



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 820 OF 2015

(FORMERLY HCCC NO. 80 OF 2009)

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

ZURIP PROPERTIES LTD.....1ST DEFENDANT

WILSON GACHANJA.....2ND DEFENDANT

JUDGEMENT

1. Kenya Anti-Corruption Commission, the Plaintiff, commenced this suit through the plaint dated the 22nd June 2009 and filed on the 24th June 2009, against Zurip Properties Limited and Wilson Gacanja, the 1st and 2nd Defendants respectively, seeking for the following prayers;

a) “A declaration that the issuance of a Lease by the 2nd Defendant to the 1st Defendant over Kisumu Municipality/Block 7/522 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 registration of the Lease and issuance of a Certificate of lease over Kisumu Municipality/Block 7/522 to the 1st Defendant was null and void and ineffectual to confer a good title upon the 1st Defendant.

c) An order for rectification of the land register by cancellation of the lease over Kisumu Municipality/Block 7/522 and certificate of lease issued to the 1st Defendant so as to restore the suit property to the Corporation.

d) An order for a permanent injunction against the 1st Defendant by itself, its agents, servants or assigns restraining them from leasing, transferring, charging, entering upon, developing, or in any other manner howsoever from dealing with Kisumu Municipality/Block 7/522.

e) General damages for fraud.

f) Costs of and incidental to the suit.

g) Any other or further relief the court may deem fit and just to grant.”

2. The Plaintiff avers that **Kisumu Municipality/Block 7/522**, the suit property, was at all material times part and parcel of a larger parcel of land which vested in the General Manager, East African Railways & Harbours Administration vide L. N. No. 440 of 1963. That the said land was in or about 1968 surveyed and assigned reference L. R. No. 1148/1383 and set apart for railway housing

purposes, and the survey plan registered with Survey of Kenya under Folio Register No. 115/42. That the said land was subsequently vested in the East African Railways Corporation vide L.N. No. 20 of 1969 issued under the East African Railways Corporation Act of 1967. That the said land was later vested in the Kenya Railways Corporation, herein after referred to as the Corporation, vide L.N. No. 24 of 1986, issued under the Kenya Railways Corporation Act Chapter 397 of Laws of Kenya, following the dissolution of the East African Community in 1977. That following investigation carried out by the Plaintiff, it found out that in or about 1999, the 1st Defendant wrongfully and fraudulently procured from the 2nd Defendant a lease over the suit property for private purposes. That the lease was registered on 20th September 1999 and a certificate of lease issued to the 1st Defendant without the knowledge or consent of the Corporation. The Plaintiff has set out the particulars of the Defendants fraud, illegality and knowledge under paragraphs 7, 8 and 10 respectively.

3. The 2nd Defendant opposed the Plaintiff's claim through his statement of defence dated the 11th December 2009, and filed on the 14th December 2009, among others averring as follows; that he is unaware, has no personal knowledge of, and is a stranger to the existence and disposition of the suit property; that he undertook his duties as the Commissioner of Lands faithfully, diligently in accordance to the Government Lands Act Chapter 280 of Laws of Kenya; that it is not uncommon for the President to divest public land for private ownership in pursuance of the Government's Privatization policy, and that the conveyancing documents would be executed by the Commissioner of lands, pursuant to the President's delegated authority. That the Commissioner of Lands in such divestiture process would be merely as a generator of documentation, and was not possessed of the capacity to confer a benefit in land to a third party. That the Government in such a divestiture process does not actually sell or dispose of land, but merely facilitates development by giving leases and retaining the radical or parent title. That the suit is brought in bad faith, constitutes false misrepresentation and should be dismissed with costs.

4. The 1st Defendant though served with summons did not enter appearance, file defence or participate in the proceedings.

5. The hearing commenced on the 6th February 2018 with the Plaintiff presenting Wilson Francis Ojunju who works with the Survey of Kenya and he testified as PW1. Then Dedan Ochieng Okwama, an investigator with the Plaintiff, testified as PW2 while Joseph Kirago Kariuki, a Land administrator with National Land Commission, testified as PW3. Their evidence was that the Corporation had lodged complaints that several plots had been hived off Block 7 and allotted to private entities without its knowledge and consent. That the investigations that were carried out confirmed that the suit property that had been allocated to the 1st Defendant by the 2nd Defendant was part of the Corporation land. That the 1st Defendant was asked in writing to surrender the title documents for cancellation. That the said allocation was among others revoked vide L. N. No. 15577 of 26th November 2010. That the Corporation then did a survey of its land, incorporating the suit property, and the land measuring about 72.38 hectares was allocated and registered in its name and a certificate of lease dated the 24th February 2014 issued.

6. That upon the Plaintiff closing its case, that of the defendants was also marked closed as none of them participated in the hearing. The learned counsel for the Plaintiff then filed their written submission.

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

a) Whether the suit property was part of the land set apart and vested in the corporation.

b) Whether the suit property was available for allocation to the 1st Defendant.

c) Whether the 2nd Defendant acted illegally and contrary to the provisions of the law when he issued a lease over the suit property in favour to the 1st Defendant.

d) Whether both Defendants acted fraudulently in the alienation of the suit property.

e) Whether the 1st Defendant acquired good title to the suit property.

f) Who pays the costs.

8. The Court has carefully considered the pleadings filed, the oral and documentary evidence tendered by PW1 to PW3, the submissions by Counsel for the Plaintiff and come to the following conclusions;

a) That the evidence tendered by PW1 to PW3 that remains uncontroverted, clearly shows that the suit property was part of the land set apart and vested in the Kenya Railways Corporation as of the time it was allocated to the 1st Defendant. That the testimony tendered by the Plaintiff has further shown that was no Part Development Plan in respect of the suit property upon which the 2nd Defendant could have anchored the allocation and lease he issued in favour of the 1st defendant.

b) That the Plaintiff has also proved that the suit property had already been alienated to the Corporation and therefore not available for allocation by the 2nd Defendant to the 1st Defendant without the Corporation surrendering it to the Government in accordance with **Section 14 (4) and (5) of the Kenya Railways Act, Chapter 397 of Laws of Kenya**.

c) That as the suit property was not unalienated Government land, the 2nd Defendant, who was then the Commissioner of Lands, had no power under **Section 3 of the Government Lands Act Chapter 280 of Laws of Kenya** to allocate it as he did, to the 1st Defendant. The allocation was therefore irregular. That the provisions of **Section 3 of the Government Land Act** places the power to alienate unalienated Government land on the President. That the power to alienate land that is delegated to the Commissioner of Lands which office the 2nd Defendant held at the material time, is limited to educational, charitable sports and other purposes set out at the foot of **page 8 of the Act**. That none of those exceptions empowered the 2nd defendant to alienate the suit property to the 1st Defendant. (See **James Joram Nyaga & Another vs Attorney General & Another [2007] eKLR**).

d) That as the Plaintiff has shown that the 2nd Defendant allocated the suit property to the 1st Defendant without first having the corporation surrender it, and without following the due process, his action was outside his official powers and therefore fraudulent and irregular. That the allocation and lease issued and registered in the 1st Defendant's name, having been unprocedurally and fraudulently obtained did not confer good title to it, and is therefore void *ab initio*. That the title is therefore not protected under **Article 40 (6) of the Constitution and Section 26 (1) of the Land Registration Act No. 3 of 2012** as was held in the case of **Kenya Anti-Corruption Commission vs Ken Deep Construction Ltd & Another Kisumu ELC No. 686 of 2015**. That the Plaintiff has not proved the damages or loss suffered for general damages to be awarded and therefore none is awarded.

e) That the court concurs with the Plaintiff's learned Counsel submissions that in this case, the public interest is in favour of the lease registered in the name of the 1st Defendant over the suit property to be cancelled and the land be reverted back to the Corporation for public purposes.

f) That as the Plaintiff has succeeded in their claim, it is entitled to costs in accordance with **Section 27 of Laws of Kenya** to the effect that costs follow the events.

9. That the foregoing shows that the Plaintiff has proved its case against both Defendants in accordance with the law. That judgment is therefore entered for the Plaintiff against the Defendants as prayed in terms of prayers (a), (b), (c) and (f) only of the plaint dated the 22nd June 2009 and filed on the 24th June 2009.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE

DATED AND DELIVERED THIS **5TH** DAY OF **SEPTEMBER** 2019

In the presence of:

Plaintiff Absent

Defendants Absent

Counsel M/s Kakuui for the Plaintiff

S.M. KIBUNJA

ENVIRONMENT & LAND

JUDGE



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