

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT KAKAMEGA

ENVIRONMENT AND LAND CASE NO.750 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

-VERSUS-

PETER MUHATIA ALUBALE.....1ST DEFENDANT

WILSON GACANJA.....2ND DEFENDANT

JUDGMENT

1. The County Council of Kakamega was the registered proprietor of all that Parcel of land known as Kakamega Municipality/Block 111/100 measuring 0.9591 hectares with effect from 28/12/1974. The second Defendant who was the Commissioner of Lands appointed under the Government Lands Act, Cap 280 caused the Parcel to be sub-divided into three parcels, namely; Kakamega Municipality/Block 111/225, 226 and 298 and on 26/1/1996, he allocated Plot No.225 to the first Defendant and a lease for 99 years from 1/2/1996 processed.
2. The Plaintiff then sued the Defendants praying for a declaration that the lease granted to the 1st Defendant is null and void and incapable of conferring any estate, interest or right, the certificate of lease issued is null and void ab initio, an order for the Land Registrar Kakamega to rectify the

register and cancel all the entries related thereto, an order for vacant possession and Permanent Injunction and general damages costs and interest.

3. The Plaintiff avers that the issuance of the certificate of lease was fraudulent, illegal, null and void ab initio as the land was not available for alienation because;

a) The land was reserved for public purposes and vested in the council for use and benefit of the residents of Kakamega Municipality and its environs.

b) The 2nd Defendant had no legal authority to alienate the land.

c) The alienation was in breach of the Government Lands Act, Registered Land Act, Local Government Act, Trust Lands Act and the Constitution.

d) The County council's authority was not obtained.

4. It was further averred that the 2nd Defendant acted in misfeasance of public office because he acted without authority, purported to act on behalf of the council, failed to comply with the Law, acted ultra vires and acted with reckless indifference to the illegality of his act knowing it to be illegal and that he breached his fiduciary duty to the people of Kenya.

5. The 1st Defendant in his defence denied the Plaintiff's claim and averred that he applied for and acquired Parcel No.Kakamega/Municipality/Block 111/225 lawfully and procedurally after paying all the requisite charges

and still continues to pay the plot rent and rates and, on a without prejudice basis, that he is a bonafide allottee and any omissions cannot be visited on him.

6. The second Defendant in his defence denied the Plaintiff's claim and averred that the land was free for alienation and he acted within his powers, that his acts were within the Law, regular and therefore valid, that the issuance of the lease was regular and lawful as all requisite steps were taken and that the suit against him is unconstitutional as he ceased holding office, is selective, scandalous and vexatious.
7. The Plaintiff's case as presented by PW1 Peter Wafula, the Western Regional Surveyor, PW2 Deadan Ochieng an Investigator with the Plaintiff, and PW3 Boniface Musango Amwayi the Director of Housing Kakamega County is that Parcel Number Kakamega/Municipality/Block 111/225 was created from original Parcel No.Kakamega Municipality/Block 111/100 with the larger portion of trust land that was reserved for housing of civil servants as per survey Map FR 418/51, that it comprises part of a compound standing Government house No.KAKA/HOU/HG/29 and on it stands Servant's Quarters for the said house, that the house is occupied by a Government Officer who pays rent and therefore was not available for alienation, that the land was irregularly allocated to the 1st Defendant by the 2nd Defendant because it was trust land but allocated to private individual as opposed to public purposes, County

Council of Kakamega was neither consulted nor did it consent and the right procedure was not followed.

8. The 1st Defendant's defence on the other hand is that he acquired the suit land lawfully and procedurally, with no ill intention or fraud after obtaining all the necessary approvals and paying all the necessary charges and still continues to pay rates to date and although the allocation was initially revoked the revocation was quashed vide Kakamega HC JR Application No.24 of 2011. He produced several documents in support of his defence.
9. The 2nd Defendant though duly served didn't participate in the trial either by himself or through his Advocates.
10. I have carefully considered the pleadings herein; the evidence adduced by both sides together with the exhibits tendered in support thereof, the written submissions together with the authorities cited therein and the relevant Law. The issues for determination are:-
 - a) **Whether the property in dispute was, unalienated Government Land.**
 - b) **Whether the same was lawfully and procedurally alienated.**
 - c) **Reliefs, if any.**
- 11 The process of allocating the 1st Defendant the land started in 1995 when he made his application and issued with Allotment letter dated 26/1/1996 offering him the land for 99 years from 1/2/1996. The applicable Law

therefore is the retired constitution, the Government Lands Act, Cap 280 (Repealed) and the Land Planning Act Cap 303 (Repealed).

12. Under Section 2 of the Government Lands Act, unalienated land was defined as Government Land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment. This include land held by Government departments, statutory bodies and Agencies. Under Section 3 of the Act the President had power to make grants or dispositions of any estates, interest or rights in or over unalienated Government land, subject to any other written Law while Section 9 empowered the Commissioner of Lands to cause any portion of a township which is not acquired for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner.
13. Government Land can be alienated through allotment or reservation for a designated purpose and land reserved for a particular public purpose is not available for re-alienation or sub-division- see Mungania & 3 Others - Vrs- County Government of Meru & 6 others (Petition E010 of 2024) (2025) KEELC 3299 (KLR) (23 April 2025) (Judgment).
14. PW1 testified that Land Parcel Kakamega Municipality/Block 111/100 was registered in the name of County Council of Kakamega but reserved for Government Civil Servant Houses as per their records. PW3 testified

that indeed there was a Government House on the Land occupied by a County Government Employee who actually pays rent to Ministry of Housing (Housing Department) and produced records to that effect but was now being converted to a Public Service Club.

15. And at the site visit, it was confirmed that the Servant Quarters to the main house actually lie in the plot allocated to the 1st Defendant.
16. In my view, the land having been reserved for Government Civil Servant houses, a house and a Servant Quarter been constructed therein and the same occupied by Civil Servants who were paying rent to the Housing Department, the same was not un alienated Government Land and therefore the same was neither available for allocation to the 1st Defendant or any other entity nor could it be sub-divided and part thereof allocated to anybody. Any such sub-division and allocation is void ab initio null and void and unlawfully and cannot confer any title to anybody.
17. As to whether the suit land was lawfully and procedurally alienated, while it is apparent from the documents supplied by the 1st Defendant that the laid down procedure was substantially followed there are two obvious anomalies. The application by the 1st Defendant is for Plot No.75 as per PDP which is referred to as un surveyed plot. This clearly cannot be true because what the 1st Defendant was applying for per his own attached was part of Parcel No.Kakamega Municipality /Block 111/100 but which he

disguised as Plot No.75. The said plot can also not be said to be un surveyed.

18. And the letter by the District Lands Officer dated 3rd October 1995 clearly states that “the area in question forms part of Plot No. Block 111/100 which contains a Government house but the area edged in red excludes the house. This therefore confirms that there was a Government house on the plot meaning it was already reserved for that purpose. And the Land’s Officer’s assertion that the area excludes the Government house was factually incorrect because the Servant’s Quarters to the main house are actually located in the plot which was to be allocated to the 1st Defendant.
19. Apart from the land being already reserved for Government house and therefore unavailable for sub-division and allocation, the two pointed out anomalies renders the allocation unprocedural, irregular and unlawful as it is based on untrue allegations of fact and/or in concealment of material facts namely the land was already surveyed; allocated to County Council of Kakamega and therefore not un surveyed as alleged and that on it stood Servant’s Quarters to the main Government house.
20. On reliefs, having found that the land, though Government land, had already been alienated through reservation for building Government houses and indeed there was in existence a Government house occupied by Government Employees who were paying rent and that the purported allocation was unlawful for being based on untrue allegations of fact and

made procured in concealment of material facts, then the reliefs sought by the Plaintiff should issue.




21. However, prayer (f) of the plaint cannot be granted because it seeks general damages as against the 3rd Defendant who does not exist as the suit as pleaded has only two Defendants and, most importantly, no evidence was led to lay the basis for such an award.

22. Save for prayer (f) all the other prayers in the plaint are granted as prayed.

Dated, signed and delivered at kakamega this ...6th ...day ofAugust,2025.


Hon. P. Mutua-CM 6/8/25

In the presence of:-

1. The Plaintiff: 
2. The 1st Defendant:..... 
3. The 2nd Defendant:..... 
4. The Court Assistant:..... 