REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

LAND CASE NO. 886 OF 2016

(FORMELY HCC 114 OF 2009)

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

PETER OLOO ARINGO.....1ST DEFENDANT

TRANS NATIONAL BANK LTD.....2ND DEFENDANT

VYATU LIMITED.....3RD DEFENDANT

WILSON GACANJA.....4TH DEFENDANT

JUDGEMENT

PALINTIFF'S CASE

Kenya Anti-corruption Commission (hereinafter referred to as the plaintiff) has come to court against Peter Oloo Aringo, Trans National Bank Ltd, Vyatu Ltd and Wilson Gachanja (herein after referred to as 1st, 2nd, 3rd and 4th Defendants respectively) praying for a declaration that the issuance of a lease by the 4th Defendant to the 1st Defendant over Kisumu Municipality/Block 7/411 was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 1st Defendant in the first instance.

Moreover, a declaration that the subsequent charge and transfer of the suit property and issuance of a Certificate of Lease over Kisumu Municipality/Block 7/411 to the 3rd Defendant was null and void and ineffectual to confer a good title upon the 3rd Defendant.

Furthermore, an order for rectification of the land register by cancellation of the lease over Kisumu Municipality/Block 7/411 and Certificate of lease issued to the 3rd Defendant so as to restore the suit property to the Corporation and an order for a permanent injunction against the 3rd Defendant by itself, its agents, servants or assigns restraining them from leasing, transferring, charging, entering upon, or developing, or in any other manner howsoever from dealing with Kisumu Municipality/Block 7/411.

Lastly, **General damages for fraud as against the 1st and 4th Defendants only** and c**osts of and incidental to the suit.**

The plaintiff states that at all material times ALL THAT parcel of land now registered as Kisumu Municipality/Block 7/411

(hereinafter referred to as "the suit property") measuring approximately 0.2497 ha situated within Kisumu Municipality was part and parcel of a larger of land which was vested in the General Manager of the defunct East African Railways & Harbours Administration vide Legal Notice No. 440 of 1963 (hereinafter referred to as "the Administration").

The Plaintiff states that prior to the vesting the said property was in or about 1935 surveyed and assigned L.R. No. 1148/ Section LV and set apart as a railway reserve and the relevant survey plan was registered at Survey of Kenya under Folio Register No. 43/53. The said land was subsequently vested in the defunct East African Railways Corporation (E.A.R.C) vide Legal Notice No. 20 of 1969 issued under the East African Railways Corporation Act, 1967 upon the division of the assets of the Administration as between the East African Railways Corporation and the east African Harbours Corporation.

Following the dissolution of the East African Community in 1977 all the assets of the E.A.R.C, including the suit property, were vested in Kenya Railways Corporation (hereinafter referred to as "the Corporation") vide Legal Notice No. 24 of 1986 issued under the Kenya railways Corporation Act, Chapter 397 of the Laws of Kenya.

The plaintiff investigated and found that in 1990, the 1st defendant wrongfully and fraudulently procured from the 4th defendant a lease over the suit property for private purposes. The said lease was purportedly registered at the district land registry on the 23rd March 1990 and a certificate of lease issued to the 1st defendant on the same date under the provisions of the rla chapter 3oo laws of Kenya without knowledge or consent of the corporation.

That the process of acquisition of the suit land land by 1st Defendant tainted with fraud and illegalities

In or about the year 1991, the 1st Defendant purported to charge the suit property to the 2nd Defendant to secure the payment of Kshs. 3,000,000/= and the said charge was registered at the District Land registry in Kisumu on or about 7.01.1991.

The plaintiff further states that when the 1st defendant defaulted in servicing the said loan the suit property was sold and transferred by the 2nd Defendant to the 3rd defendant in or about 1996.

The Plaintiff asserts that at all material times the Defendants were actually or constructively aware of the interest of the Corporation and its predecessors in the suit property.

It is contended that legal notice no. 440 of 1963 vesting the suit property General Manager to E.A.R.C was published in the official government gazettment for the notification of the general public.

The Plaintiff also contends that since the 1st Defendant's registration as proprietor of the suit property was fraudulent, illegal, null and void ab initio it could not confer or transfer any estate, right or interest upon the 2nd and 3rd Defendants, or any one of them.

The Plaintiff further contends that the illegal alienation of the suit property for private purposes was clearly contrary to the intended public user for which the land was vested in the Corporation.

DEFENDANTS' CASE

The 1st Defendant filed defence denied the allegation of fraud and illegality and contended that the parcel of land was applied for, properly allotted, certificate of lease issued and the property charged to the Bank (2nd Defendant). He states that the suit is time barred and ought to be dismissed.

The 2nd Defendant filed defence denying the allegation by the plaintiff and stating that the plaintiff has no locus standi for the orders sought and that all legal requirements were followed prior to the registration of the charge by the 2nd Defendant to ensure that the title for which was being offered as security for the loan was regular title.

The 2nd Defendant was a holder of a legal charge without notice of any irregularity or illegality had sold the land and passed it to another party.

The 4th Defendant denied all allegation of fraud and illegality and claims to have followed due process.

The 3rd defendant filed defence stating that on the 25th of October 1995 the suit property was advertised for public auction in the daily nation that was held on the 21st November 1995.

The 3rd Defendant proceeded to bid at the auction on 3rd November 1995 and the said bid for the sum of Kshs. 3,340,00.00 was accepted. The 3rd defendant thereafter entered into a sale agreement with the chargees being the 2nd defendants for the purchase of the property through the auction.

The 3rd defendant proceeded to pay the total purchase price of Kenya Shillings Three Million Three Hundred and forty Thousand (Kshs. 3,340,00.00) in full through the auctioneers, equity recovery services and Mohammed, Ibrahim & Associates being Kshs. 1,000,000.00 and Kshs. 2,340,000.00 respectively.

On the 25th of June 1993 the Kenya Railways Corporation had expressly acknowledged and endorsed private ownership of Kisumu Municipality Block VII/411 by requesting for a refund of rates that Kenya railways Corporation had paid on the suit property.

The 3rd defendant has constantly been remitting the land rent and rates to the Government of Kenya for the suit property.

Therefore there is no disclosure of any illegality or fraud on the part of the 3rd defendant. The suit ought to be dismissed with costs.

The 4th defendant also filed defence denying allegations of fraud and illegality in the transactions.

In reply to all defendants, the plaintiff reiterated the claims in the plaint and states that the defendants participated in an illegality in the acquisition of the property charging and selling the same in a public auction.

PLAINTIFF'S EVIDENCE

PW 1, Wilson Francis Ojonjo a lands surveyor with survey of Kenya Nairobi whose duties includes checking the technical correctness of all the survey work done by private and public surveyors before they are used to process titles among others states that In June, 2012 he was approached by officers from the EACC to write a statement regarding the map containing parcel No. Kisumu/Municipality/Block 7/411.

That land was part of the Kenya Railways land Kisumu Municipality/Block 7/365. The commissioner of land later did a letter to PWI requesting for all the parcels created from block 7/365 to remove them and return them to parcel 365. That was complied with.

According to PW1, the original map F.R No. 43/53 contains all the railway land in 1935. As of today Kisumu/Municipality/Block 7/567 belongs to Kenya Railways and all the parcels that had been curved out of it have been removed.

PW 2, Judith Akinyi, a cartographer with the Ministry of Lands Survey of Kenya Department states that among the documents they kept included the map for Kisumu Municipality/Block 7 which she had during her examination. The receipts in her custody included the registry index map popularly known as R.I.M. She knew of the map creating the parcel in dispute and another cancelling the same property. The maps gave the status of the properties in it.

PW 3, Victor Wahome, an employee of Kenya Railways as manager in survey work including for registration, enquiring works and land information states that he is aware that this case revolves on block 7/411 Kisumu Municipality. The land is within the bigger land of Kenya Railways in Kisumu. The land was reserved for Kenya Railway and vested through L.R 440 of 12th July, 1963. It had been vested to East African Railways and Harbours. Also L.N No. 20 of 13th May, 1969 vested it. Under L.N 24 of 22nd February, 1986 it was vested to Kenya Railways. These are the three legal notices MFI (4) and produce them as exhibit 4(a) (b) and (c). A survey of 1975 had been carried out for the land vested to Kenya Railways. He produced a copy of a green card of 28th September, 1975 in favour of East Africa Railways for Kisumu Municipality/Block 7/365 which is in the same area with the parcel subject matter of this case.

About 2010 Kenya Railways wrote to the commissioner of lands on the status of their land after learning that some titles had been issued over the land without their consent. The commissioner of land wrote back notifying them that the plots registered with other people over the Railway land in Block 7 were cancelled.

The letter dated 12th June, 2011 from Kenya Railways to Commissioner of land asking for revocation of the titles was shown to court by the witness. The titles were revoked through G. N. 15577 of 26th November, 2011. May Kenya Railways did a resurvey to consolidate all the parcels which were registered under Block 7/567. After the payment they were issued with the lease and certificate of lease dated 24th February, 2014. The suit parcel is new with block 7/567.The suit parcel has always been under the occupation and possession of Kenya Railways.

PW4, Joseph Kirago Kariuki, a Land Administration Officer with National Land Commission Nairobi and before then Land Administration Officer with Commissioner of Land whose duties included allocation of land, processing extension of leases and others states that their office was approached by EACC over land parcel Kisumu Municipality Block 7/411 allocated to an individual from Kenya Railways land. They confirmed that the Land had been reserved for Kenya railways but had been subdivided and parcel 411 allocated to an individual.

The official procedure for allocation of public land is commenced by receipt of an application. Their office then confirms the status of the land. After confirming that the land is vacant and available recommendation is made to the Commissioner for Lands for approval after which the land is allocated. In this case the procedure was followed except that the Land Officer recommending the allocation overlooked the fact that the land had been vested and received for Kenya Railways and Kenya Railways had not consented to the allocation. It was decided that all the allocations over Block 7 be cancelled and the land re-surveyed and registered with Kenya Railways as Block 7/567.

After considering the records, they found parcel Block 7/411 was part of land earmarked for Kenya railways and had been allocated mistakenly.

According to the witness, the allocation of the land was procedurally done and those who transacted on the land thereafter cannot be faulted. To his knowledge the Defendants were never given a hearing before the title was cancelled nor were they offered any compensation.

2ND AND 3RD DEFENDANTS EVIDENCE

DW1, Paul Ndegwa, working as Manager Transnational Bank Eldoret and having worked for 32 years states that when a customer applies for a loan and gives them the security they would do a search to confirm ownership of the security. The copy of the register shows the first registered owner as 1st Defendant. The charge was registered on 7.1.1991 when Peter Oloo Aringo, the 1st Defendant was the registered proprietor of the land. The bank does not investigate how a person acquired the registration. The customer defaulted in repaying the loan and after issuing the notices sold the land by public auction to the highest bidder Vyatu Limited, the 3rd Defendant in this case. The land was transferred to the 3rd defendant and they do not have any interest to it.

The plaintiff claim the land belonged to other parties but they relied on the certificate of official search. On cross examination, he states that the 1st Defendant had been their customer and after defaulting in repayment they realized the security. They had no reasons to doubt the legality of the title when they accepted it as security. The charge was prepared and filed by the Bank after it was signed and attested. The Plaintiff has not pleaded any particular of fraud against the bank as paragraph 9 of the plaint only refers to 1st and 4th Defendants. Navichandra Lalji Shah testified on behalf of the 3rd defendant and stated that the 3rd defendant biught the land in a public auction and is currently the registered proprieter of the suit parcel,

ANALYSIS AND DETERMINATION

WHETHER THE 2ND DEFENDANT VALIDLY ALIENATED THE LAND TO THE 1ST DEFENDANT

The court of appeal in **Chemey Investment Limited v Attorney General & 2 others [2018] eKLR** observed as follows:-

“There was a time in the history of this country, not too long ago, when public officers appeared to have been bitten by a bug that infested them with a malignant and shameless craving to acquire for themselves, their friends or relatives, public property in respect of which they were trustees or custodians. This appeal is a throwback to those days.”

This court adds that the transactions herein were done at lightning speed and it all ended up in the beneficiaries taking loans which they failed to service leading to the banks suffering. In some cases, the banks succeeded in auctioning the property and therefore transferring the problem to the buyers who had no knowledge of the fraud. This is not a different case.

I have considered the pleadings, evidence on record and rival submissions and do find that It is evident that the suit land was exercised from a property held by Kenya Railways Corporation measuring 5.1 hectares having a R.T.A title number 1148/1184 and which was in 1975 converted to Kisumu Municipality Block 7/365. It is clear that the suit property was part of land was vested in Kenya Railways Corporation vide legal Notices No. 440 of 1963, No. 20 of 1967 and no 24 of 1986.

It came out clearly from Victor Kariuki Wahome PW3) and Wilson Ojonjo (PW1) that the suit property was part of the land reserved for Kenya Railways Corporation. This court finds that the land has never been degazetted as K.R.C property.

The Commissioner of lands had no power to alienate land reserved for Kenya Railways Corporation. Manager to Kenya Railways Corporation could not alienate land reserved for itself without de-gazettment.

The 1st Defendant, 2nd Defendant, 3rd Defendants and 4th Defendant could not feign ignorance of the law as the property was gazetted .

In Essence, the suit land was the property of the Government of Kenya reserved for Kenya Railways Corporation for public use and therefore not available for allocation. According to section 2 of the Government Lands Act (Repealed), the following is the definition of unalienated land;

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

Section 3 of the Physical Planning Act, Cap 286 of the Laws of Kenya defines unalienated land in similar fashion.

The Court of Appeal in **High Court Civil Appeal No. 288 of 2010, Kipsirgoi Investments Limited vs Kenya Anti-Corruption Commission** relied on section 2 of the Government Lands Act and Section 3 of the Physical Planning Act when it found that the suit property was planned as an open space and held that the subsequent lease under section 3 of the GLA was irregular as the land was already alienated.

Under section 3 of the Government Lands Act (Repealed), it states;

3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(*a*) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;

The act further states;

The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—

(*a*) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;

In **James Joram Nyaga & Another v the Hon. Attorney General & Another [2007] eKLR,** the court, in reference to sections 3 and 7 of the Government Lands Act stated;

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 Registration of Titles Act Cap 281 Laws of Kenya.

I do find the subsequent process of charging the property to the 2nd Defendant was illegal. The 2nd Defendant ought to have known that the land was reserved for Kenya Railways Corporation. It was in the public domain as the same was gazetted.

The 2nd Defendant illegally charged the property and transferred it illegally to the 3rd Defendant vide an auction and therefore they are liable to refund the 3rd Defendant the amount paid to them amounting to Kshs 3,300,000 plus interest from the date of the filing of the suit.

Ultimately the plaintiff succeeds and it is hereby declared that the issuance of a lease by the 4th Defendant to the 1st Defendant over Kisumu Municipality/Block 7/411 was null and void *ab initio* and ineffectual to confer any right, interest or title upon the 1st Defendant in the first instance and that the subsequent charge and transfer of the suit property and issuance of a Certificate of Lease over Kisumu Municipality/Block 7/411 to the 3rd Defendant was null and void and ineffectual to confer a good title upon the 3rd Defendant. Furthermore I do issue an order for rectification of the land register by cancellation of the lease over Kisumu Municipality/Block 7/411 and Certificate of lease issued to the 3rd Defendant so as to restore the suit property to the Corporation. The 2nd Defendants to refund the 3rd defendant Kshs. 3,300,000 plus interest. The plaintiff to be paid the costs of the suit by the 1st, 2nd and 4th defendants Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF FEBRUARY 2020.

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

In the presence of:

M/S Omweri for Plaintiff

M/S Chelashaw For The 2nd Defendant

M/S Kemboi For 3rd Defendant

N/A FOR 4TH DEFENDANT

A. O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

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