

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA
ELCC NO. 85 OF 2013

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF
VERSUS

SHAIBU HAMISI MGANDI 1st DEFENDANT

ABDULLAH ALI TAIB (Sued as the administrator
of the Estate of the Sheikh Ali Taib, deceased 2nd DEFENDANT

WILSON GACANJA 3rd DEFENDANT

AND

NATIONAL LAND COMMISSION INTERESTED PARTY

JUDGEMENT

1. Vide the amended plaint dated 13th March 2019, the plaintiff averred inter alia that the 1st defendant was issued with a letter of allotment dated 19th January 1996, without making any application over a parcel of land MN/I/9816, measuring 0.1300 ha, the suit property, and particularly identified in Part Development Plan No. 12.4. CT.20.95 also dated 19th January 1996, by the 3rd defendant, for a term of 99 years commencing from 1st February 1996. The plaintiff further averred that the suit property was wholly excised from a strip of land abutting Links Road a road reserve, and is a road leading to 1st Avenue, Nyali, and therefore part of a classified road vested in the defunct Mombasa Municipal Council. That

the part development plan that was used to survey the suit property is a forgery and the allocation was thus fraudulent. The plaintiff set out the particulars of fraud and illegalities attributed to the 1st defendant at paragraph 12 of the plaint, and particulars of misfeasance and breach of fiduciary duty on the part of 3rd defendant at paragraph 14 of the plaint. The plaintiff also averred that as the 1st defendant's title was void ab initio, he was incapable of conferring any interest over the land to the 2nd defendant. The plaintiff therefore seeks for the following prayers against the defendants:

- a. *"A declaration that the grant culminating in issuance of titles on or about 19th January 1996 in favour of the 1st defendant over the parcel of land described MN/I/9816 being Grant Number CR 28222 was issued ultra vires the 3rd Defendant statutory powers, is otherwise illegal, null and void ab initio;*
- b. *Further to (a) above, a declaration that the said grant is incapable of vesting an interest in land or proper title to the land to the 1st defendant and the deceased herein and or any other person;*
- c. *An order directed to the Land Registrar Mombasa to rectify the register by cancellation of the entries relating to the issuance of*

Certificate of Lease in favour of the 1st Defendant over the parcel of land known as MN/I/9816;

- d. An order directed to the Land Registrar Mombasa to rectify the register by cancellation of the entries relating to issuance of Certificate of Lease in favour of the 1st Defendant over the parcel of land known as MN/I/9816 and any other interest purportedly created pursuant to the cancelled Lease/Certificate of Lease in respect of the parcel known as MN/I/9816;*
- e. An order for a permanent injunction restraining the 1st defendant and the 2nd defendant by themselves, their agents, servants, employees, and or assigns from trespassing upon, transferring, leasing, wasting and/or dealing in any other manner howsoever whatsoever interfering with the parcel now known as MN/I/9816 Grant Number CR 28222 in any other way than by way of surrender to the Government of Kenya;*
- f. As against the 1st defendant; general damages;*
- g. Costs of and incidental to this suit;*
- h. Interest at court rates on (f) and (g) above.”*

2. The 1st & 2nd defendants opposed the plaintiff's claim through their statement of defence dated the 3rd March 2022, inter alia averring that

this suit is *sub judice* and or *res judicata*, in light of the proceedings in Mombasa ELCC No. 212 of 2012, Engel Gisela t/a Engelcop Tours & Safaris versus, Shaibu Hamisi Mgandi, Sheikh Ali Taib, Commissioner of Lands, Municipal Council of Mombasa and the Ethics and Anti Corruption Commission.

3. The 3rd defendant entered appearance but did not file any pleadings. The interested party neither entered appearance nor participated in the proceedings.
4. During the hearing, the plaintiff presented Timothy Mwangi, a Deputy Director of Physical Planning in the Ministry of Lands, Physical Planning and Urban development, who testified as PW1. He relied on his statement dated 14th June 2022 and inter alia testified that a part development plan (PDP) is a plan prepared for alienation of land or development of a project. He took the court through the process of applying for and allocation of land, summarized as follows:
 - a. That a party seeking to be allocated with a parcel would make an application to the defunct Commissioner of Lands or the Minister who would on approval write to the Director of Physical Planning to prepare a PDP;

- b. Before the enactment of the Physical Planning Act, the Director would prepare a PDP and circulate to the defunct District Commissioner, defunct clerk to the local authority, district surveyor, land officer and among others;
- c. That if there was no objection, the Director would forward the final copy to the Commissioner of Lands for approval, attaching the evidence of no objection from the consulted officers;
- d. After the Commissioner of Lands has approved, it would returned to the Director who would issue it with an approved development number which was a unique identifier, and enter it in the register showing the use of the land and reference and the date of circulation;
- e. The Commissioner of Lands would use the approved PDP and development/plan number to issue an allotment letter and copies of the PDP would be circulated to the authorities that had approved it;
- f. Post Physical Planning Act, the Director is mandated to publish the PDP in the Kenya Gazette and give 60 days to members of the public to make objections. The PDP is also to be published in two local

diaries with national circulation, specifically in English and Swahili, as well as being placed at the Chief's office and local authorities;

g. If after 60 days there was no adverse comments, the Director would forward the PDP to the Minister and procedure and the other procedure set out above would be followed.

PW1 stated that they received the letter dated 10th June 2022 from the plaintiff, seeking confirmation whether PDP NRB /12/23 179/2 and approved development number 62 dated 6th August 1979, as well as PDP 12.4.CT.30.95 was in their record. They replied vide their letter dated 15th June 2022 stating that the PDP was not valid as the suit property was a road reserve. During cross-examination PW1 reiterated that PDP 12.4.CT. 30.95 was not prepared and approved in their office and that though he had received from the plaintiff a copy of the letter dated 19th December 1995 by the Coast Provincial Surveyor, that was copied to several officers, he could not confirm whether the PDP was circulated for comments. He admitted that the said letter from the Coast Provincial Surveyor was a letter of no objection and that if the Commissioner was satisfied that there was no objection to the PDP, the office could issue a letter of allotment. In re-examination, the witness clarified that the letter

by the Coast Provincial Surveyor was given to them by the plaintiff, and that they do not have any record of it in their office.

5. The plaintiff called Emmanuel Arunga, an investigating officer with the plaintiff, who testified as PW2, and relied on his statement dated 27th March 2013 and list of documents dated 3rd May 2013. He told the court that he conducted investigation in this matter in 2012, visited the suit property and the Land registry but could not trace any documents pertaining to the land. He contacted the defunct Mombasa Municipal Council where he obtained a letter dated 15th March 1996 from the Commissioner of Lands to the Registrar of Titles forwarding a grant and copied to the 1st defendant. He also obtained a letter to Salma Taib from S.M Osodo dated 13th April 2004 over outstanding rent over the suit property, and traced property rates payment by the 2nd defendant. Thereafter they requested the Physical Planning Officer for the PDP and other related documents but was informed there was none. He obtained from Survey of Kenya, Nairobi, the survey map showing the history of the property and established that the suit property was hived from a road reserve, using PDP 12.4.CT.30.95 which was approved by the Commissioner of Lands on 19th January 1996. That it was on the said PDP that the issuance of allotment letter to the 1st defendant was based.

Further investigations showed that the demarcated plot was registered as MN/I/9816 and was wholly on a road reserve. They therefore concluded that there was illegality in allocation and registration of MN/I/9816. That they also discovered that there was no record of the 1st defendant applying for the suit property, application and consent to transfer. He added that the other offices in Mombasa who had been asked for comment had indicated that the property was on a road reserve. Refer to the letters by the District Lands officer dated 19th December 1995, and District Commissioner dated 22nd December 1995. On cross-examination, PW2 admitted that they did not interrogate the 3rd defendant. He stated that there was no approved PDP used in the allocation of the plot and that the one in the plaintiff's list of documents is only a development plan. That a development plan is what creates a Part Development Plan, PDP. On re-examination, PW2 clarified that PDP 12.4.CT.30.95 does not contain the approval number and that the same had not been approved by the Director of Physical Planning.

6. The next witness was Gordon Ochieng, Director of Land Administration, who testified as PW3. He relied on his statement dated 7th February 2013 as his evidence in chief and inter alia testified that from F/R 296/26, which is in respect of the suit property, the deed plan 203604 had been issued

by Director of Survey and signed by one Were in accordance with the Commissioner's letter dated 18th January 1996. Further that PDP 12.4.CT.30.95 had been processed and approved by the Commissioner of Lands on 10th January 1996 and it is that plan that led to the issuance of letter of allotment reference 794//4/V/133 dated 19th January 1996 to the 1st defendant. He however, could not establish whether a correspondence file was opened, or acceptance of the offer received and whether title over the suit property was ever issued. It was his testimony that the allocation of the suit property was irregular, as the PDP had no approval number that signals finalization of the process by the Director of Physical Planning, even though it had been approved by the 3rd defendant. He added that there was no evidence that the road reserve had been de-gazetted before allocation to the 1st defendant. On cross-examination, PW3 stated that PDP 12.4.CT.30.95 was not given to him by the Director of Physical Planning or the defendants. He also explained the process of allocation once more and was categorical that if a plot applied for was committed, then the applicant would be notified that it was not available for allocation. He indicated that the letter dated 19th December 1995 from the Coast Provincial Surveyor could be over a plot different from the suit property as it mentions 30 as the PDP reference. He stated that he could

not tell whether the Commissioner of Lands received a letter of application of the plot from 1st defendant. He termed the allocation of the plot as irregular due to the fact that the said letter of 19th December 1995 refers to PDP 12.4.CT. 95 which differs from the PDP 12.4. CT.30.95 which is what the plaintiff requested confirmation for in their said letter of 10th June 2022.

7. The fourth witness was Geoffrey Kibowen, Assistant Director of Survey, who testified as PW4, as a substitute witness for the one Peter Karanja who was deceased. He relied on his statement dated 24th August 2021 and stated that PDP 12.4.CT.30.95 is a departmental reference number and not an PDP approval reference number. He also testified that a survey done sometime in 1980 as F/R 152/35 shows that the suit property was part of a road property. He added that a survey should not be done before approval of the PDP as was the case in this property.
8. In his defence, Hamisi Mgandi, the 1st defendant, testified as DW1 and relied on his statement dated 3rd March 2022, as his evidence in chief. He testified that he had applied for allocation of the plot but did not have a copy to produce in court. He stated that he had verified the status of the suit property both at the Nairobi Land Registry, and the defunct Mombasa Municipal Council, before making an application. Thereafter he engaged

the services of a surveyor who also informed him that the suit property was vacant. He told the court that he paid Kshs.500,000 as acceptance of the letter of allotment but did not have receipts for the same. It was his testimony that the deed plan attached to the title did not show that the suit property was on a road reserve. That he applied for a consent to transfer the suit property when he was selling to the late 2nd defendant but did not have a copy of the application or consent to produce. He insisted that the letters from the District Commissioner and Survey office had no adverse comments and that despite two letters stating that the suit property was on a road reserve, none indicated that they had not approved. That the Director of Physical Planning letter in response to that of the plaintiff indicating that they did not have evidence that the PDP was prepared and approved by that office could be as a result of the approved copy having got lost.

9. Abdula Ali Taib, the 2nd defendant, testified as DW2, and relied on his statement dated 3rd March 2022 as his evidence in chief, and the list of documents of even date as his exhibits. He pointed out that the letter dated 19th December 1995, by Peter Karanja, Surveyor had stated he had no objections though the plot was on a road reserve, and to him the procedure of applying and allocation of the plot was followed in respect

of the suit property. He however indicated that he did not have any documents used in completion of the sale of the suit property. He also added that the government could not have allocated the suit property if it was on a road reserve and was surprised that the government is denying its own documents.

10. The learned counsel for 3rd defendant closed his defence without calling any witness.

11. The learned counsel for the plaintiff, 1st & 2nd defendants and 3rd defendant filed their submissions dated 4th July 2025, 25th July 2025 and 27th June 2025 respectively, which the court has considered.

12. The issues for the court's determinations are as follows:

- a. Whether the suit property was available for allocation to the 1st defendant.*
- b. Whether the allocation of the suit property to the 1st defendant was lawfully and regularly done.*
- c. Whether the 3rd defendant breached the fiduciary duties in the allocation of the suit property.*
- a) Whether the 1st defendant acquired an good interests over the suit property that he could pass to the 2nd defendant.*
- b) Who bears the costs of the suit?*

13. The court has carefully considered the parties' pleadings, oral and documentary evidence presented by PW1 to PW4, DW1 and DW2, submissions by the three learned counsel, superior court decisions cited thereon and come to the following determinations:

- a. This suit could be termed as one seeking to correct a historical injustice over public property, road reserve. The plaintiff has joined National Land Commission as an interested party, even though it did not participate at all in the proceeding. Through the suit, the plaintiff has placed blame on the former Commissioner of Lands, Wilson Gacanja, sued as 3rd defendant, and the 1st defendant, to whom the suit property was allocated by the former. The 1st defendant's acquisition of the suit property, and the subsequent registration of ownership of the said land by the 2nd defendant, has been challenged by the plaintiff under *section 26* of the Land Registration Act. The plaintiff has set out the particulars of fraud in their plaint to the effect that the suit property was on a road reserve and was illegally allocated to the 1st defendant. The Black's Law Dictionary defines fraud thus:

"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in

some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

- b. The current Land Registration Act Chapter 300 of Laws of Kenya does not have a definition for fraud, but the Registration of Titles Act under which the current title was obtained defined ‘fraud’ in section 2 as follows:

“Fraud” shall on the part of a person obtaining registration include a proved knowledge of the existence of an unregistered interest on the part of some other person, whose interest he knowingly and wrongfully defeats by that registration.”

In Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427 states that:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas. 685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

It is therefore clear from the foregoing that the statement of claim based on fraud must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of. See Lawrence versus Lord Norreys (1880) 15 App. Cas. 210 at 221. It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must not only be distinctly alleged but also distinctly proved. See Davy versus Garrett (1878) 7 ch.D. 473 at 489, where it was held that:

“General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice”.

It follows therefore that fraud is a matter of evidence, and once it has been pleaded, it must be proved as required under *section 109* of the Evidence Act chapter 80 of Laws of Kenya.

- c. The short and long of the testimony presented by the four witnesses called by the plaintiff is that the 1st defendant did not follow the procedure as was provided in the Government Land Act (repealed) in applying for allocation and acquiring registration of the suit property. In the case of Dina Management Ltd versus County Government of Mombasa & 5 Others [2023] KESC 30 (KLR) the Supreme Court relied on the case of Nelson Kazungu Chai & 9 others versus Pwani University [2014] eKLR where it was held that:

“...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.

131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013* where Njagi J held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

The detailed testimony of PW1 on the procedure to be followed before a Part Development Plan, PDP, was prepared was not challenged by any of the defendants. The procedure begins with a

letter of application for the plot, which 1st defendant, DW1, claimed he had done, but did not have a copy in court. A PDP is then prepared by the office of the Director of Physical Planning and circulated to the various local stakeholders, including the authorities such as the defunct District Commissioner, Clerk to the Local Authority, District Surveyor, Lands Officer among others, in accordance to the procedure in existence in use before the Physical Planning Act Chapter 286 of Laws of Kenya (repealed). The plaintiff produced two letters dated 19th December 1995 and 22nd December 1995 which are from the office of the Provincial Surveyor and the District Commissioner, communicating that they had no objection to a letter referenced 12/4/XIII/96 dated 18th December 1995, which the court takes to have been the letter circulating the draft PDP. It is instructive to note the letter from the Provincial Surveyor in addition to communicating their no objection, it stated that the suit property was on a road reserve.

- d. The next step was for the draft PDP to be forwarded to the Commissioner of Lands with the stakeholders' comments for approval, after which it was returned to the Director of Physical Planning to be given a final reference number. In this case, the

number appears as PDP 12.4.CT.30.95, which PW4 stated is not fake, but added that the PDP relied on in the allocation was never approved.

- e. On perusal of the PDP NRB/12/23/79/2 which was prepared and registered for the whole area where the suit property is situated in 1979, there is an approved development number 62, while PDP 12.4.CT.30. 95 does not have any such approval number. PW1 was firm in his evidence that PDP 12.4.CT.30.95 was not approved and the letter dated 15th June 2021 as a reply to the plaintiffs enquiry on PDP 12.4.CT.30.95 had stated that the same was not in their records. The question that arises now is who is to be believed between PW1, the director of Physical Planning, and PW4, the Director of Surveys, who claimed that PDP 12.4.CT.30.95 exists in their records? The answer lies in the testimony of PW4, who stated during cross-examination inter alia that:

“The Director of Surveys is not the custodian of letter of allotment and PDP and that is why what I have are copies. I did not see the original copies of PDP which must be with Director of Physical Planning.....”

The PDP 12.4.CT.30.95 is not evidently in the records of the Director of Surveys for the simple reason that they were not approved by the Director Physical Planning as no unique identifier known as approved development number was inserted. Despite the absence of an approved PDP, a survey plan 152/35 was prepared and a letter of allotment was issued to the 1st defendant. The rest is as detailed in the pleadings and evidence tendered herein.

- f. In addition to the above noted discrepancies in the application and allocation of the suit property, no receipts were traced by the PW2 and PW3 for payment of stand premium of Kshs.360,000 by the 1st defendant, who however claimed to have paid Kshs.500,000, though he admitted he had not provided receipts to the court. With the foregoing background, it becomes clear that the Commissioner of Lands circumvented the formal procedures in issuing the allotment letter over the suit property to the 1st defendant, in the absence of an approved Part Development Plan. The Commissioner of Lands was indeed guilty of misfeasance for approving the PDP 12.4.CT.30.95 despite the letter dated 19th December 1995, which clearly left no doubts that the plot was situated on a road reserve. The 1st to 3rd defendants did not adduce any evidence to rebut or

challenge that of the plaintiff to the effect that the procedure of applying for a plot and allocation was not followed, and that the suit property was part of a road reserve.

- g. Having come to the finding that the procedure in applying for the plot and issuing of the letter of allotment was not followed, then the 1st defendant did not acquire a good title over the suit property that he could pass on to a third party. It follows that the title to the suit property currently held by the 2nd defendant is invalid and has been impugned, in view of the decision in the case of Funzi Development Ltd & others versus County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR where the Court of Appeal held that:

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

The plaintiff has therefore succeeded in proving that the suit property was not available for allocation as it was already alienated

as a road reserve, and its allocation to the 1st defendant by the 3rd defendant was fraudulently done.

- h. On the claim for general damages, the court does not find favour in it as the fraud was authored and executed by those in the office of the Commissioner of Lands, in collusion with the 1st defendant. to award general damages in this situation would be like allowing the government to benefit from its own wrongs. The plaintiff should be satisfied by orders restoring the suit property where it has always rightfully belonged, part of road reserve, and therefore, public land.
- i. Under *section 27* of the Civil Procedure Act, chapter 21 of Laws of Kenya, costs follow the event unless where there is good reason to depart from that rule. Having considered the nature of this litigation in which public resources has been employed to reclaim public land successfully, the plaintiff is entitled to costs of the suit against the defendants.

14. From the foregoing determinations, the court finds the plaintiff has substantially proved its claim against the defendants. The court enters judgement for the plaintiff against the defendants and orders as follows:

- a. *That a declaration is hereby issued that the grant culminating in issuance of titles on or about 19th January 1996 in favour of the 1st*

- defendant, over the parcel of land described MN/I/9816 being Grant Number CR 28222, was issued ultra vires the 3rd Defendant's statutory powers, and is otherwise illegal, null and void ab initio;
- b. That further to (a) above, a declaration is hereby issued that the said grant is incapable of vesting an interest in suit property or proper title to the said land to the 1st defendant and the 2nd defendants;
- c. That an order is hereby issued directing the Land Registrar Mombasa to rectify the register of the suit property by cancellation of the entries relating to the issuance of Certificate of Lease in favour of the 1st Defendant over the parcel of land known as MN/I/9816;
- d. That an order is hereby issued directing the Land Registrar Mombasa to rectify the register of the suit property by cancellation of the entries relating to issuance of Certificate of Lease in favour of the 1st Defendant over the parcel of land known as MN/I/9816 and any other interest purportedly created pursuant to the cancelled Lease/Certificate of Lease in respect of the parcel known as MN/I/9816;
- e. That an order for a permanent injunction is hereby issued restraining the 1st and 2nd defendants by themselves, their agents, servants, employees, and or assigns from trespassing upon, transferring,

leasing, wasting and/or dealing in any other manner howsoever whatsoever interfering with the suit property, now known as MN/I/9816 Grant Number CR 28222, in any other way other than by way of surrender to the Government of Kenya;

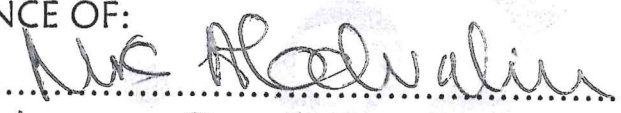
f. The 1st to 3rd defendants to bear the plaintiff's costs and interests at court rates.

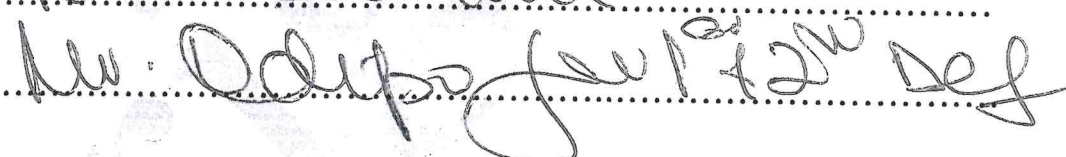
Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS^{22nd} DAY OF OCTOBER 2025.


S. M. Kibunja, J.
ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF

DEFENDANTS

.....
KALEKYE-COURT ASSISTANT.


S. M. Kibunja, J.
ELC MOMBASA.