REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA

COURT NAME: MOMBASA LAW COURT

CASE NUMBER: ELC 39/2009

CITATION: KENYA ANTI-CORRUPTION COMMISSION VERSUS AGIL MAHMOUD & 2 OTHERS

JUDGMENT

1. The plaintiff commenced this suit through the plaint dated 13th February 2009, against the defendants, seeking for orders that:
a. “A declaration that the allocation to the 1st defendant by the 3rd defendant and subsequent issuance of the Certificate of Lease to the 1st Defendant of the land comprised in MN/VI/3748, was irregular, fraudulent, and illegal and consequently null and void.
b. A declaration that the transfer of land reference number MN/VI/3748 by the 1st defendant to the 2nd defendant is null and void.
c. An order for rectification of the register by cancellation of the certificate of lease and all entries on the land register for MN/VI/3748.
d. An order of preservation and a permanent injunction against the 1st and 2nd defendants, their agents, servants, charges or assigns restraining them from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with MN/VI/3748 otherwise than by transfer or surrender to the Kenya Airports Authority Act or/and the Government of Kenya.
e. Costs of and incidental to the suit.
f. Interest on (e) above at court rates.
g. Any other or further relief the court may deem fit and just to grant.”
2. The plaintiff inter alia averred that the Government of Kenya reserved land as an aerodrome measuring 1,183 acres and officially named as Port Reitz Airport and was gazetted vide a gazette notice No. 1161 of 14th March 1961 pursuant to the provisions of the Aerodromes (Control of Obstructions) Ordinance, Cap 227 (repealed); that the parcel was previously held by the Aerodromes department in the Office of the President and also held under the Commissioner of Lands as a public utility. Upon establishment of the Kenya Airports Authority, vide the Kenya Airports Authority Act (KAA) Cap 395 all the assets of Port Reitz Airport were later renamed as Moi International Airport and this included the above mentioned parcel; that sometimes in 1996 KAA resurveyed all its airports and airstrips with a view of obtaining title documents; that during the said exercise, a survey plan for Moi International Airport was prepared and registered with the Director of Surveys on 20th August 1996, and a deed plan thereof was prepared and issued by the Director of Surveys on 18th September 1996 and a title document issued in favour of KAA for the L.R MN/VI/3888 measuring 538.76 Ha on 27th September 1996; that during the preparation of the said survey plan

and deed plan, it was discovered that a portion of the said parcel had been excised and subdivided into various plots, one of them being L.R MN/VI/3748, CR 23466, the suit property, and allocated to the 1st defendant who later transferred it to the 2nd defendant on 18th June 1993; the plaintiff therefore avers that the 1st and 2nd defendants participated in fraud, illegality and irregularity in the suit property's acquisition and pleaded the particulars thereof at paragraphs 9 of the plaint; that plaintiff also averred that the 3rd defendant participated in fraud and abused his office as Commissioner of Lands, as well as misfeasance in public office and set out the particulars at paragraphs 10 and 13 of the plaint.
3. The 1st defendant did not file a defence but filed a list of witnesses and list of documents.
4. The 2nd defendant filed statement of defence dated 14th May 2009, inter alia denying that the suit property was reserved by the Government of Kenya pursuant to gazette notice No. 1161 of 14th March 1961, and that the suit property was vested in KAA; that it denied being involved in fraud and corruption in transfer of the suit property, and that it had knowledge of any circumstances surrounding the transfer that may be construed as misfeasance in use of public office. The 2nd defendant also averred that the suit was time barred and that the plaintiff lacks locus.
5. The 3rd defendant filed his statement of defence dated 4th March 2009 and traversed in seriatim every allegation made by the plaintiff. He also alleged that the suit is selective, scandalous and vexatious as well as unconstitutional, misconceived and an abuse of the powers given to the plaintiff by the repealed Anti-Corruption and Economic Crimes Act Chapter 65 of Laws of Kenya.
6. During the hearing of the plaintiff's case, Athmani Amani Ali, a Senior Survey Assistant at Survey of Kenya, testified as PW1 stating inter alia that he works in the verification or authorisation office. He added that he is also an alternative deed plan officer, and has worked with the Survey of Kenya since 1992. He relied on his statement dated 7th June 2021 and testified that survey plan F/R 269/57 indicated the whole parcel of land as 538.76 Ha. He told the court that before a survey, a Physical Development Plan (PDP) is prepared, and after approval, a survey is then carried out, relying on the PDP and letter of allotment. He added that the surveyor then prepares the computation file and survey plan, which are then submitted to the Director of Surveys and after approval the said Director of Surveys prepares a deed plan, after an indent is prepared and received from the Commissioner of Lands. That the deed plan for the suit property was prepared and registered as No. 165697 on 11th August 1992, which he produced as exhibit together with the F/R or survey plan No. 226/40 for the suit property. He testified that a boundary plan No. 454 of Port Reitz Aerodrome, was referred to by the said gazette notice No. 1161, dated 8th March 1961, and that the said boundary plan and F/R 269/57 look similar with slight variations. He informed the court that the survey, which produced the survey plan for the suit property, was done sometime in 1992 and that the inset "F" represents parcel MN/VI/3746 to 3748. He explained that the boundary plan No. 451 of 1961 is different from the perimeter survey of the parcel of 1996 due to creation of plots numbers 3746 to 3748 in 1992. He also agreed that double survey is the genesis of the dispute herein, and that one should not resurvey land that has already been surveyed. On cross-examination he testified that F/R No. 269/57 gave acreage as 538.76 Ha, which is approximately 1331.3029 acres and has a difference of about 200 acres from the acreage gazetted in 1961. He was unable to explain where the extra acreage came from. The F/R dated 13th July 1992 shows the suit property and other plots, which existed independently of the F/R in 1996.
7. The plaintiff also called Arthur Mbatia, Principal Physical Planner at the Ministry of Lands, Public Works, Housing and Urban Development, who testified as PW2. He relied on his statement dated 18th November 2011 and told the court that the procedure of preparing the PDP before 1996 and after were different. He elucidated that before 1996 the Commissioner of Lands would authorize the Director of Physical Planning to visit a parcel and prepare a PDP if the said parcel was not public land. Thereafter the PDP would be circulated to various offices, and if approved the PDP would be sent to the Commissioner of Lands for approval. That after approval the PDP would be returned to the Director of Physical Planning who would assign it an approved PDP number and record it in the register of approved plans. Thereafter the PDP would be returned to the Commissioner of Lands

with a copy the Director of Survey. The letter of allotment would then be issued and survey would follow. He stated that the sketch number 97022/55A referred to in the letter of allotment dated 24th April 1992 issued to the 1st defendant does not conform to a PDP as it does not have a legend, reference to dates and approvals. He was adamant that a sketch could not have been the basis of issuing the letter of allotment, as the drafting standard of a PDP has never changed even after 1996. He referred to the plaintiff's letter dated 18th May 2018 seeking confirmation whether the aforementioned sketch was a PDP or an extract thereof to which they replied it was neither vide their letter dated 20th June 2018. During cross-examination, PW2 stated that letter from the Commissioner of Lands dated 9th April 1992 does not mention any attachment which the above mentioned reply from their office had. That further it was practice that the before a letter of allotment was issued there would be a recommendation from his office. He denied that the then Director Physical Planning had failed to enter the PDP entry in the said register of plans.
8. The third witness for the plaintiff was Dedan Okwama, an investigator with the plaintiff, who testified as PW3. He testified that he was part of the team that investigated the suit property and relied on his statement dated 14th May 2018, and he reiterated the claims in their pleadings. He stated that the letter of allotment to the 1st defendant dated 24th April 1992 was attached with a sketch claiming that the parcel of land in Chaani was unsurveyed. He reiterated that the Director of Physical Planning had denied the veracity of sketch No. 97022/58A. he produced the correspondence dated 9th April 1992 from the Commissioner of Lands asking for a PDP to be prepared and a letter in reply of the same date declining approval. He added that they did not find a letter of the 1st defendant applying for allocation of the land or any acceptance of the conditions in the letter of allotment, or any evidence of payment of the requisite fees. He testified that one cannot effect a transfer of interest on a letter of allotment. He confirmed finding out that a survey was conducted under F.R 26/40 dated 24th April 1992 and title was transferred to the 2nd defendant under entry No. 2 on 14th January 1993.He was categorical that the suit parcel was not un-alienated land for allocation. On cross-examination, PW3 state that the said letter of allocation to the 1st defendant was illegal. He however agreed that the suit property had been surveyed and allocated to the 1st defendant and that the 1994 order vesting the property of Port Reitz Aerodrome to KAA could not have covered the suit property. PW3 testified that he did not get any evidence of the Government of Kenya expressing intention to acquire the suit property, but the subsequent survey of 1996 showed that the KAA's parcel had increased in size. He added that there is a list of properties to be acquired by KAA but was uncertain as to whether the Government had acquired them or not.
9. Daniel Chepnoi Moss, a legal officer with KAA, testified as PW4. He relied on his statement dated 18th May 2018 and testified that the land gazetted on 14th March 1961 was 1183 acres, and that additional plots were acquired under gazette notice 799 of 13th March 1972. On cross-examination, he stated that title for 1183 acres was not registered as at 1961, and that the suit property is not among the parcels acquired. He was categorical that the suit property was within the layout of the aforementioned boundary plan No. 454.
10. In his defence, the 1st defendant testified as DW1, that he was a civil servant in the Physical Planning Department from 1979 to 2005, when he retired under the 50 years rule. He relied on his statement dated 5th November 2018 and list of documents dated 2nd November 2018. It was his testimony inter alia that sometime in 2012, he went to the Director of Physical Planning headquarters and after completing the official duties, he made an application for allocation of land. Then he was sued in this suit. During cross-examination, DW1 stated that he had not specified the parcel of land that he was applying for, and was never informed whether his application was allowed or not. He also denied knowing the 2nd defendant and transferring the suit property to that company. He termed any document purporting to show that he transferred the suit property to the 2nd defendant to be a forgery. He denied being allocated the suit property, as he never received the letter of allotment. He also denied seeing Grant No. 23466 before he saw it in court, and indicated that he does not know where the suit property is located. He denied being the author of the above-mentioned statement, which states that he acknowledged being allocated the suit property, and

transferring it to the 2nd defendant. Surprisingly, DW1 told the court he was aware of the surveyor's report that found the suit property was outside KAA's parcel, and that the boundary plan No. 454 does not indicate the suit property is within the KAA parcel. He told the court that he did not sign the witness statement prepared by Timamy Advocates, his previous advocates, but agreed that the undated survey report was done under his request.
11. For the 2nd defendant's defence, Edward Kiguru Malenye, a licensed land surveyor, testified as DW2. He testified that he prepared a survey report dated 22nd October 2024 for the suit property, which he adopted as his evidence in chief. On cross-examination, DW2 stated that when a parcel of land is allocated vide a letter of allotment, a surveyor carries out survey on the basis of the PDP. Thereafter, the survey plan was prepared and subsequently, a deed plan sent to the Commissioner of Lands to issue a lease. He admitted that the sketch attached to the letter of allotment is not a PDP, but a Limit of Disturbance plan, which should be an extract of a PDP, and that it ought to have been signed by the Commissioner of Lands, but it was not. He testified that when a survey is done on a parcel of land, the external boundaries do not change.
12. The 2nd defendant also called Abdalla Salim, a director, who testified as DW3. He relied on his statement dated 9th June 2020 and the list of documents of even date and stated that they did due diligence through their advocates before acquiring the 2nd defendant. On cross-examination, he stated that he knows the 1st defendant but did not buy anything from him, as the transactions over the 2nd defendant that owned the suit property were done by their advocates. He revealed that the 2nd defendant was the owner of the suit property when they bought it, but cannot tell whether consent to transfer the suit property was obtained or stamp duty paid. That the grant he produced was given by the 1st defendant to the 2nd defendant. That the grant was drawn by Anjarwalla Advocates, but there is no signature by the transferee, the 2nd defendant. He added that he had done an official search of the suit property in 2006. That the suit property is accessed through the Airport Road, but is not inside Moi International Airport. That he was unaware of the 1961 gazette notice, but said he knew of the gazette notice revoking several parcels of land, including the suit property. He confirmed that he did not deal with the 1st defendant but found the 2nd defendant as owner of the suit property when they bought it sometime in 2006.
13. The 3rd defendant did not call any witness in defence.
14. The learned counsel for plaintiff and 3rd defendant filed submissions 21st February 2025 and 20th June 2025 respectively, which the court has considered.
15. The following are the issues for the court's determinations:
a) Whether the suit property is part of the 1183 acres of land belonging to KAA that was gazetted on 14th March 1961.
b) In the alternative, whether the suit property was public land and if so, whether the proper procedure was followed in converting and allocating it as private land to the 1st defendant.
c) Whether the 2nd defendant obtained good title over the suit property.
d) Who bears the costs of the suit?
16. The court has carefully considered the pleadings filed, oral and documentary evidence tendered, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following determinations:
a. In a civil case, proof is on a preponderance of evidence or on a balance of probabilities. This is based on the rules of evidence which is that he who alleges must prove, see Springboard Capital Limited versus Njenga & Another (Civil Appeal 14 of 2024) [2024] KEHC 7013 (KLR) (14 June 2024) (Judgment). In the case of Nyaga versus Attorney General (On Behalf of the Ministry of Environment, Water and Natural Resources) (Civil Appeal E019 of 2023) [2023] KEHC 26484 (KLR) (13 December 2023) (Judgment) the court cited with approval the case of Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR and held as follows:
"The standard of proof in civil cases is a matter of fact and the scale is to be tilted using the competing arguments and evidence in order for the court to establish this standard. That is to say, the balance of probabilities is usually attained when both parties tell their stories and the court

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considers the weight of the evidence on other side. In the case of Palace Investment Ltd v. Geoffrey Kariuki Mwenda & Another (2015) eKLR, it was held that:
“Denning J. in Miller v Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties…are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”
This court has the duty to determine which story is more believable and weigh the evidence presented by each party. At the onset, the court has noted that the 1st defendant, who was the first allottee, vehemently denied being involved in obtaining the suit and transferring it to the 2nd defendant. The fact that the 1st defendant denial that he transferred the suit property to the 2nd defendant means the latter claim of origin or root of title to the said property rests on very shaky grounds.
b. The Gazette notice 1161 of 14th March 1961 declared the Port Reitz Aerodrome’s acreage as being 1183 acres, as can be seen in boundary plan 454, mentioned in the plaintiff’s list of documents dated 7th May 2018, but not attached. PW4 contended that the suit property can be seen from the layout of the said boundary plan, but DW1 disputed that even though conceding he did not know the location of the suit property. Though the boundary plan of 1972 and gazette notice 799 of 13th March 1972 were listed on the above mentioned list of documents they were not attached. It is therefore not discernible whether prior to 1992, the suit property was part of the 1183 acres. The F/R 269/56 showing KAA parcel as 538.76 ha does not indicate that the suit property is part of it either. Looking at the surveyors’ reports produced by the 1st and 2nd defendants, I notice the first report was undated and the author was not summoned to testify. It however appear to reflect the probably true events and the court will consider it under the overriding objectives in sections 1, 1A and 3A of the Environment and Land Court Act. In the first report, the surveyor claims that the suit property was private unclaimed land 245/VI/MN, as can be seen from Plan No. 39951, but the court is not convinced about that claim as the map is not clear and the author was not availed to be cross-examined on it to determine the veracity of the said map. The second survey report distinguished the suit property from MN/VI/3888, CR 28885, but did not give the history of the said property. The court has perused the other documents and it remains uncertain whether the suit property was part of the original parcel of 1183 acres. The first issue therefore still remains a mystery. More documents and witnesses from the National Land Commission and its predecessor would have best shed light as the genesis of the dispute.
c. What remains certain, indisputable and unchallengeable is the fact that the suit property was once public land. The court has taken note of the fact that DW1 has through his evidence, washed his hands of the entire process of applying for the suit property and transferring it to 2nd defendant. The 3rd defendant elected to put in a statement of defence, but failed to call witnesses. In the case of Aviation Ltd versus Crusair Ltd (No.1) (1987) KLR 103, the Court of Appeal made the following remarks:
“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.”
That being the fate of pleadings that are bereft of evidence in support, the court will not consider the statement of defence by the 3rd defendant, as its averments are mere allegations.
d. On the issue of whether the proper procedure was followed, in the allocation of the suit property, the court notes that only DW3 attempted to adduce evidence on the matter. He testified on the routine procedure of transfer of the 2nd defendant to him and others upon acquisition. That as the

suit property belonged to the 2nd defendant at the time of its acquisition, it was therefore theirs, but he could not tell whether there were any irregularities in its acquisition. He stated that the 2nd defendant has been in occupation of the suit property since 2006. DW3 could not answer the questions of whether stamp duty was paid or consent to transfer obtained though he claimed that he did due diligence through his then advocates, Anjarwalla. Superior courts have in various decisions, including that of the Supreme Court in Dina Management Limited versus County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment), held that purchasers should conduct due diligence on the root of the property's title, before purchasing the same. In this case, the court has no difficulty in concluding that from the evidence availed, the 2nd defendant, did not do proper due diligence to among others establish the origin or root of title of the suit property before allegedly purchasing it from the 1st defendant. Likewise, DW3 did not do due diligence on the origins or root of title of the suit property by the time of purchasing the 2nd defendant that owned it through their then advocates. That is why DW3 could not categorically answer the question of whether the proper procedure was followed in converting the suit property from public land to private land.

e. Although the 1st defendant, DW1, denied ever being allocated the suit property through the letter of allotment dated 24th April 1992, the court has to consider the presumption of regularity in issuing out the said letter of allotment. See Kibos Distillers Limited & 4 others versus Benson Ambuti Adega & 3 others (2020) eKLR. The burden of proving that regularity fell upon the plaintiff to show that the allocation was irregular. Though they failed to prove that the suit property was part of 1183 acres, they successfully proved the existence of alot of irregularities in the plot's creation, allocation and transfer on the basis of the letter of allotment. First, there was no application for the plot allocation, acceptance of the offer, and no receipts for payment of the requisite fees were availed to the court. Secondly, though there is a purported letter dated 9th April 1992, under reference 97022/57, from one Somba Kivalya, of the office of the Commissioner of Lands, requesting for preparation of a PDP for his approval, with the proposed user being residential, that was replied to on the same date, attaching three copies of a drawing reference NRB/12/3/92/3 for approval as PDP, there is no evidence that they were approved. What followed next was issuance of a letter of allotment dated 24th April 1992 referring to plan 97022/58A, and even if the court were to assume that the sketch plan was a PDP, the reference is not for the same parcel of land, that was requested in the letter by Mr. Somba.

f. DW2 claim that the sketch plan was a limit of disturbance plan, was negated by the letter dated 20th June 2018, from one Augustine Masinde, Director of Physical Planning, who explicitly stated that the sketch plan is not a PDP, and that it was never approved by his office. Even assuming again that the 1st defendant had legally obtained the suit property, he could not have transferred the plot based on a letter of allotment, as it was not title document. The Supreme Court stated in Torino Enterprises Limited versus Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment) as follows:

"So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein. In Dr Joseph NK Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others CA 60/1997 [unreported]; and in Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

"It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the offeree and does not confer an interest in land at all"

That as the 1st defendant did not have a good title to the suit property, he could not purport to transfer it to the 2nd defendant. The court therefore finds that due process was not followed in the creation and allocation of the plot to the 1st defendant and he could not have transferred good title to the 2nd defendant.

g. From the foregoing, the only orders that commends to be issued from the evidence tendered in

herein are for title to the suit property to be revoked/cancelled, and the property be returned to the Government of Kenya; and a permanent injunction against the 1st and 2nd defendants, their agents and or servants.
h. Under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where there is a good reason to direct differently. That as the plaintiff has succeeded in prosecuting the suit that was for the benefit of the Kenyan citizens, it is entitled to costs.
17. From the foregoing determinations, the court finds the plaintiff has established its claim on a balance of probabilities, and judgement is entered in its favour against defendants in the following terms:
a. A declaration is issued that the allocation to the 1st defendant by the 3rd defendant, and subsequent issuance of the Certificate of Lease to the 1st Defendant of the land comprised in MN/VI/3748, suit property, was irregular, fraudulent, illegal and consequently null and void.
b. A declaration is issued that the transfer of land reference number MN/VI/3748, suit property, by the 1st defendant to the 2nd defendant is null and void.
c. An order for rectification of the register by cancellation of the certificate of lease and all entries on the land register for MN/VI/3748, suit property, is hereby issued.
d. An order of preservation and a permanent injunction against the 1st and 2nd defendants, their agents, servants, charges or assigns restraining them from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with MN/VI/3748, suit property, otherwise than by transfer or surrender to the Government of Kenya is hereby issued.
e. The defendants to pay the plaintiffs' costs.
Orders accordingly.

SIGNED BY: HON. JUSTICE STEPHEN KIBUNJA

THE JUDICIARY OF KENYA.
MOMBASA ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT
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