



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC NO. 708 OF 2015

KENYA ANTI-CORRUPTION COMMISSION...PLAINTIFF

VERSUS

ONLINE ENTERPRISES LIMITED.....1ST DEFENDANT

EJAI NOBALA AMOYL.....2ND DEFENDANT

SHIRAZ MOHAMED NANJI.....3RD DEFENDANT

ZEENAT SHIRAZ.....4TH DEFENDANT

WILSON GACHANJA.....5TH DEFENDANT

JUDGMENT

By a plaint dated 22nd June 2009 the plaintiff herein sued the defendants jointly and severally seeking for the following orders:

- a) A declaration that the issuance of a lease by the 5th defendant to the 1st defendant over Kisumu Municipality Block 7/474 was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st defendant in the first instance.
- b) A declaration that the transfers and issuance of certificates of lease over Kisumu Municipality Block 7/474 to the 2nd, 3rd and 4th defendants was null and void and ineffectual to confer a good title upon any of them.
- c) An order for rectification of the lands register by cancellation of the lease over Kisumu Municipality Block 7/474 and certificate of lease issued to the 3rd and 4th defendants so as to restore the suit property to the Corporation.
- d) An order of permanent injunction against the 3rd and 4th defendants by themselves, their 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 7/474.
- e) General damages as against the 1st and the 5th defendants only.

Plaintiff's Case

PW1 Joseph Kiragu Kariuki a Land Administrator at the National Lands Commission based in Nairobi stated that from their records, the land in question belonged to Kenya Railways Corporation after it had been reserved way back in 1935. Also that the maps showed that the land belonged to the Corporation. He further stated that after conducting their own investigations, it was established that the said parcel of land had been irregularly allocated to individuals. The said individuals were notified of the need to

surrender the allotment letter for cancellation and subsequently another letter was written to the 1st defendant notifying it of the cancellation of Kisumu Municipality Block 7/474 and the withdrawal of the offer as the land belonged to the Kenya Railways Corporation.

PW1 further stated that the said cancellation was gazetted, the Director of survey gave it a new number and all consolidated parcels as Kisumu Municipality Block 7/567 measuring 72.38 ha together with the approved map were forwarded to the Railways Corporation. A lease in favor of the Kenya Railways Corporation was prepared and registered on 24/2/2014.

On cross examination, he stated that block 7/474 was initially reserved for Kenya Railways Corporation as per the map and that all the documents of the history of allocation are available in their offices.

PW2 one Hassan Zakaria Osotsi a Land surveyor in the Ministry of Lands and Physical Planning stated that pexb 1 showed a map of parcel of land which was reserved for Kenya Railways Corporation in 1935. He further stated that during the survey of land, the department of Physical Planning prepares a PDP and the Commissioner of Lands uses the PDP to allocate the land and that once the PDP and the allotment letter is ready, the allottee approaches the private surveyor to do ground survey and quality control and authentication. He stated that a survey from a private surveyor was received in their office indicating that he had consolidated all the parcels of land belonging to the Corporation. After confirmation from the Commissioner of Lands, the same was registered as Block 7/567 and was forwarded to the Commissioner for Lands.

On cross examination, he stated that the registry index map was amended to show the alienation of Block 7/474 and that there was a gazette notice revoking the parcel.

PW3 one Dedan Ochieng Okwama an investigator at EACC in his testimony stated that from their investigation the suit parcel of land was reserved for Kenya Railways Corporation and was not vacant for allocation. It was his evidence that various documents were collected in the process of investigation and was established that Legal Notice No 440 dated 12/7/1963 vested the property in the name of East Africa Railways and Harbour, Legal Notice No 20 dated 13/5/1969 vested the property in the name of East Africa Railways and Harbour and Legal Notice No 24 dated 22/2/1986 vested the same property in the name of Kenya Railways corporation.

PW3 also stated that after writing to the Provincial Physical Planner, a response was sent to EACC indicating that there were no PDPs. That there were no approved PDPs for purposes of allocation of the land. A conclusion was made that the said land was not available for allocation.

On being cross examined, he confirmed that the lease and the green card were a forgery by the person who executed on behalf of the president. He also stated that Kenya Railways Corporation was not involved in the transfer of the property. The plaintiff therefore closed its case.

The 1st defendant did not tender any evidence.

2nd Defendant's Case

DW1 Benjamin Nobala Amoyi stated that he bought the parcel of land from the 1st defendant and was registered as proprietor on 28th July 2000 and later sold it to the 3rd and 4th defendants. He stated that he bought the suit property after carrying out a search which indicated that the land belonged to the government of Kenya. That he was not aware that the parcel of land belonged to any other person apart from the government of Kenya. Lastly, he stated that he was never involved in any fraud or forgery.

On cross examination he stated that he did not have a PDP and that he was not aware that he was to get a PDP. The 2nd defendant therefore closed his case.

The 3rd and 4th defendants closed their case without tendering any evidence. Counsel therefore filed written submissions.

Plaintiff's Submission

Counsel submitted that the Plaintiff filed this suit pursuant to powers conferred to it under Section 7 (1) (h) of the Anti-Corruption and Economic Crimes Act (ACECA) [powers not housed under Section 11 (j) of the Ethics and Anti-Corruption Commission Act (EACCA)]. In their submissions, the plaintiff states that there was no presidential authority to alienate the suit property and the defendant did not tender any such authority in their defence and thus the plaintiff's evidence on the point is unchallenged.

It was further Counsel's submission in reference to Section 7 of the Government Lands Act states that there is a limit on the power of the Commissioner of Lands to executing leases on behalf of the President. It was the President who had sole discretion to alienate unalienated Government land under Section 3 of the Government Lands Act. Further, that from the foregoing facts, it is established that the title issued to the 1st defendant over the suit property was unlawful ab initio and that in accordance with Article 40(6) of the constitution the 1st defendant cannot enjoy property rights over the same.

Counsel listed the following issues for determination by the court

- 1) Whether Kisumu Municipality Block 7/474 (herein after 'the suit property') constitutes part of land that was set apart as a Railway reserve and vested in the Kenya Railways Corporation under the provisions of the Kenya Railways Corporation Act Cap 397.
- 2) Whether the 5th Defendant acted illegally and contrary to the provisions of the Government Lands Act (Cap 280), the Kenya Railways Corporation Act (Cap 397) and the State Corporations Act (Cap 446) when he purported to issue a lease over the suit property to the 1st defendant.
- 3) Whether the 1st and 5th defendants acted fraudulently in the alienation of the suit property as particularized in paragraph 10 of the Plaintiff.
- 4) Whether the 1st and 5th defendants passed a title over the suit property to the 2nd defendant.
- 5) Are the 3rd and 4th defendants bona fide purchasers for value without notice of any defect in title"
- 6) Whether a Demand and Notice of intention to sue was given.
- 7) Whether the Plaintiff is entitled to the reliefs sought in the plaint.

Counsel submitted that from the evidence of the plaintiff's witnesses covered the issues listed above which showed that the 5th Defendant acted illegally and contrary to the provisions of the Government Land Act (Cap 280), the Kenya Railways Corporation Act (Cap 397) and the State Corporations Act (Cap 446) when he purported to issue a lease over the suit property to the 1st Defendant. He stated that the evidence of PW1 indicates that the suit property was part of the land reserved for Kenya Railways Corporation. PW 1 is a Chief Land Administration Officer and testified that EACC approached them to look into the illegal alienation for the Kenya Railway land and that upon perusal into the history of the land in their records, there was the original map for Kenya Railway reserve land. He produced Exhibit 1 which is a survey plan of Railway Reserve land that he was referring to in his testimony.

Further that the evidence of PW2 who is the Land Surveyor confirmed that Exhibit 1 was the map that showed the original boundaries of Kenya Railways land. He produced the RIM for Kisumu Block 7 indicating the boundaries of Kenya Railways Reserve indication Kisumu Municipality Block 7/474 lies within the Kenya Railways land. PW 2 further produced a Part Development Plan (PDP) for the Kenya Railway Reserve Land Exhibit 12 which he stated marched the boundaries in the original Kenya Railways Reserve Land Exhibit 1. The evidence of Dedan Okwama (PW 3) who is the Investigating Officer indicted that during the investigation, records obtained from the Ministry of Lands indicated that Legal Notice No. 440 of 1963, No. 20 of 1967 and No. 24 of 1986 (marked as Exhibit 13, 14 and 15 respectively).

On the second issue as to whether the 5th Defendant acted illegally and contrary to the provisions of the Government Lands Act (Cap 280), the Kenya Railways Corporation Act (Cap 397) and the State Corporations Act (Cap 446) when he purported to issue a lease over the suit property to the 1st Defendant Counsel submitted that The Kenya Railways Corporation is a body corporate with the power to acquire, own and dispose of property in its own name (Sections 3(2) of the Kenya Railways Act, Cap 397 Laws of Kenya and Section 3(2) (c) of the State Corporations Act, Cap 446 Laws of Kenya. Section 14(4) and (5) of the Kenya Railways

Act provides that:-

‘(4) The Corporation may at any time convey, transfer or surrender any land surplus to both its existing and future requirements by a conveyance or a deed of surrender either for, or without, consideration: Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct.

(5) The provisions of subsection (4) shall apply to land vested in the Corporation by any written law, including this Act, as well as to land conveyed to it or otherwise placed at its disposal.’

Counsel therefore submitted that the Railways Corporation did not itself alienate the land reserved for it as established above. Further there was no consent from the Minister responsible for land for the alienation of the suit property as required by the section quoted above.

The Government Land Act Cap 280 Laws of Kenya, gives the Commissioner of Lands power to allocated ‘unalienated Government land.’ The said Act goes on to provide the procedure for the same. Unalienated Government land is defined in the Act as: ‘Government land which is not for the time being leased to any other person, or in respect of which the Commissioner had not issued any letter of allotment.’

Further that the suit property was part of land reserved to the Kenya Railways Corporation and therefore not unalienated Government land and thus the 5th defendant, who was at the time the Commissioner for Lands, had no powers to allocate the same to the 1st defendant or any other person as was confirmed by PW 3 as the same was already reserved.

Counsel cited Court of Appeal **Civil Appeal No. 288 of 2010; Kipsirgoi Investment Ltd – vs – Kenya Anti-Corruption Commission**, where the court found that there was uncontested material that as early as 1974, the suit property was planned as an ‘open space’ and held that the subsequent lease to the Appellant was on the face of section 3 of the GLA irregular. Quoting from section 3 of the Physical Planning Act CA. 286, the court concluded that reservation for a particular purpose renders that land alienated.

Counsel submitted that the Plaintiff has pleaded and testified that no presidential authority to alienate the suit property was given and that the defendants have not tendered any such authority in their defence and thus the Plaintiff’s evidence on the point is unchallenged. Section 7 of the Government Lands Act provides that:

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the president under this Act:

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128.”

The foregoing Section clearly limits the power of the Commissioner of Lands to executing leases on behalf of the President. It is the President who had sole discretion to alienate unalienated Government land under Section 3 of the Government Lands Act. This was the finding by the court in the case of **James Joram Nyaga & Another – vs – The Hon. Attorney General & Another**

On the issue as to whether the 1st and 5th defendants acted fraudulently in the alienation of the suit property Counsel submitted that the evidence of PW3 highlighted the irregularities in the allocation of land to the 1st defendant which included the fact that there was no application for allotment by the 1st defendant as required, lack of consent from the Railways Corporation and finally that there was no public auction or tendering of the parcels allocated. PW 1 stated that upon receiving a complaint from Kenya Railways Corporation on the irregular allocation of its land, the Land office wrote a letter to the 1st defendant dated 10th March, 2009 (Exhibit 2) cancelling the title and asking for the surrender of the title irregularly issued. He stated that the said titles were further cancelled vide Gazette Notice No. 15577 of 26th November, 2010 by the then Minister of Lands.

Counsel further submitted that after cancellation of the title to the suit property among other titles the Lands office reallocated the

land back to Kenya Railways Corporation. The land reserved for Railways was re-surveyed to consolidate the irregularly allocated parcels back into one and a new title issued for 72.38 hectares of land reserved for Kenya Railways Corporation within Block 7. The process of reconsolidation is documented in correspondence between the Commissioner for Lands and the Director of Survey. It was Counsel's submission that this shows that the allocation of the suit property to the 1st defendant was fraudulent and unlawful.

On the issue as to **whether the 1st and 5th Defendants passed a good title over the suit property to the 2nd defendant and whether the 3rd and 4th defendants are bona fide purchases for value without notice of any defect in title"**

Counsel submitted that the 1st defendant had no valid title as the land belonged to Kenya Railways and as such he held a bad title and therefore any subsequent transactions to that land were null and void.

Counsel cited the case of **Alice Chemutai Too –vs – Nickson Kipkurui Korir & 2 Others (2015) eKLR**, in which the trial court held

'that having analysed the totality of the evidence adduced, having found that the title of the 1st defendant was acquired fraudulently, the onus was on the 2nd defendant to challenge the claim of the plaintiff that the title upon which they advanced the loan is tainted with fraud. It did not discharge that duty. It then follows that there was no valid title that was charged to the 5th defendant capable of conveying a legal interest in the suit land by way of a realizable security'.

On the issue as to **whether the 5th Defendant was rightfully sued**, Counsel submitted that the defendants cannot be heard to say that the 5th defendant was the Commissioner of Lands and that therefore his actions bind the Government. The plaintiff contended that the actions of the 5th defendant as Commissioner of Lands were illegal. The Government cannot therefore be liable for the illegal acts of its servants as illegalities do not bind the office. The liability of the 5th Defendant is personal and cannot be transferred to his office. It cannot be said that he was acting in the course of his employment as the terms of employment does not include acting contrary to the law. Once he breaks the law he takes himself outside the protection of his office and becomes personally liable for his actions.

Counsel cited the case of KACC –Vs- Sammy Komen Mwaita and another, NAKURU. HCCC No. 43 of 2008 where the court deliberated on this issue.

It was therefore Counsel's submission that the plaintiff has established that the title issued to the 1st defendant over the suit property was unlawful ab initio and that under Article 40 (6) of the Constitution, the 1st Defendant cannot enjoy property rights over the same. Counsel cited the case of **Republic –vs- District Land Registrar, Mombasa & 5 Others Ex-Parte Super Nove Properties Ltd [2016] eKLR** where the court found that there can be no indefeasibility of title as against Article 40(6) of the Constitution.

Finally Counsel submitted that public interest is in favour of the cancellation of title held by the 1st defendant since the suit property was part of land reserved for public purposes. Counsel urged the court to find that the Plaintiff has proved its case that the alienation of the suit property was illegal, fraudulent, null and void and conferred no interest or estate in the 1st defendant and that in any event it is in the interest of justice and public policy that the remedies sought by the plaintiff herein be granted as prayed.

2ND DEFENDANT'S SUBMISSIONS

Counsel for the 2nd defendant reiterated the evidence of the parties and submitted that given the evidence tendered by the plaintiff, there was no illegality/fraud or any wrong doing shown by the plaintiff to warrant the orders sought

Counsel further submitted that there is no credible evidence that the suit land ever belonged to Kenya Railways Corporation and that even if it did, the Corporation did not allow it to be registered in the name of the Government of Kenya. No evidence was brought to show that the Government of Kenya had no legal power to issue a leasehold interest to the 1st defendant.

Lastly Counsel submitted that the Government of Kenya registered as the absolute proprietor, leased the suit land to the 1st defendant who in turn sold the leasehold interest to the 2nd defendant for a valuable consideration. There is no evidence that the 2nd defendant knew of any defect in the 1st defendant's title and that there is no defect in the 1st defendant's title. Counsel urged the court to dismiss the plaintiff's case with costs to the 2nd defendant.

3rd and 4th defendants' Submission

It should be noted from the onset that the 3rd and 4th defendants did not tender any evidence and they were not present in court during the hearing but their Counsel was present.

The 3rd and 4th defendant's submitted that no evidence was led to prove that there was any fraud on the part of the 3rd and 4th defendant and that their possession both actual and constructive was acquired after payment of valuable consideration without any knowledge of any fraud of any degree whatsoever.

Counsel further submitted that the 3rd and 4th defendants discharged their legal obligation when it properly investigated the title and cannot be faulted on other eventualities it could have not reasonably ascertained including how the 2nd defendant acquired his certificate of lease. Lastly, that the suit property is and has never been land belonging to the Kenya Railways Corporation and that the plaintiff had no mandate to sue on his behalf which is a legal entity capable of suing and being sued under its own name.

Counsel submitted that the 3rd & 4th Defendants clearly satisfy the requirements of bona fide purchasers as they hold a title purchased in good faith for valuable consideration without notice of any fraud.

Analysis and Determination

The plaintiff brought this suit pursuant to powers conferred to it under Section 7 (1) (h) of the Anti-Corruption and Economic Crimes Act (ACECA) [powers not housed under Section 11 (j) of the Ethics and Anti-Corruption Commission Act (EACCA).

It should be noted that the 1st defendant was served by substituted service but did not enter appearance. All other defendants entered appearance and the 2nd and 5th defendants filed defences. The 3rd and 4th Defendants filed a further Affidavit through one Azim Mohammed Nanji who stated in the affidavit that he had a power of attorney.

The 2nd, 3rd and 4th defendants, through their Counsel participated in the hearing and cross-examined the plaintiff's witnesses. The 2nd defendant had one witness who was cross examined by the Counsel for the plaintiff and Counsel for the 3rd and 4th defendants. The 5th defendant on the other hand did not participate in the proceedings despite being served.

The chronology and the background of the case is as enumerated elaborately above from the evidence of the plaintiff and its witnesses. The issues for determination by the court in this case are as follows:

- 1) Whether Kisumu Municipality Block 7/474 (herein after 'the suit property') constitutes part of land that was set apart as a Railway reserve and vested in the Kenya Railways Corporation under the provisions of the Kenya Railways Corporation Act Cap 397.
- 2) Whether the 5th Defendant acted illegally and contrary to the provisions of the Government Lands Act (Cap 280), the Kenya Railways Corporation Act (Cap 397) and the State Corporations Act (Cap 446) when he purported to issue a lease over the suit property to the 1st defendant.
- 3) Whether the 1st and 5th defendants acted fraudulently in the alienation of the suit property as particularized in paragraph 10 of the Plaintiff.
- 4) Whether the 1st and 5th defendants passed a good title over the suit property to the 2nd defendant.
- 5) Are the 3rd and 4th defendants bona fide purchasers for value without notice of any defect in title"
- 6) Whether the Plaintiff is entitled to the reliefs sought in the plaintiff.

On the first issue as to **whether Kisumu Municipality Block 7/474 constitutes part of land that was set apart as a Railway reserve and vested in the Kenya Railways Corporation under the provisions of the Kenya Railways Corporation Act Cap 397.**, PW1 led elaborate evidence with documents in tow to prove that the suit parcel of land had been reserved for Kenya Railways

Corporation as early as 1935 and therefore it was not available for alienation.

The Commissioner of Lands also had no authority to alienate the suit land as Section 3 of the GLA, vests the power to alienate unalienated Government land in the President. The power to alienate is delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set in the GLA. None of the exceptions set out therein empowered the 1st defendant to alienate the suit property to the 2nd defendant.

In NBI, HC. Misc. Appl. 1732 of 2004, James Joram Nyaga & Another –v- Attorney General & Another [2007] eKLR the court referring to section 3 and 7 of the GLA observed thus:

“The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the president. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registrarion of Titles Act Cap. 281 of the Laws of Kenya.”

In the same case the court having found that the land in dispute was government land over which the Commissioner of Lands had no power to pass any title, the court dismissed the Applicant’s Originating summons in which they were seeking, inter alia, a declaration that they were the lawful owners of the property in dispute.

Further in the case of **Milankumarn Shar & Two others –vs- City Council of Nairobi & Others, Nairobi HCCC No. 1024 of 2005** the Court found that the Commissioner of Lands did not have authority under Section 3 of the Government Lands Act to make any grant or disposition of any estate, interest or right in or over a portion that was a part of a public road and therefore not unalienated Government Land. The learned Judges in this case quoted with approval the case of **Paul Nderitu Ndung’u & 20 Others –V- Pashito Holdings Limited & Another (Nairobi HCCC No. 3063 of 1996)** where it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. In the Paul Nderitu Ndung’u case Justice Mbogholi Msagha said:

“Under the Government Lands Act (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in over unalienated government land. (Section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienated was void ab initio.”

The above tackles the issue that the 5th defendant acted illegally and contrary to the provisions of the Government Lands Act (Cap 280), the Kenya Railways Corporation Act (Cap 397) and the State Corporations Act (Cap 446) when he purported to issue a lease over the suit property to the 1st defendant.

In order to determine the question whether the lease held by the 1st defendant is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material and important especially when there are doubts to the regarding the process.

It is therefore necessary for the court to determine how the defendant ended up having a Lease and Certificate of Lease in its name, and further determine if the Government did intend to issue the defendant with a Lease over the suit land. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

In the case of **Elijah Makeri Nyangw’ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR** where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or

through a corrupt scheme. Hon Justice Munyao Sila in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

"the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme."

The Court in the case of **Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR** stated that:

"It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market. Perhaps the provisions of the new Constitution 2010 and the Land Registration Act, 2012 will have a positive impact for land investors in future."

It should be noted that at one time in the history of Kenya there was unprecedented land grabbing which is known in other parlance as large scale land based investment depending on which side you are in, meant to sanitize the illegal act. The courts had to stamp their authority to root out this vice in order to protect the public interest and individuals who would otherwise lose their land through these schemes.

In **Republic vs Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563 Maraga, J** (now Chief Justice) expressed himself as follows:

"Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of the Constitution or under section 1 and 1A of the Constitution or under the doctrine of public trust a title would have to be nullified because the Constitution is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of the Constitution."

Similarly, Nyamu, J (as he then was) in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** held:

"Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests" How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title" Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of the Constitution. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.".....In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of the Constitution captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in "a democratic society." This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency...A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of the Constitution in my view...The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and "kayas" just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land."

Further in the same vein in **Chemel Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005** at para. 64 it was held:

“The Constitution protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

Also in the case of **Dr. Joseph Arap Ngok vs Justice Moiwo ole Keiwua & 5 Others, Civil Appeal No. Nai. 60 of 1997** the court stated thus that:

“Section 23 (1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of title, otherwise the whole process of registration of Titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

If violation of such sanctity which is guaranteed by the State is proved, then section 24 of the same Act states as follows:

“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person as proprietor of the land or interest, or in consequence of any error or misdescription in any grant or certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to the interest through the fraud, error or misdescription.

The above judicial authorities are in consonant with the plaintiff’s case. The 5th defendant had no authority to alienate land that had been reserved for Kenya Railways as has been proved by the evidence and the documents produced.. The defendants claimed that they were bona fide purchasers for value without notice. For a person to rely on this doctrine, he must prove the following ingredients as was enunciated in the case of KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173 where the Court of Appeal in Uganda held that:

“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, ... (he) must prove that:

- a) he holds a certificate of title;
- b) he purchased the property in good faith;
- c) he had no knowledge of the fraud;
- d) he purchased for valuable consideration;
- e) the vendors had apparent valid title;
- f) he purchased without notice of any fraud;
- g) he was not party to any fraud.”

The 1st to 4th defendants therefore do not qualify as innocent purchasers for value without notice as the 5th defendant had no authority to alienate the land. He could therefore not pass a good title to the defendants. If they have any claim for the land then their remedy lies elsewhere, moreso at the doorstep of the persons who purportedly sold to them land which they did not have title to.

Section 26 of the Land Registration Act provides that the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, it also provides that such title can be impeached on the grounds of having been acquired fraudulently, through misrepresentation or illegally or unprocedurally.

title.

As Justice Munyao put it in the case of **Alice Chemutai Too – Vs – Nickson Kipkurui Korir & 2 Others [2015] eKLR**

... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.

The assertion of the defendants that they were innocent purchasers who were not aware of the fraudulent transaction does not hold water in this case as the purpose of section 26 is to protect the real title holders from the unscrupulous persons.

The court is also empowered under Section 80 (1) of the Land Registration Act, 2012 to order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the defendants irregularly, fraudulently and unprocedurally registered the suit land in their names and the same should not be allowed to stand. I therefore enter judgment for the plaintiff against the defendant and make the following orders:

- a) A declaration that the issuance of a lease by the 5th defendant to the 1st defendant over Kisumu Municipality Block 7/474 was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st defendant in the first instance.
- b) A declaration is hereby made that the transfers and issuance of certificates of lease over Kisumu Municipality Block 7/474 to the 2nd, 3rd and 4th defendants was null and void and ineffectual to confer a good title upon any of them.
- c) An order is hereby issued for rectification of the lands register by cancellation of the lease over Kisumu Municipality Block 7/474 and certificate of lease issued to the 3rd and 4th defendants so as to restore the suit property to the Corporation.
- d) An order of permanent injunction is hereby issued against the 3rd and 4th defendants by themselves, their 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 7/474.
- e) Costs of the suit to be paid by the defendants.

DATED and DELIVERED at KISUMU this 25TH DAY of JANUARY, 2019.

M.A ODENY

JUDGE

Delivered in the presence of:-



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