



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC CASE NO. 686 OF 2015**

**(FORMERLY HCCC NO. 95 OF 2009)**

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

**VERSUS**

**KEN DEEP CONSTRUCTION LIMITED.....1<sup>ST</sup> DEFENDANT**

**WILSON GACANJA.....2<sup>ND</sup> DEFENDANT**

**JUDGEMENT**

1. Kenya Anti-Corruption Commission, the Plaintiff, commenced this suit against Ken Deep Construction Limited and Wilson Gacanja, the Defendants, vide the plaint dated the 22<sup>nd</sup> June 2009 and amended on the 21<sup>st</sup> January 2010 seeking for the following prayers;

(a) “A declaration that the issuance of a lease by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant over Kisumu Municipality/Block 7/455 was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 1<sup>st</sup> Defendant in the first instance.

(b) A declaration that the registration of the lease and issuance of a Certificate of lease over Kisumu Municipality/Block 7/455 to the 1<sup>st</sup> Defendant was null and void and ineffectual to confer a good title upon the 1<sup>st</sup> Defendant.

(bb) In the alternative to (a) and (b) above, a declaration that the 1<sup>st</sup> Defendant holds the registration of Kisumu municipality/Block 7/455 in trust for the Corporation and that the land register be rectified by deleting the name of the 1<sup>st</sup> Defendant and substituting the name of Kenya Railways Corporation as the proprietor.

(c) An order for rectification of the land register by cancellation of the lease over Kisumu municipality/Block 7/455 and Certificate of Lease issued to the 1<sup>st</sup> Defendant so as to restore the suit property to the Corporation.

(d) An order for a permanent injunction against the 1<sup>st</sup> Defendant by itself, its agents, servants or assigns restraining them from leasing, transferring, charging, taking possession, developing, or in any other manner howsoever from dealing with Kisumu municipality/Block 7/455

(e) General Damages for fraud.

(f) Costs of and incidental to the suit.

(g) Interest on (f) above at court rates.

(h) Any other or further relief the Court may deem fit and just to grant.”

The Plaintiff avers that Kisumu Municipality/Block 7/455, the suit land, was at all material times part of a larger parcel of land set apart as a railway reserve and vested in Kenya Railways Corporation vide L.N. No. 24 of 1986, and previously in the Corporation's predecessors in title vide L.N. Nos. 20 of 1969 and 440 of 1963. That pursuant to the Plaintiff's investigations, it found that in or about 1996 the 1<sup>st</sup> Defendant wrongly and fraudulently procured a lease from the 2<sup>nd</sup> Defendant over the suit land for private purposes, which was registered on the 19<sup>th</sup> March 1996 and Certificate of Lease issued without the knowledge and consent of the Kenya Railways Corporation. The Plaintiff has set out the particulars of fraud, illegality, knowledge, and constructive trust attributed to the Defendants at paragraphs 7, 8, 10 and 11A of the Amended plaint respectively. The Plaintiff alleges that the 2<sup>nd</sup> Defendant acted illegally in issuing the lease to the 1<sup>st</sup> Defendant, by knowingly alienating land vested in a public body for private purposes, and without following the laid down procedures; failing to circulate the Part Development Plan for the said alienation as required; alienating public land contrary to the provisions of the Government Lands Act; and without a resolution by the Board of the Kenya Railways Corporation to surrender the land for allocation, and approval of by the Minister responsible for Treasury to alienate the suit land to the 1<sup>st</sup> Defendant.

2. The 2<sup>nd</sup> Defendant denied the Plaintiff's claim through his statement of defence dated the 11<sup>th</sup> December 2009. He avers that the suit does not disclose any cause of action against him in his private capacity, and that the allegations in the plaint are injurious to his reputation, and that he has a right to institute legal action for defamation. That he is a stranger and unaware of the existence, disposition, previous circumstances, historical transfer and or conveyance of the suit land. That he undertook his duties and responsibilities as Commissioner of Lands during the material time faithfully, diligently and in accordance with the statutory provisions of the Government Lands Act. That throughout the process of divesting unoccupied public land, the Commissioner of Lands would merely be a generator of documentation, and not possessed with requisite capacity to confer a benefit in land to a third party, and denied knowledge of fraud or illegality on the convergence of the suit land. The 2<sup>nd</sup> Defendant prays for the Plaintiff's suit to be dismissed with costs.

3. The 1<sup>st</sup> Defendant did not enter appearance, file defence or participate in the proceedings. The hearing of the Plaintiff's case commenced on the 22<sup>nd</sup> January 2018 with Wilson Francis Ojunju, a surveyor with Survey of Kenya, testifying as PW1. He was followed by Victor Kiruiki Whome, a Surveyor with Kenya Railways Corporation, testifying as PW2 and Dedan Ochieng Okwama, an investigator with the Plaintiff, testifying as PW3. The last witness was Joseph Kirago Kariuki, a Land Administration Officer with National Land Commission, who testified as PW4 on the 29<sup>th</sup> October 2018. Their evidence was that the suit land was a subdivision from Kisumu Municipality/Block 7/365, which vested in the Kenya Railways Corporation and set apart as Railways Reserve. That the excision of the suit land and its allocation was done without the Kenya Railways Corporation's approval or consent, and when it was discovered, the Corporation lodged complaints which were acted upon by the Plaintiff and the Commissioner of Lands leading to the revocation of the suit land's title and those of others similarly allocated. That the suit land, and those others whose title were similarly revoked, were resurveyed and amalgamated into one parcel Kisumu Municipality/Block 7/567 which was allocated and registered with Kenya Railways Corporation.

4. That upon the Plaintiff closing its case, the Defendants' case were also marked closed. That subsequently the learned Counsel for the Plaintiff filed their written submissions dated the 14<sup>th</sup> November 2018. The Counsel submitted that through the testimonies of PW1 to PW4, the Plaintiff has proved that the suit land was part of the land vested in Kenya Railways Corporation and therefore not available for alienation to for private use. That they have also shown that **Section 14 of the Kenya Railways Act** was not complied with during the said alienation as the Kenya Railways Corporation was not aware of the process, and had not given its approval. That as the suit land was already alienated to Kenya Railways Corporation, it was not part of the un-alienated government land in the context of **Government Lands Act**, and therefore the Commissioner of Lands, the 2<sup>nd</sup> Defendant, had no power to allocate it to the 1<sup>st</sup> Defendant. That even if the suit land was part of the un-alienated government land, **Section 3 of the Government Lands Act** vested the power to alienate such land in the President. The learned counsel cited the case of **James Joram Nyaga & Another vs Attorney General & Another [2007] eKLR** where the court referring to **Sections 3 and 7 of the Government Lands Act** observed at page 24 that the provisions limits the power of the Commissioner of Lands to executing leases or conveyances on behalf of the President, and that the provisions specifically limits the power to alienate un-alienated land to the President. The Counsel further submitted that there were irregularities pointed out by PW3 in the process of allocating the suit land to the 1<sup>st</sup> Defendant which confirmed the process was done fraudulently and unlawfully. That when the alienation was discovered, PW4 wrote to the 1<sup>st</sup> Defendant to surrender the title documents for cancellation. That the 2<sup>nd</sup> Defendant was rightly sued as his liability was personal, and could not be transferred to the office for he had broken the law in the alienation of the suit land. The learned Counsel cited the decision in **Kenya Anti-Corruption Commission vs Sammy Komen Mwaita Nakuru H.C.C.C No. 3 of 2008**. That both

Defendants did not participate in the proceedings and the Plaintiff's evidence remains uncontroverted and therefore the 1<sup>st</sup> Defendant's title to the suit land should be cancelled in the public interest.

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

- a) **Whether the suit land was part of the land set apart as railway reserve and vested in the Kenya Railways Corporation.**
- b) **Whether the allocation of the suit land and its registration in the 1<sup>st</sup> Defendant's name by the 2<sup>nd</sup> Defendant was fraudulent, illegal and un-procedural.**
- c) **Whether the Plaintiff is entitled to the prayers or any of the prayers sought.**
- d) **Who pays the costs.**

6. The Court has considered the pleadings filed by the Plaintiff and 2<sup>nd</sup> Defendant; the oral and documentary evidence by PW1 to PW4; the written submissions by the learned Counsel for the Plaintiff and come to the following determinations;

a) That from the testimonies tendered in support of the Plaintiff's case, it is apparent that Kisumu Municipality Block 7/455, the suit land, that is registered with the 1<sup>st</sup> Defendant, is a subdivision from Kisumu Municipality/Block 7/365, and formerly L. R. No. 114/1157, that was set apart as railway reserve and currently vested in the Kenya Railways Corporation. That the suit land was therefore subdivided from land already alienated to Kenya Railways Corporation without its approval, or being released or surrendered for reallocation.

b) That as the 2<sup>nd</sup> Defendant did not tender evidence to support his pleadings, and both Defendants did not participate in the hearing of the Plaintiff's case, the evidence presented in support of the Plaintiff's claim remains uncontroverted, un-rebutted and unchallenged. That superior Court decisions have held the position that *"where a party fails to call evidence in support of its case, that party's pleadings remain mere statements of facts since in so doing the party fails to substantiate its pleadings. ...the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged."* [See Shancebal Limited vs County Government of Machakos [2018] eKLR where Odunga J, at paragraph 25 cited with approval Trust Bank Limited vs Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) H.C.C.S No. 1243 of 2001].

c) That further to the finding in (b) above, the failure by the Defendants to call evidence to support their pleadings does not excuse the Plaintiff from discharging its evidential burden to prove their case to the standard required in each situation. That the provision of **Section 7 of the Evidence Act Chapter 80 Laws of Kenya** requires whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove those facts exist. That in the case of **CMC Aviation Ltd vs Cruisair Ltd (No. 1) KLR 835** Madan JA, had the following to say;

*"The pleadings contain the averments of the three parties, until they are proved, or disapproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence. As stated in the definition of "evidence" in Section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted to investigations, is proved or disapproved. Averments are matters the truth of which is submitted for investigations. Until their truth has been established or otherwise they remain unproven."*

The Court of Appeal in the case of **Kinyanjui Kamau vs George Kamau Njoroge [2015] eKLR** held as follows;

*"In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. ....To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding."*

That the standard of proof to be met when allegations of fraud are made can be discerned from the guidance given in **Ratilal Goudhanbhai Patel vs Layi Makanji [1957] EA 314, paragraph F at page 317** as follows;

*“...Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”*

That from the totality of the evidence presented by the Plaintiff, it is clear the suit land was part of the larger parcel of land that was vested in the Kenya Railways Corporation, that was alienated without the said Corporation's Board's, and the relevant Ministries giving their approval or consent. That the procedure required for alienation and registration for the private purposes of such land was not followed. That had the 1<sup>st</sup> Defendant diligently checked on records of the suit land and its history, they would have known the land was already alienated, and hence not available to be allocated to them. That no diligent public officer at the lands registry and survey department, would have processed the allocation and subdivision of the suit land, and the registration of the lease thereof without ensuring and satisfying themselves that the relevant approval, consent and documents had been availed before them. The upshot of the evidence tendered by the Plaintiff is that the entire transaction through which the 2<sup>nd</sup> Defendant allocated the suit land to the 1<sup>st</sup> Defendant, its subdivision, issuance and registration of the lease over the suit land in the name of the 1<sup>st</sup> Defendant, was fraudulent, irregular, illegal and un-procedural. That the title is therefore not protected under **Article 40 (6) of the Constitution 2010 and Section 26 (1) of the Land Registration Act No. 3 of 2012**. That accordingly the court finds that the Plaintiff has made a case for the rectification of the suit land's register and cancelling the same pursuant to **Section 80 of the Land Registration Act**.

d) That though the Plaintiff had sought for damages for fraud, the same cannot be allowed as there is no evidence tendered that the Defendants have been found guilty of crimes related to fraud. [See the decision of Ongudi J, in **Registered Trustees of the Sisters of Mercy (Kenya) T/A “Mater Misericordiae Hospital vs John Muriithi & 2 Others [2019] eKLR at paragraph 26**, cited with approval in **Kisumu ELC No. 423 of 2015 Kenya Anti-Corruption Commission vs Dr. Oburu Odinga & Another**].

e) That flowing from the provisions of **Section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, the Plaintiff, having succeeded in all but one of the prayers is entitled to costs of the suit as costs follow the event.

7. That having come to the foregoing findings, the court enters judgment for the Plaintiff against the Defendants in terms of prayers (a), (b), (c), (d), (f) and (g) of the Amended plaint dated the 21<sup>st</sup> January 2010 and filed on the 29<sup>th</sup> January 2010.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

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

**In the presence of:**

Plaintiff Absent

Defendants Absent

Counsel Ms. Omieni for the Plaintiff

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**



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