7/2020 through **Ms Regina Jemutai Advocate**. Counsel submitted that the suit property had been planned, surveyed, alienated, titled, developed and set aside for public use and was therefore not available for alienation. Counsel added that the power to alienate unalienated Government land were vested in the President; the Commissioner of Lands only exercised delegated power in limited circumstances where the alienation related to educational, charitable, sports and other purposes set out on the foot of page 8 of the Government Land Act. It was counsel's submission that the Commissioner of Lands did not have authority to alienate the suit property.

**25.** Counsel for the plaintiff further submitted that existence of Grant No. IR 19103 relating to the suit property rendered the subsequent Grant issued in 1997 a nullity. Counsel added that the suit property having been surveyed in 1962 and the survey plan having been authenticated and used to generate Grant No IR 19103 in 1962, it was not available for fresh survey in 1997. Counsel

for the plaintiff further submitted that the subsequent transfer of the suit property to the 3rd defendant by the 2nd defendant was a sham transaction whose aim was to take advantage of the doctrine of innocent purchaser for value. Ms Jemutai argued that it was clear from the evidence presented to the Court that Mr. Wilson Kipkoti (4th defendant) was a director of both the 2nd and 3rd defendants at the time of generation of the impugned Grant and at the time of the subsequent transfer of the land from the 2nd defendant to the 3rd defendant.

**26.** Counsel for the plaintiff further submitted that no evidence was led by the defendants to controvert the plaintiff's evidence. She added that the 1st defendant being the person uniquely placed to explain how the alienation of an already alienated and titled land was alienated to the 2nd defendant, he elected to offer no evidence. Lastly, counsel submitted that there was no evidence of any boarding exercise carried out in accordance with the Government Financial Regulations and Procedures as well as the Ministry of Public Works Circulars. Counsel urged the court to grant the prayers sought in the amended plaint.

#### **1st Defendant's Submissions**

**27.** The 1st defendant filed written submissions dated 24/9/2020 through the Firm of **Njuguna, Kahari & Kiai Advocates**. Counsel for the 1st defendant submitted that the single issue falling for determination in the suit against the 1st defendant was whether the suit as filed disclosed any cause of action against the 1st defendant. Counsel argued that the plaintiff had failed to substantiate or prove fraud, illegality, irregularity and misfeasance attributed to the 1st defendant. Counsel argued that there was no evidence to prove that the 1st defendant either in his personal or official capacity approved the allocation of the suit property or signed the letter of allotment or that he had any interest in the suit property. Counsel added that the suit against the 1st defendant was discriminative, biased, unconstitutional, and an abuse of the court process because there were many people involved in the processing of the impugned alienation and grant yet only the 1st defendant was sued. Counsel faulted the plaintiff for bringing this suit against the 1st defendant in his personal capacity yet he had acted in his official capacity as the Commissioner of Lands. Lastly, counsel submitted that no cause of action was disclosed against the 1st defendant because no relief was sought against him. Counsel urged the court to dismiss the suit against the 1st defendant.

#### **4th Defendants' Submissions**

**28.** The 4th defendant filed written submissions dated 4/9/2020 through the Firm of **Kwengu & Company Advocates**. Counsel identified the following as the two issues falling for determination in the suit against the 4th defendant: (i) whether the plaintiff had proved its case against the 4th defendant; and (ii) whether the plaintiff was entitled to the prayers sought in the amended plaint. Counsel argued that the 4th defendant had filed a statement of defence illustrating how the suit property moved from the 2nd defendant to the 3rd defendant. Counsel added that the plaintiff had failed to present evidence to show how the 4th defendant committed fraud or connived with the 1st and 2nd defendants to acquire Government land that was unavailable for allocation, hence the claim against the 4th defendant lacked merit. Further, counsel argued that prayer 1 was unavailable because the suit property was allocated to the 2nd defendant and not to the 1st defendant. Counsel added that the prayer for nullification of the Grant and the titles registered in the names of the 2nd and 3rd defendants could not be realised because due process was followed in their successive registrations. Counsel for the 4th defendant urged the court to dismiss the suit against the 4th defendant.

#### **Interested Party's Submissions**

**29.** The interested party filed written submissions dated 16/9/2020 through the Firm of **Kinyanjui Njuguna & Co. Advocates**. Counsel for the interested party identified the following as the three issues falling for determination in relation to the interested party: (i) whether the 3rd and 4th defendants preformed due diligence before joining the interested party to this suit; (ii) whether the interested party was entitled to be paid land rates over the suit property; and who should bear costs of joining the interested party to this suit. Counsel submitted that the 3rd and 4th defendants hastily joined the interested party to this suit without conducting due diligence to verify that the people who purported to be agents of the interested party were indeed agents of the interested party. Counsel added that the interested party had no ownership interest in the suit property and its legitimate entitlement in relation to the suit property were land rates payable to it by the owner of the suit property. Lastly, counsel urged the court to condemn the 3rd and 4th defendants to pay its costs of the suit.

#### **Analysis & Determination**

**30.** I have considered the pleadings, evidence and submissions in this suit. I have also considered the relevant legal frameworks and jurisprudence. None of the defendants led evidence to controvert the plaintiff's case or to support their respective cases. The

interested party entered appearance but did not file any pleadings. Through oral presentations at the hearing, the 3rd defendant supported the plaintiff's case. Parties did not agree on a common statement of issues for determination in this suit.

31. Taking into account the pleadings, evidence and submissions in this case, the following are the three key issues falling for determination in the case: (i) whether the letter of allotment dated 3/11/1997 and Grant Number 74856 executed by the 1st defendant on 19/11/1997 and registered on 21/11/1997 in favour of the 2nd defendant are valid instruments of title relating to Land Reference Number 209/6238; (ii) whether the plaintiff is entitled to the reliefs sought in the amended plaint; and (iii) what order should be made in relation to costs. I will make brief sequential pronouncements on the three issues in the above order.

32. I have noted in paragraph 30 above that none of the defendants led evidence to either support their respective cases or controvert the evidence led by the plaintiff. It is however not lost to the court that the present suit was brought by the plaintiff. It follows that the plaintiff bore the evidential burden of proving the fraud and illegalities particularized in paragraph 14 of the amended plaint.

33. What emerges from the uncontroverted evidence before court is that the suit property was part of a larger parcel of land surveyed in May 1947 as Land Reference Number 209/298 and delineated on Survey Plan No 41498 (see Plaintiff Exhibit No 1). In 1962, Land Reference Number 209/298 was subdivided into LR No 209/6237 and LR No 209/6238, the latter being the suit property herein. In the same year, 1962, the two sub-divisions were allocated to **East African Common Services Organization**. On 10/9/1962, Grant Numbers IR 19102 and 19103, relating to the two sub-divisions, were executed in favour of the **East African Common Services Authority**. The two Grants were registered and issued on 11/9/1962.

34. What further emerges from the uncontroverted evidence presented to the court is that upon the collapse of the East African Community, the suit property vested in the Government of Kenya. At the time of the purported alienation of the suit property to the 2nd defendant by the 1st defendant in 1997, the suit property was a surveyed, titled and developed Government property. It was the official residence of the Principal of the Kenya School of Law. Further, at the time of the impugned alienation, the occupant of the suit property was retired Justice Leonard Njagi who at that time was the Principal of the Kenya School of Law. It is noted from the letter dated 20/3/1997 through which the 2nd defendant applied to the 1st defendant to allocate to them the suit property that Retired Justice Leonard Njagi and Mr Wilson Kipkoti were the two directors who signed the application on behalf of the 2nd defendant.

35. Having considered the totality of the evidence before the court, I agree with the plaintiff's contention that the impugned alienation and the resultant Grant were and are illegalities. Firstly, this was an already surveyed, alienated, titled (registered), and developed parcel of land; it was not an unalienated Government land available for alienation. There is no evidence that the title issued in 1962 had been surrendered to the Commissioner of Lands and cancelled to make the land available for fresh alienation, resurvey, and re-titling.

36. Secondly, there is no evidence of a procedural disposal of the suit property which was a titled and developed government land. Were there to have been a lawful disposal of the suit property, the defendants would have had no difficulties in demonstrating to the court that the requirements of the applicable Government Regulations and Procedures relating to disposal of developed and titled Government land, including the Ministry of Public Works Housing Circular No 2/58 of 1958 were duly satisfied. The defendants did not attempt to lead evidence to demonstrate that.

37. Thirdly, it does emerge from the application for allocation of the suit property that the 2nd defendant's directors and the 1st defendant knew about the pre-existing survey details of the land. This is because, the application dated 20/3/1997 was specific about the survey details of the suit property, namely LR No 209/6238. Similarly, the letter of allotment dated 3/11/1977 was specific about the survey details of the suit property. What is intriguing is that the 2nd defendant and the Department of Survey came up with a survey plan dated 19/11/1997 bearing exactly the same Land Reference Number as what was quoted in the application letter and in the letter of allotment. A Grant was generated and executed by the 1st defendant on the same day that the survey plan was authenticated. It is therefore clear from the above evidence that the 1st, 2nd and 4th defendants knew about the pre-existing survey details of the suit property but elected to generate a second deed plan and a second grant relating to the suit property. The relevant land law did not and does not countenance the duplication of deed plans and grants in relation to the same parcel of land.

38. Fourthly, the 1st defendant purported to issue the allotment letter dated 3/11/1997 on behalf of an unnamed County Council [see the letter of allotment dated 3/11/1997]. There is no evidence to suggest that the suit property belonged to any County Council or that any County Council authorized the issuance of the allotment letter dated 3/11/1997.

39. Fifth, there is no evidence to suggest that the President of Kenya authorized or was privy to the impugned alienation. Under Section 3 of the repealed Government Lands Act, the power to alienate unalienated Government land was vested in the President of the Republic of Kenya. The Commissioner of Lands only exercised limited delegated authority in limited circumstances. The 1st, 2nd and 4th defendants have not demonstrated to the court that the land was unalienated Government land and that the impugned alienation was made by the President of the Republic of Kenya as required by the law.

40. Kenya's superior courts have been categorical on the fate of titles relating to illegally or improperly acquired public land. The Court of Appeal in **Chemey Investment Limited v Attorney General & 2 Others** [2018] eKLR rendered itself on this subject in the following words:

*"Decisions abound where courts in this land have consistently declined to recognise and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example Niaz Mohamed Jan Mohamed v. Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v. County Council of Kwale (supra); Republic v. Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others KLR (E&L) 1, 563; John Peter Mureithi & 2 Others v. Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v. Shalien Masood Mughal & 5 Others (2017) eKLR; Arthi Highway Developers Limited v. West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v. City Council of Nairobi & Others, HCCC No. 1024 of 2005. The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.*

41. Similarly, the Court of Appeal in **Munyu Maina v Hiram Gathiha Maina** [2013] eKLR emphasized the duty of the holder of an impugned title in a claim where the root of that title has been challenged in the following words:

*"We state that when a registered proprietors' root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register"*

42. The totality of the foregoing is that, there were glaring illegalities in the impugned alienation and in the generation of the impugned Grant. Consequently, it is the finding of this court that the allotment letter dated 3/11/1997 and Grant Number 74856 issued to the 2nd defendant by the 1st defendant in 1997, relating to Land Reference Number 209/6238 were and are illegal, null and void by dint of the above illegalities.

43. The second issue relates to the reliefs available to the plaintiff. I have considered the prayers sought by the plaintiff in the context of its constitutional and statutory mandate. The focus of the prayers is the nullification of the impugned alienation and the impugned parallel title. In the absence of evidence challenging the reliefs sought by the plaintiff, I will grant prayers (a) to (f) of the amended plaint.

44. Lastly, I have reflected on the subject of costs. This is yet another of the many irregular alienations of public properties which was presided over by some operatives in the Ministry of Lands. The plaintiff is carrying out a constitutional and statutory mandate on behalf of the Kenyan People. This is therefore largely a public litigation. The plaintiff is funded by the Kenyan public in this exercise. Two key culprits in the impugned alienation are the defunct Office of Commissioner of Lands and the Directorate of Survey. Both of them were public officers. Further, the two key culprits are not parties to this suit. In the circumstances, parties to this suit shall bear their respective costs.

### **Disposal Orders**

45. In light of the foregoing, the court finds that the plaintiff has proved its case to the required standards and issues the following disposal orders in tandem with the prayers sought in the amended plaint:

*(a) A declaration is hereby made that the letter of allotment dated 3/11/1997 allocating to the 2nd defendant Land Reference Number 209/6238 is null and void and the same is hereby cancelled.*



*(b) A declaration is hereby made that Grant Number 74856 registered on 21/11/1997 in respect of Land Reference Number 209/6238 in the name of the 2nd defendant is null and void and the same is hereby cancelled.*

*(c) A declaration is hereby made that the transfer of Land Reference Number 209/6238 by the 2nd defendant to the 3rd defendant is null and void and the same is hereby canceled.*

*(d) An order is hereby issued cancelling and/or revoking the title documents issued to the 2nd and 3rd defendants in respect of Land Reference Number 209/6238.*

*(e) The Chief Land Registrar is hereby ordered to register Land Reference Number 209/6238 comprised in Grant Number IR 19103 registered on 11/9/1962 and delineated on Survey Plan Number 79163 dated 1962 in the name of The Principal Secretary for the National Treasury to hold the same on behalf of the State Law Office.*

*(f) A permanent injunction is hereby issued restraining the defendants, their agents and/or servants against disposing, encumbering, wasting or trespassing on or interfering with Land Reference Number 209/6238.*

*(g) Parties shall bear their respective costs of this suit.*

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF DECEMBER 2020.**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Ocharo holding brief for Ms Jemuti for the plaintiff

Mrs Omutimba for the 1st defendant

Ms Miya holding brief for Mr Okwengu for the 4th defendant

Mr Khisa for the interested party

Court Clerk - June Nafula



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