



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISII**

**ELC CASE NO. 120 OF 2008**

**(FORMERLY HCCC NO. 120 OF 2008)**

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

**VERSUS**

**ABEL SANGONDE MOMANYI.....1<sup>ST</sup> DEFENDANT**

**SAMMY SILAS KOMEN MWAITA.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**INTRODUCTION**

1. The Plaintiff filed suit vide a Plaint dated 23<sup>rd</sup> September 2008 and amended on 30<sup>th</sup> April, 2010 seeking the following reliefs:

i. A declaration that the transfer of the certificate of lease registered and issued on 20<sup>th</sup> September, 2002 in favor of the 1<sup>st</sup> Defendant over the parcel of land described as KISII BLOCK 3/434 (hereinafter referred to as the Suit Property) was issued *ultra vires* the statutes and fraudulently and thus illegal, *null and void ab initio*;

ii. An order directed to the Land Registrar, Kisii County to rectify the register by cancellation of the entries relating to the transfer of lease and Certificate of Lease registered and issued respectively on 20<sup>th</sup> September, 2002 in favor of the 1<sup>st</sup> Defendant over the Suit Property;

iii. An order for vacant possession of the suit property;

iv. An order for permanent injunction restraining the 1<sup>st</sup> Defendant whether by himself, servant or agents from alienating, transferring charging, leasing, entering, taking possession, or in the manner howsoever described from dealing with the suit property other than by way of surrender to the county council of Gusii;

v. General damages against the 2<sup>nd</sup> Defendant for misfeasance in office.

vi. Costs of incidental to this suit together with interest.

2. It is the Plaintiff's case that by virtue of the provisions of the Constitution, the Trust Land Act and Gazette Notice No. 1937 of

31<sup>st</sup> May 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County Council.

3. Through an approved Part Department Plan No. KSI/37/85/10, a portion of the land vested in trust in the County Council of Gusii was reserved for a Community Development Centre, Gusii Training Institute.

4. The Plaintiff further pleaded that on or about 31<sup>st</sup> January 1995, the Land Registrar Kisii, opened a register in respect of the aforesaid reserved land and gave it title number KISII MUNICIPALITY BLOCK 3/332. A certificate of lease was subsequently issued to the County Council on 6<sup>th</sup> February, 1995. On the said parcel of land there exists the Gusii Training Institute to date.

5. The County Council held the land in trust and all dealings in respect thereof had to be subject to the Constitution of Kenya, the Trust Land Act and the Local Government Act.

6. On or about 17<sup>th</sup> May 1995, the then Clerk to the County Council wrote to the 2<sup>nd</sup> Defendant purporting to enclose an extract of a minute regarding sub-division of the plot. It was to be sub-divided into about 15 plots.

7. On 21<sup>st</sup> July, 1995 an officer purporting to be acting on behalf of the Permanent Secretary, Ministry of Local Government, wrote to the 2<sup>nd</sup> Defendant stating that the Ministry had no objection to the proposed sub-division.

8. On 18<sup>th</sup> September, 1995 the Chairman of the County Council wrote to the 2<sup>nd</sup> Defendant and expressed the council's shock and dismay that part of the aforesaid plot was in the process of being alienated without the Council's awareness. He asked the Commissioner to stop the illegal deal.

9. The 2<sup>nd</sup> Defendant wrote to the County Council and stopped further processing of the request for subdivision.

10. However, the 2<sup>nd</sup> Defendant in the course of the year 2000 acting outside his statutory mandate and without any due regard to the provisions of the Constitution, the Government Lands Act, the Trust Land Act, the Physical Planning Act and the Local Authority Act authorized and approved the sub-division of the said plot into thereof to 44 beneficiaries. One of the beneficiaries was the 1<sup>st</sup> Defendant.

11. On or about 20<sup>th</sup> September, 2002 the Council entered into the register as the absolute proprietor of one of the subdivisions, the suit property measuring approximately 0.047 Ha after lease in its favor was registered in the name of the 1<sup>st</sup> Defendant for a term of 99 years from 1<sup>st</sup> February, 1986.

12. The Plaintiff avers that the sub-division, change of user of KISII MUNICIPALITY BLOCK 3/332 and the transfer of the suit property to the 1<sup>st</sup> Defendant was carried out fraudulently between the Defendants and persons known to them but presently unknown to the Plaintiff and the Council with the objective of improperly alienating trust/public land. The Plaintiff further avers that the said transfer was invalid, null and void and conferred no estate, interest or right in or over the suit property on the 1<sup>st</sup> Defendant.

13. It is the Plaintiff's contention that the suit property was transferred to the 1<sup>st</sup> Defendant without a resolution of the council or the consent of the Minister of Local Authority. There was no transfer instrument executed by the Clerk and Chairman of the Council at the material time and the 2<sup>nd</sup> Defendant authorized/approved the sub-division and change of user without approved Part Development Plans.

14. The Plaintiff avers that the 1<sup>st</sup> Defendant did not apply to purchase the leasehold interest in the suit property nor did he pay any consideration for the same.

15. Additionally, the Plaintiff claims that the leasing of the suit property was not done through public auction as required by the law nor was there any exemption of the same.

16. The Plaintiff avers that the 2<sup>nd</sup> Defendant owed to the Government of Kenya as his employer fiduciary duty to act in good faith, which he failed and is thus liable for damages of misfeasance in office.

17. The 1<sup>st</sup> Defendant filed a statement of Defence dated 30<sup>th</sup> October, 2002 denying the above averments by the Plaintiff and stated that he acquired the leasehold interest in the suit property lawfully and after complying with all the requirements and pre-requisites put forth by the County Council. He said that the County Council after due deliberations, advised the Commissioner of Lands to allocate the property to him and so there was nothing unprocedural or fraudulent about the transaction. He added that neither the County Council nor the Commissioner of Lands had sworn any affidavit and complained about impropriety or illegality in the allocation of the suit land to him.

18. The 2<sup>nd</sup> Defendant on his part filed a statement of Defence dated 27<sup>th</sup> May, 2010 in which he denied all the allegations raised against him specifically by the Plaintiff and stated that all he did concerning the approvals in question was within the statutory mandate and under instruction from the President of Kenya.

19. The matter was set down for hearing on several occasions but the Defendants and their Advocates did not show up despite being served. Affidavits of service were duly filed as proof of service. The court was therefore forced to proceed with the hearing of the Plaintiff's case Ex-parte.

### **PLAINTIFF'S EVIDENCE**

20. At the hearing of the Plaintiff's case, the Plaintiff called three witnesses to testify on its behalf.

21. PW1 Dedan Ochieng' Okwama introduced himself as an Investigator with the Kenya Anti-Corruption Commission. He relied on his witness statement dated 20<sup>th</sup> November, 2020 as his evidence before this court. In his testimony Mr. Okwama told the court that in the course of investigations he together with his colleagues discovered that the suit property was reserved for public use and specifically for a Community Development Centre. He stated that they established that on the suit property there existed a Nursery School, Community Hall, Home Craft Training Centre and Staff Offices. He contended that the allocation of the suit property to the 1<sup>st</sup> Defendant was not proper as the same was not available for allocation to private entities. He further contended that the issuance of the Lease Certificate to the 1<sup>st</sup> Defendant was not proper as there was no Council resolution to that effect and that the change of user was authorized without a Part Development Plan. He reiterated that once a property is reserved for public use it is no longer available for private use, unless the procedure laid down in the law is followed and that in this particular case the said procedure was not followed.

22. PW2 Mr. Wenslaus Wekesa Wanyama, testified that he was stationed at Ardhi House Nairobi where he works as a Principal Physical Planner. He said that he was formerly stationed in the Physical Planning Department at Kisii. He adopted his witness statement dated 12<sup>th</sup> November, 2020 as his evidence. He thereafter went on to testify that the suit property was part of the public land reserved for a Community Development Centre under the then County Council of Gusii. He explained that once the land is reserved for public use the same cannot be allotted for public use without following the procedure outlined in Paragraph 2 of his witness statement.

23. PW3 Mr. James Cheruiyot testified that he is a Surveyor based in Uasin Gishu County and that he previously worked in Kisii County. He adopted his witness statement dated 12<sup>th</sup> November, 2020 as his evidence. He went on to testify that he was conversant with the case because he was working within the County as a Surveyor. He testified that there were no records in the Kisii Office authorizing them to carry out any sub-division of parcel No. KISII MUNICIPALITY BLOCK 3/332 and that if there was any such subdivision then the same must have been done by a private Surveyor.

24. At the close of the Plaintiff's case, the court directed the Plaintiff to file written submissions. The Plaintiff filed its submissions on 8<sup>th</sup> October, 2021.

### **ISSUES FOR DETERMINATION**

25. Having considered the Pleadings filed by the parties, the witness statement of the three witness together with their oral testimonies and documentary evidence as well as the Plaintiff's written submissions, I deduce the following as the issues for determination:

i. Whether the parcel of land known as KISII MUNICIPALITY /BLOCK/3/434 constitutes land that was set apart as trust land and

vested in the County Council of Gusii under the provisions of the Trust Land Act.

ii. Whether the Defendants acted fraudulently in alienation of the suit property as particularized in paragraph 10 of the Amended Plaintiff.

iii. Whether the 1<sup>st</sup> Defendant holds a good title in respect of the suit property.

iv. Whether the 2<sup>nd</sup> Defendant is liable for misfeasance in public office.

v. Whether the Plaintiff is entitled to the reliefs sought.

## ANALYSIS AND DETERMINATION

26. The Plaintiff's case is that through a Gazette Notice No. 1937 of 31<sup>st</sup> May 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County, Council within whose jurisdiction it was situated as provided for under section 115 of the repealed Constitution of Kenya. Through an approved Part Department Plan No. KSI/37/85/10, a portion of the land vested in trust in the County Council of Gusii was reserved for a Community Development Centre, Gusii Training Institute. This assertion was supported by both oral and documentary evidence.

27. PW1 testified that when he commenced investigations with regard to the suit property he established that the entire area was reserved for use as a Community Development Centre and it had several facilities. These include a Nursery School, Community Hall, Homecraft Training Centre and staff houses. All these properties were meant for public use and not private use. He produced documents to show that through a Gazette Notice No. 1937 of 31<sup>st</sup> May 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County. The Community Development Centre was established pursuant to an approved Part Department Plan No. KSI/37/85/10.

28. PW3 told the court that when he visited the suit property it had a school, community hall, staff houses and part of it was under cultivation. He stated that some of the staff members of the County Government were staying in the staff houses. He stated that the intent and purpose for which the plot was reserved has never changed. It is therefore clear that parcel No. KISII MUNICIPALITY/BLOCK 3/434 which is a sub-division of parcel No. KISII MUNICIPALITY BLOCK 3/332 constitutes land that was set apart as trust land and vested in the County Council of Gusii under the provisions of the Trust Land Act.

29. The second issue for determination is whether the Defendants acted fraudulently in alienating the suit property.

PW2 gave an elaborate explanation of the procedure governing the alienation of public land. This procedure was aptly captured by Cheron J in the case of **Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR** where he stated as follows:

“The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See *Harison Mwangi Nyota v Naivasha Municipal Council & 20 others [2019] eKLR*

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The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See *Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR*

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The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include the setting price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazette of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situated in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 (Nyeri); and in Dr. Joseph N.K. Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others C.A.60/1997

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In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others [2014] eKLR

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The allotment letter also must have attached to it a part development plan (PDP). See the decision in African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:

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The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease.

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Having evaluated in detail the necessary steps to be followed, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant's case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate."

30. In the instant case it is clear that the above-mentioned procedure was not followed. In particular, PW1 pointed out that the sub-division that was done was not proper as there was no application for sub-division and no approval was given for the sub-division of the suit property into 48 plots.

31. There is no evidence of that another Part Development Plan was ever drawn and approved by the 2<sup>nd</sup> Defendant apart from Part Development Plan No. KSI/37/85/10 nor is there any evidence of a gazette notice making the suit property available for disposal to private citizens like the Defendant via public Auction. Further, no evidence is presented to show the suit property was acquired through public auction as required.

32. Furthermore, there is no evidence that an allotment letter was issued to the 1<sup>st</sup> Defendant nor is there any evidence that the 1<sup>st</sup> Defendant made payment of the price that was expected to have been set out in the Allotment letter.

33. Additionally, there are no cadastral Survey Maps that were authenticated and approved by the Director of Surveys nor is there evidence that there was a beacon certificate issued to the Applicant.

34. PW3 produced exhibit 4 which is a letter dated 18.9.1995 from the Chairman of the Council, Mr. Joseph Rasugu Ntabo to the Commissioner of Lands objecting to the proposed subdivision on account of fraudulent dealings with the land. He also produced Plaintiff's Exhibit 5 which is a letter dated 21.9.1995 from the Commissioner of Lands to the Gusii County Council stopping further processing of the request for subdivision due to the issues raised by Mr. Ntabo. He told the court that he established that the original title for KISII MUNICIPALITY/ BLOCK 3/332 which was reserved for public use was never surrendered to facilitate the subdivision so the whole process was irregular.

35. As correctly submitted by counsel for the Plaintiff even though the Council obtained approval to sell more identified properties including 4.5 acres out of the land reserved for the Community Development Centre, Gusii County Council purported to hold a meeting in which they approved the subdivision of Kisii Municipality/Block 332 into 44 parcels which were given new numbers and allocated to individual beneficiaries including the 1<sup>st</sup> Defendant, leaving the Council with only 2.755 acres. It was her contention that the said subdivision was contrary to the Ministerial approval and the applicable statutes such as the Trust Land Act, Land Planning Act, Physical Planning Act and Local Government Act. Counsel submitted that the said alienation was constructed in a manner that constitutes corrupt conduct as envisaged under the Anti-Corruption and Economic Crimes Act, 2003.

36. In view of the foregoing, I find and hold that the 1<sup>st</sup> and 2<sup>d</sup> Defendants acted fraudulently in alienating parcel KISII MUNICIPALITY BLOCK 3/332.

The third issue for determination is whether the 1<sup>st</sup> Defendant holds a good title in respect of the suit property.

37. Having held that the alienation of KISII MUNICIPALITY BLOCK 3/332 was fraudulent, it follows that the resultant titles including land parcel no. KISII MUNICIPALITY /BLOCK 3/434 tainted with fraud and it is therefore *ultra vires*, illegal, null and void. In saying so, I am guided by the case of **Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR** the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

38. I also rely on the cases of **Kenya Anti-Corruption v Online Enterprises Limited & 4 Others** and **Kenya Anti -Corruption Commission v Frann Investments Limited & 6 Others (2020) eKLR** where the court declared the plaintiffs' titles null and void as they had been acquired through a fraudulent process.

39. The fourth issue I must determine is whether the 2<sup>nd</sup> defendant is liable for misfeasance in public office.

The tort of misfeasance in public office has been defined in a persuasive authority, *Jones v. Swansea City Council* [1990] 1 WLR 55, at p.71 (*per Slade, L.J.*):

**“The essence of the tort, as I understand it, is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public, either with intent to injure another or in the knowledge that he was acting ultra vires.”**

40. In the instant case, counsel for the Plaintiff argued that the 2<sup>nd</sup> defendant, had committed the tort of misfeasance in public office, because as the Commissioner of Lands at the material time, he had a fiduciary duty by virtue of his office to safeguard public interest but to failed to do so.

41. Counsel further submitted that the 2<sup>nd</sup> Defendant committed the said offence by authorizing or approving the unlawful subdivision, change of user and transfer of land parcel No. KISII MUNICIPALITY BLOCK 3/332 to private individuals including the 1<sup>st</sup> Defendant outside his statutory mandate and without due regard to section 117 (1) of the repealed Constitution of Kenya, Section 3, 7, 12 and 13 of the repealed Government Land Act, section 13 of the Trust Land Act, section 41 (3) and 42 Physical Planning Act and Section 144 (3), (5) of the Local Government Act (now repealed). It is counsel's contention that the actions of the 2<sup>nd</sup> Defendant being illegal and fraudulent amounted to depriving the Abagusii Community of the use of the community development center.

42. Since of the 2<sup>nd</sup> Defendant did offer any evidence to controvert the accusation against him regarding his actions while serving as the Commissioner of Lands and having found that his actions were fraudulent and illegal, I have no hesitation in holding him liable for misfeasance in public office as he acted in breach of the public trust bestowed upon him.

43. The last issue for determination is whether the Plaintiff is entitled to the reliefs sought.

The plaintiff seeks various prayers in his Complaint, all of which I find that he has proved on a balance of probability. I therefore enter judgment for the Plaintiff and make the following final orders:

**i. A declaration is hereby issued that the lease made to the 1<sup>st</sup> Defendant on 20<sup>th</sup> September, 2002 in respect the parcel of land described as KISII MUNICIPALITY BLOCK 3/434 was made in excess of statutory powers of the 2<sup>nd</sup> defendant and is thus null and void *ab initio*.**

**ii. An order of permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant his servants, employees, agents or assigns from trespassing upon, transferring, leasing, wasting and or dealing with the suit property that is KISII MUNICIPALITY BLOCK 3/434 other than by way of transferring the said title to Kisii County Government as the successor to County Council of Gusii.**

**iii. The Land Registrar Kisii County is hereby directed to rectify the Register by cancelling the lease and certificate of lease issued on 20<sup>th</sup> September, 2002 in respect of KISII BLOCK 3/434 in favor of the 1<sup>st</sup> Defendant.**

iv. The 2<sup>nd</sup> Defendant shall pay General damages of Kshs. 1,000,000/= for misfeasance in public office.

v. The costs of this suit shall be borne by the Defendants jointly and severally.

**DATED, SIGNED AND DELIVERED AT KISII THIS 9<sup>TH</sup> DAY OF DECEMBER, 2021**

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**J.M ONYANGO**

**JUDGE**



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