



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 679 OF 2006

JULIE NYAWIRA MATHENGE.....PLAINTIFF

-VERSUS-

KENYA SCHOOL OF GOVERNMENT1ST DEFENDANT

THE CHIEF LAND REGISTRAR SUED THRO'

THE ATTORNEY GENERAL.....2ND DEFENDANT

ATTORNEY GENERAL.....THIRD PARTY

ETHICS AND ANTI-CORRUPTION

COMMISSION.....INTERESTED PARTY

CONSOLIDATED WITH

NAIROBI ELC SUIT NO. 324 OF 2010

KENYA ANTI-CORRUPTION

COMMISSION.....PLAINTIFF

-VERSUS-

JULIE NYAWIRA MATHENGE.....1ST DEFENDANT

WILSON GACANJA.....2ND DEFENDANT

AND

NAIROBI ELC SUIT NO. 325 OF 2010

KENYA ANTI-CORRUPTION COMMISSIONPLAINTIFF

-VERSUS-

JULIE NYAWIRA MATHENGE.....1ST DEFENDANT

JAMES RAYMOND NJENGA.....2ND DEFENDANT

JUDGMENT

The pleadings:

1. This judgment is in respect of three suits namely, ELC No.679 of 2006, ELC No. 324 of 2010 and ELC No. 325 of 2010 that were consolidated and heard together.
2. The dispute in the consolidated suits relates to the ownership of three parcels of land namely, L.R No. 11509, L.R No. 11510 and L.R No. 11511(hereinafter together referred to as “the suit properties” and separately as “Plot No. 11509”, “Plot No. 11510” and “Plot No. 11511” respectively).
3. The dispute is between Julie Nyawira Mathenge (hereinafter referred to only as “the Plaintiff”), Kenya School of Government (hereinafter referred to only as “the 1st Defendant”), the Chief Land Registrar (hereinafter referred to only as “the 2nd Defendant”), the Attorney General (hereinafter referred to only as “the 3rd Party”) and Ethics and Anti-Corruption Commission (formerly known as Kenya Anti-Corruption Commission) (hereinafter referred to only as “EACC”). EACC brought into the dispute the former Commissioners of Lands, James Raymond Njenga (hereinafter referred to only as “Njenga”) and Wilson Gacanja (hereinafter referred to only as “Gacanja”).
4. In her plaint dated 27th June 2006 that was amended on 30th June 2015 filed in ELC No. 679 of 2006, the Plaintiff averred that she was allocated Plot No. 11509 on 19th June 1981 and was issued with a title I.R No. 36911 in respect thereof on 28th September 1982. The Plaintiff averred that Plot No. 11509 was allocated to her for the purposes of a petrol station, shops, offices and flats.
5. The Plaintiff averred that at the time of allocation, the Commissioner of Lands informed her that Plot No. 11509 initially belonged to the 1st Defendant and that the same was surrendered by the 1st Defendant for the development of a commercial centre.
6. The Plaintiff averred that she was unable to develop a petrol station on Plot No. 11509 as she was advised by professionals that the plot was too narrow on the side fronting the road and as such heavy vehicles delivering fuel would find it difficult to turn.
7. The Plaintiff averred that due to this technical challenge, she applied to the Commissioner of Lands to be allocated Plot No. 11510 and Plot No. 11511 which were also surrendered by the 1st Defendant as part of the proposed commercial centre. The Plaintiff averred that she intended to use the three parcels of land to develop the said petrol station and other amenities. The Plaintiff averred that she was issued with letters of allotment in respect of Plot No. 11510 and Plot No. 11511 and was subsequently issued with titles in respect thereof on 30th July 1997.
8. The Plaintiff averred that she was unable to commence development on the suit properties because Plot No. 11510 and Plot No. 11511 had old government houses which needed to be bonded and demolished by the Ministry of Roads and Public Works. The Plaintiff averred that her several letters to the Ministry of Roads and Public Works to bond and demolish the said structures did not yield any response forcing her to put her development plans on hold.
9. The Plaintiff averred that some of the said structures on Plot No. 11510 and Plot No. 11511 were partially destroyed by fire in 2005 but she did not take possession as she continued to wait for the Ministry of Roads and Public Works to bond and demolish the same.
10. The Plaintiff averred that in May 2006, she learnt that the 1st Defendant was reconstructing the shops that were partially destroyed by fire on Plot No. 11510 and Plot No. 11511. The Plaintiff averred that through her advocates she demanded that the 1st Defendant stops the said activities on her properties. The Plaintiff averred that the 1st Defendant responded to her demand denying her title and claiming that Plot No. 11510 and Plot No. 11511 belonged to the 1st Defendant.
11. The Plaintiff averred that her attempts to fence L.R No. 11509 which was vacant were also thwarted by the 1st Defendant using force. The Plaintiff averred that she was also unable through her surveyor to retrace the beacons of L.R No. 11509 due to the fact that structures on the said parcel of land had interfered with the beacons.
12. The Plaintiff averred that searches that she conducted on Plot No. 11510 and Plot No. 11511 revealed that the 2nd Defendant had registered caveats on 23rd December 1998 claiming interest in the two parcels of land under section 65(1)(f) of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). The Plaintiff averred that the said caveats were placed without notice to her.
13. The Plaintiff averred that while this suit was pending, the 2nd Defendant purported to revoke the Plaintiff’s titles to the suit properties administratively through Gazette Notice No. 15580 dated 26th November 2010. The Plaintiff averred that the purported revocation was carried out despite the existence of an order for the maintenance of status quo that was issued on 8th October 2007.
14. The Plaintiff averred that the purported revocation was unlawful and amounted to violation of the Plaintiff’s right to property. The Plaintiff averred that she made an application to challenge the purported revocation but was directed to raise the issue in these proceedings.
15. The Plaintiff sought the following reliefs against the Defendants:
 - a) A declaration that the suit properties namely, L.R No. 11509, L.R No. 11510 and L.R No. 11511 do not constitute public land within the meaning of Article 62 of the Constitution of Kenya 2010 and is private land belonging to the Plaintiff.
 - b) A declaration that the decision of the 2nd Defendant to interfere with the Plaintiff’s ownership and possession of the suit properties by purportedly cancelling the titles in respect thereof is a violation of the Plaintiff’s right under Article 40, 47, 62 and 64

of the Constitution of Kenya.

- c) A declaration that the said purported cancellation of title by the Registrar of Titles (who is succeeded in title by the second defendant) was unlawful, unconstitutional and illegal and is thus null and void.
- d) A declaration that the 1st Defendant had no entitlement legal or otherwise to the suit properties and that the Plaintiff is the legal owner thereof.
- e) A mandatory injunction requiring the 1st Defendant to forthwith vacate the suit properties forthwith and in default the 1st Defendant be evicted from the properties.
- f) A permanent injunction barring the Defendants, their agents or associates from in any way interfering with the Plaintiff's title, possession, occupation or other property rights over the suit properties.
- g) Compensatory damages for loss of user of the suit properties and for the inconvenience and anguish caused to the Plaintiff for the unlawful, unconstitutional, unreasonable and illegal conduct of interfering with the Applicant's use and enjoyment of her property.
- h) General damages for trespass and mesne profits.
- i) Costs of this suit.
- j) Any other and/or further orders that this court deems just and expedient.

16. The 1st Defendant filed a defence and counter-claim against the Plaintiff on 25th September 2006. The 1st Defendant denied that the Plaintiff was the owner of the suit properties. The 1st Defendant averred that the suit properties were set aside and allocated to the 1st Defendant by the Government at its inception in 1961 and that the 1st Defendant had occupied the same since then.

17. The 1st Defendant denied that it had surrendered the suit properties for the development of a commercial centre and for allocation to the Plaintiff or any other person or entity. The 1st Defendant averred that the suit properties had never been available and/or capable of being allocated to any person by the Commissioner of Lands.

18. The 1st Defendant averred that the 1st Defendant had always leased the suit properties and the buildings thereon to tenants who used the same as shops for the benefit of the 1st Defendant's community and the residents of the surrounding areas. The 1st Defendant averred that the Plaintiff had never claimed ownership or possession of the suit properties.

19. The 1st Defendant averred that the titles if any that were issued to the Plaintiff in respect of the suit properties were issued fraudulently, illegally, through concealment of material facts, misrepresentation and in contravention of the provisions of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed), the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) and other provisions of the law.

20. The 1st Defendant denied that the Plaintiff had taken any step towards the development of the suit properties since she had never had possession of the same. The 1st Defendant averred that the Plaintiff had never demanded possession of the suit properties from the 1st Defendant or the Ministry of Public Works save for the demand letter of 16th May 2006.

21. The 1st Defendant averred that in June 2005 buildings on the suit properties were destroyed by a mysterious fire in circumstances that were suspect after which the 1st Defendant commenced repairs and reconstruction of the destroyed buildings to restore the shops that were vital for the residents of the 1st Defendant and the surrounding areas. The 1st Defendant averred that as soon as it became aware of the allocation of the suit properties to the Plaintiff it raised objection with the Commissioner of Lands in respect thereof. The 1st Defendant averred that it was confirmed that the allocation was wrong, illegal and the same should be cancelled. The 1st Defendant denied that Plot No. 11509 was vacant.

22. The 1st Defendant averred that the Plaintiff had not demonstrated that she had complied with the conditions under which the suit properties were allegedly allocated to her rendering the titles held by her illegal, null and void. The 1st Defendant averred further that the Plaintiff's suit was time barred.

23. In its counter-claim, the 1st Defendant reiterated the contents of its defence and averred that it was the lawful owner of the suit properties. The 1st Defendant averred that the titles issued to the Plaintiff in respect of the suit properties were illegal, null and void. The 1st Defendant sought the following reliefs against the Plaintiff by way of counter-claim;

- i. A declaration that the titles issued to the Plaintiff in respect of the suit properties were issued fraudulently and through concealment material facts and/or misrepresentation and as such the same are illegal, null and void.
- ii. An order that the said titles be cancelled and new titles issued in favour of the 1st Defendant.
- iii. An order restraining the Plaintiff by herself or through her agents, servants and/or employees from interfering with the

defendant's occupation and/or ownership of the suit properties.

iv. The cost of the suit.

24. The Plaintiff filed a reply to defence and defence to counter-claim dated 4th October 2006. The Plaintiff admitted that the suit properties were government land that had been reserved for the 1st Defendant's use. The Plaintiff contended however that the same were surrendered by the 1st Defendant back to the government. The Plaintiff denied that the suit properties were allocated to her fraudulently and through misrepresentation as alleged by the 1st Defendant. The Plaintiff contended that she acquired the suit properties lawfully. The Plaintiff denied that the suit was time barred.

25. In her defence to counter-claim, the Plaintiff reiterated the contents of her reply to defence and denied that the suit properties were owned by the 1st Defendant. The Plaintiff averred that the 1st Defendant's claim over the suit properties was unfounded in law and in fact and that in any event, its claim over Plot No. 11509 was statute barred and unmaintainable. The Plaintiff averred further that the 1st Defendant's counter-claim was defective and should be struck out.

26. The 3rd Party filed a defence on 15th October 2007 in which it contended that if there was any fraud in the allocation of the suit property to the Plaintiff, it was not vicariously liable for the same. The 3rd Party contended that the claims by the Plaintiff and the 1st Defendant were time barred and that the same were fatally defective for noncompliance with the provisions of the Government Proceedings Act, Chapter 40 Laws of Kenya. The 3rd Party averred that the Caveat that was registered against the suit properties by the 2nd Defendant was registered in accordance with the law and that the reliefs sought were not capable of being executed while the said caveat remained in place.

27. In ELC No. 324 of 2010 and ELC No. 325 of 2010, EACC averred that the suit properties were at all material times part of alienated Government Land that was reserved for use by the 1st Defendant which was a public body and as such was not available for alienation. EACC averred that on or about 30th July 1997, Wilson Gacanja ("Gacanja") in purported exercise of statutory powers conferred upon the Commissioner of Lands under the Government Lands Act, the Registration of Titles Act and other written laws issued and/or caused to be issued to the Plaintiff grant of leases in respect of Plot No. 11510 and Plot No. 11511 for a term of 99 years each with effect from 1st November 1996 on the terms and conditions that were set out therein.

28. EACC averred that on or about 28th September 1982, James Raymond Njenga ("Njenga") in purported exercise of statutory powers conferred upon the Commissioner of Lands under the Government Lands Act, the Registration of Titles Act and other written laws issued and/or caused to be issued to the Plaintiff grant of a lease in respect of Plot No. 11509 for a term of 99 years each with effect from 1st July 1981 on the terms and conditions that were set out therein.

29. EACC averred that the suit properties were not available for alienation in any manner whatsoever to the Plaintiff or any other person and as such the issuance of leases over the suit properties to the Plaintiff was fraudulent, illegal, null and void for all intents and purposes.

30. EACC averred that the purported issuance of the grants in respect of the suit properties to the Plaintiff by Gacanja and Njenga was in excess of their statutory powers and as such void *ab initio* and could not therefore confer upon the Plaintiff any estate, interest or right in the suit properties.

31. EACC contended in the alternative and without prejudice to the foregoing that the Plaintiff holds the suit properties in trust for the 1st Defendant and that the register for the suit properties should be rectified to reflect this legal position. EACC averred that the 1st Defendant was in possession and using the suit properties.

32. EACC averred further in the alternative that Gacanja and Njenga as holders of the office of the Commissioner of Lands were the custodian of all Government Land and by purporting to allocate the suit properties to the Plaintiff, Gacanja and Njenga were in breach of their fiduciary duties.

33. EACC sought the following reliefs against the Plaintiff, Gacanja and Njenga;

i. A declaration that the Grants made to the Plaintiff in respect of LR. No. 11509, LR No. 11510 and LR No. 11511(the suit properties) were made in excess of Statutory powers of Gacanja and Njenga and are null and void *ab initio*.

ii. A declaration that the Grants in respect of the suit properties in the name of the Plaintiff conferred no estate, interest or right on the Plaintiff and the same are null and void.

iii. An order to rectify the registers by cancellation of the Grants and Certificates of Title in respect of the suit properties made to the Plaintiff herein.

iv. An order for a permanent injunction against the Plaintiff herein to restrain her by herself, her agents or assigns from trespassing upon, transferring, leasing, wasting and/or dealing in any manner with the suit properties, otherwise than by way of transfer to the Government of Kenya.

v. General damages against the Plaintiff herein.

vi. Costs of and incidental to the suit.

vii. Interest on (iv) and (v) above at Court rates.

viii. Any other relief the Court deems fit and just to grant.

34. The Plaintiff, Gacanja and Njenga filed defences in response to EACC's claims in ELC No. 324 of 2010 and ELC No. 325 of 2010. In her defences, the Plaintiff averred the suit properties were available for allocation, a decision having been made in 1962 to exercise the same from the land that had been reserved for the 1st Defendant, for the creation of a commercial centre to serve the community in Lower Kabete.

35. The Plaintiff averred that the purpose of the excision that gave rise to the suit properties was to make the same available for alienation. The Plaintiff averred that the Commissioners of Lands who issued her with the grants in respect of the suit properties were legally empowered to do so. The Plaintiff denied that there was any fraud or illegality involved in the issuance of the said grants or that the Commissioners of Lands who issued the said grants breached their fiduciary duties.

36. The Plaintiff averred that it was not for the Plaintiff to investigate whether or not the said Commissioners of Lands were acting within the scope of their powers. The Plaintiff averred that she acted in good faith in reliance on the representations by the said Commissioners of Lands that they had power to issue the grants in respect of the suit properties.

37. The Plaintiff denied that she holds the suit properties in trust for the 1st Defendant. The Plaintiff averred that she had all along acted in good faith and that she was the lawful proprietor of the of the suit properties. The Plaintiff averred that it would be unjust and inequitable to allow EACC's claims.

38. The Plaintiff averred that EACC was undeserving of the reliefs sought. The Plaintiff averred that the suits by EACC were frivolous, vexatious and amounted to an abuse of the court process.

39. Gacanja filed a defence dated 6th August 2010. Gacanja denied EACC's claim in its entirety. Gacanja averred that he had no interest in the suit properties and as such the orders sought by EACC could not be enforced against him. Gacanja contended that the suit against him was unconstitutional as he left the office of the Commissioner of Lands over 10 years prior to the filing of the suit and that the suit was selective, scandalous, vexatious and disclosed no cause of action against him.

40. Njenga filed a defence dated 12th August 2010 in which he admitted that he was the Commissioner of Lands until 1989. Njenga contended that he was wrongly sued in his personal name. He contended that he was an employee of the Government and as such the suit should have been brought against the office of the Commissioner of Lands and/or the Attorney General. He contended that EACC's suit was incompetent.

41. Njenga averred that he had no recollection of the parcel of land said to have been allocated by him since the records relating to the same were in the office of the Commissioner of Lands that he left several years ago. Njenga denied that any parcel of land alienated during his tenure as the Commissioner of Lands was alienated illegally, irregularly or through abuse of office. He denied that he breached his fiduciary duty in allocating Plot No. 11509 to the Plaintiff.

42. EACC filed replies to the defences by the Plaintiff, Gacanja and Njenga in which it reiterated the contents of its complaints in ELC No. 324 of 2010 and ELC No. 325 of 2010.

The evidence tendered by the parties:

43. The Plaintiff testified as PW1. She adopted her recorded witness statement dated 18th February 2016 at pages 155 to 165 of the common bundle of documents as part of her evidence in chief. In her oral evidence given in court, she told the court that the suit properties were allocated to her at different times. She stated that she first applied for Plot No. 11509 to operate a petrol station and the same was allocated to her.

44. She testified that upon acquiring the parcel of land, she approached Shell Kenya Ltd. and Total Kenya Ltd. on her proposed project but was told that the land was too narrow for fuel tankers to turn. This prompted her to apply to the Commissioner of Lands to be allocated additional land namely, Plot No. 11510 and Plot No. 11511 and the two plots were allocated to her in 1996.

45. She stated that in 1997 she lost a briefcase that contained several documents among them the title for Plot No.11509 and allotment letters for Plot No. 11510 and Plot No. 11511 and upon reporting the loss to the Commissioner of Lands and at the Central Police Station, she was issued with a provisional title for L.R No.11509. With regard to Plot No. 11510 and Plot No. 11511 the processing of titles took its own course, and the same were issued to her on 30th July 1997 and registered on 28th August 1997.

46. PW1 stated that once she had the titles for the three parcels of land, she went back to Total Kenya and asked them to come and set up a petrol pump for her. She stated that at the same time, she also wanted to establish the beacons for the suit properties. She stated that a surveyor by the name James Kamwere established the beacons after which she did a lot of clearing at the place. She stated that when she was ready to start developing the suit properties, the 1st Defendant which claimed to own the suit properties stopped her from fencing the same.

47. PW1 stated that when Plot No. 11509 was allocated to her, she used to grow maize and beans thereon after clearing it. She stated that she engaged an architect who prepared for her plans for the developments that she wished to carry out on the suit properties but the 1st Defendant did not allow her to commence the same.

48. She stated that she regularly paid to the City Council land rates and land rent to the Government without fail. She stated that there were

small structures on Plot No. 11510 and Plot No. 11511 which were being used as shops. She stated that there were three shops in total. She stated that she asked the Ministry of Public works to demolish the structures but they did not take any action even after she supplied them with evidence of her ownership of the two parcels of land.

49. PW1 stated that while she was out of the country, the buildings on Plot No. 11510 and Plot No. 11511 were partially burnt. She stated that when the 1st Defendant tried to reconstruct the structures, she protested over the same. She stated that the 1st Defendant went ahead with the reconstruction and let the shops to tenants. She stated that the suit properties belonged to her and she was still interested in developing the same. She denied that she acquired the suit properties illegally.

50. PW1 stated that the idea of putting up a shopping centre on the suit properties was mooted in 1960s. PW1 stated that in a meeting that was held to discuss the issue, the 1st Defendant stated that it wanted nothing to do with commercial premises. PW1 stated that she was not involved in the decision to excise a portion of the 1st Defendant's land and to have the same subdivided and allocated. PW1 stated that she just made an application and was not involved in the processing of the allotment letters.

51. PW1 stated that she was not consulted before her titles to the suit properties were revoked by the 2nd Defendant. She stated that when the revocation took place, this suit was pending. PW1 produced several documents as exhibits in support of her case.

52. On cross examination, PW1 denied that the suit properties were owned by the 1st Defendant before the same were allocated to her. She stated that she had lived in the area where the suit properties are situated since 1967/68. She stated that she was living about 1 kilometer from the 1st Defendant's premises. PW1 admitted that there was a shopping center where the suit properties are located. She stated that not all shops were occupied at all times. She stated that there was a retail shop, a butchery and a bakery. She admitted that when she made the application to be allocated Plot No. 11510 and Plot No. 11511, the shops were occupied by tenants. She also admitted that the shops were let to the said tenants by the 1st Defendant. She stated further that there was also a fuel pump run by Shell Kenya Limited and that by the time she made the application to be allocated the land where the pump was located, Shell Kenya had ceased operation.

53. PW1 stated that she did not know that Shell Kenya Ltd. was a tenant of the 1st Defendant. She stated further that she did not inquire from the 1st Defendant whether it owned the shopping centre. PW1 stated that the suit properties belonged to the Government and every Kenyan had a right to apply to be allocated the same. She stated that the suit properties were created in 1960s while she was still in school. She admitted that she did not have any evidence that the 1st Defendant had consented to the petrol station site being allocated to her.

54. PW1 admitted that the letter of allotment for Plot No. 11509 had development conditions. She stated however that it was impossible for her to develop the property. She stated that correspondence she had with the Commissioner of Lands in relation to Plot No. 11510 and Plot No. 11511 were stolen. She stated that the correspondence that she produced in evidence must have been obtained from the Commissioner of Lands. PW1 admitted that she did not have communication from Shell Kenya Ltd. and Total Kenya Ltd. on the issue of Plot No. 11509 being too narrow at the road frontage for a petrol station. PW1 admitted further that the architectural drawings for the proposed developments that she produced in evidence were not approved.

55. PW1 stated that the titles for Plot No. 11510 and Plot No. 11511 were issued to her in July 1997. She stated that she was not aware that the 1st Defendant had opposed the allocation of the said parcels of land to her. She stated that she had not seen any evidence that the 1st Defendant had surrendered the suit properties to the Government. She admitted that she did not have copies of the letters of allotment for Plot No. 11510 and Plot No. 11511. She stated that she could not have been issued with titles for the two parcels of land without the same. She stated that she was not aware if the suit properties were advertised before the same were allocated to her. She stated that she did not ask the occupants of the suit properties to vacate the same since it was the responsibility of the Commissioner of Lands to do so. She reiterated that her request to the Ministry of Public Works to demolish the structures on the suit properties was not acted upon. She stated that she had nothing to do with the burning of the said structures. She confirmed that as at the time of her testimony, the structures on the suit properties were still in place after being reconstructed by the 1st Defendant.

56. The 1st Defendant's Senior Principal Lecturer and a former human resource and administrative manager, Nicholas Mutemi Iko (DW1) was its sole witness. DW1 adopted his witness statement dated 28th June 2016 as part of his evidence in chief.

57. DW1 testified that at all material times, the suit properties were government land reserved for government facilities. DW1 stated that a survey map prepared on 26th May 1964 shows the location of the 1st Defendant on the ground as College of administration. DW1 stated that the survey map was prepared for a proposed shopping centre for the 1st Defendant. He stated that there was a plan to have a shopping centre for the community in the area. He stated that there was a dispensary on Plot No.11508 which is still in existence. The dispensary belongs to County Government of Nairobi.

58. DW1 stated that Plot No. 11509 was planned for a petrol station and next to it were Plot No.11510 and Plot No. 11511 which were also allocated to the Plaintiff. He stated that there were other plots namely, Plot Nos. No.11512,11513 and 1514 which were also allocated to private entities but were recovered by the 1st Defendant through court orders.

59. DW1 stated that initially, the 1st Defendant owned a large piece of land which is captured in the survey plan No. 18869/II/70A. He stated that the parcel of land where Jeane's Training school is on the plan is where University of Nairobi School of Business is currently situated. He stated that the land belonged to the 1st Defendant but the same was surrendered to the University of Nairobi in 1980s. He stated that from where the dispensary is situated on the plan on both sides of Lower Kabete road up to the borders of the University of Nairobi is public land owned by the 1st Defendant. He stated that after the 1st Defendant surrendered a portion of its land to the University of Nairobi, it remained with land measuring approximately 78 acres. DW1 stated that the suit properties which are situated in front of the 1st Defendant's premises were reserved for a shopping centre for the 1st Defendant. He stated that the suit properties belong to the 1st Defendant.

60. DW1 stated that from the letter by the 1st Defendant's predecessor dated 21st May 1962 at page 212 of the Plaintiff's bundle of documents, it is clear that the intention behind the shopping centre that had been proposed was to organize an existing shopping center but not to allocate land. He stated that the correspondences at pages 213 to 217 of the same bundle and the minutes at page 218 of a meeting held on 19th November 1965 to discuss the development of a shopping center at Kenya Institute of Administration shows that there were existing shops on the ground. DW1 stated that alienation of the said shops was not discussed at the meeting of 19th November 1965.

61. DW1 stated that after the fire that burnt the said shops in 2005, the 1st Defendant reconstructed the same and rented out the same to tenants. The 1st Defendant produced in evidence a copy one of the tenancy agreements that it entered into with the tenants and receipts for rents received from the tenants. DW1 stated that the 1st Defendant was still collecting rent from the premises.

62. DW1 stated that they did not have a record of how the suit properties were acquired by the Plaintiff. He stated that there was also no record showing that the 1st Defendant surrendered the suit properties back the Government. He stated that the 1st Defendant learnt of the alleged allocation of the suit properties in 1995 when some people were seen demarcating the same. He stated that the suit properties are listed in the Ndungu report as having been irregularly allocated.

63. DW1 testified the Director of the 1st Defendant, Mr. Gateere who has since retired protested against encroachment on the 1st Defendant's land. The correspondence between Mr. Gateere, the Commissioner for Lands and the Permanent Secretary Ministry of lands in that regard were produced in evidence. He stated that the 1st Defendant registered its protest to the encroachment on its land before the titles for the suit properties were issued to the Plaintiff. He stated that the said protests were ignored and titles for the suit properties issued to the Plaintiff.

64. DW1 stated that the titles that were issued to the Plaintiff were cancelled in 2010 after which the ownership of the suit properties reverted back to the 1st Defendant. He stated that Plot No. 11509 has never been vacant. He stated that there was a butchery on part of the said parcel of land and that it was after the said butchery was burnt down that the property became vacant. He stated that at no time did the Plaintiff occupy or possess the suit properties. He stated that when the shops on the suit properties were burnt down the 1st Defendant reconstructed the same from the compensation that it was paid by its insurers. DW1 stated that correspondence at pages 288 to 294 of common bundle of documents showed that the 1st Defendant was in need of more land. He stated that it would have been ironical for the 1st Defendant to surrender land and at the same time ask for more land.

65. DW1 produced the documents in the 1st Defendant's lists of documents filed on 5th June 2017 and 15th August 2018 as DExh.1 and DExh.2 respectively.

66. On cross examination DW1 stated that Kenya Institute of Administration is the predecessor of Kenya School of Government, the 1st Defendant herein. DW1 stated that the survey plan No. 18869/II/70A that was forwarded to the 1st Defendant by the Commissioner of Lands under cover of a letter dated 4th June 1969 showed that the suit properties are inside the land that was reserved for the 1st Defendant. He stated that as at 4th June 1969, the suit properties were in existence. He stated that even after the suit properties were demarcated, they remained in the custody of the 1st Defendant. DW1 stated that the parcels of land had not been allocated and no titles had been issued in respect thereof. DW1 stated further that the fact that leases were signed by Ministry of works did not mean that the land belonged to the Government. He stated that leasing of government land was being done by the Ministry of works.

67. DW1 stated further that the predecessor of the 1st Defendant, Kenya Institute of Administration started as a government department until 1996 when it became a state corporation. He stated that the 1st Defendant on becoming a state corporation had power to own land and was issued with the titles for the suit properties. DW1 stated that the proposal to have a shopping centre was the 1st Defendant's idea and that the shopping centre was to remain the property of the 1st Defendant. He stated that the 1st Defendant's intention was to separate the training ground from the shopping ground. He reiterated that there was no intention to alienate land. He stated that neither the proposal for a petrol station nor the shopping centre took off and as such the suit properties remained the properties of the 1st Defendant.

68. DW1 stated further that the allotment letter produced as by the Plaintiff as PExh.3 did not have authority number and that the application letter showed that the Plaintiff applied to be allocated the 1st Defendant's land. DW1 stated that the minutes of the meeting held to discuss establishment of the shopping Centre showed that it was agreed that the plot for the petrol station could be advertised for alienation. He stated however that, it did not mean that the land had been surrendered by the 1st Defendant. DW1 stated that the 1st Defendant did not have a problem with the land that was given to the dispensary as it was a public institution serving its students.

69. DW1 stated that the Grant in respect of Plot No. 11509 was signed by James Raymond Njenga while the grants in respect of Plot No. 11510 and Plot No. 11512 were signed by Wilson Gacanja. He stated that these latter grants were issued despite protest from the 1st Defendant. He stated that the suit properties were not surrendered to the Government and as such James Raymond Njenga and Wilson Gacanja who were the Commissioners of Lands at the material time had no power to allocate the same to the Plaintiff.

The Submissions:

70. The Plaintiff filed her submissions dated 22nd July 2021. In summary; the Plaintiff submitted that she held good titles in respect of the suit properties. The Plaintiff submitted that the 1st Defendant did not adduce any evidence showing that it had any rights over the suit properties. The Plaintiff submitted that the correspondence produced by the 1st Defendant in evidence in proof of its protest over the allocation of the suit properties did not specifically mention the Plaintiff or the suit properties.

71. The Plaintiff submitted that she produced documents showing how she was allocated the suit properties hence the root of her titles are traceable. In support of her submission, the Plaintiff cited Mike Maina Kamau v Attorney General [2017] eKLR. The Plaintiff submitted that

she acquired the suit properties legally and not fraudulently as claimed by the 1st Defendant. The Plaintiff submitted that the properties were un-alienated Government land. The Plaintiff submitted that the suit properties had not been alienated to anyone.

72. The Plaintiff submitted that her cause of action against the 2nd Defendant for the cancellation of her titles on 26th November 2010 despite the existence of this suit and the status quo order issued on 8th October 2007 was not time barred.

73. The 1st Defendant filed its submissions dated 17th September 2021. In summary; the 1st Defendant submitted that the suit properties were not available for allocation to the Plaintiff. The 1st Defendant submitted that the suit properties constituted alienated Government land. The 1st Defendant submitted that it had sought the approval of the Commissioner of Lands to develop a shopping centre for the 1st Defendant's community. The 1st Defendant submitted that the suit properties were reserved for use by the Ministry of Education and the same were occupied by the 1st Defendant. The 1st Defendant submitted that the survey of the reserved land that gave rise to the suit properties was done at the 1st Defendant's own initiative and the suit properties were to be for its own use and not for alienation to third parties.

74. The 1st Defendant submitted that the Plaintiff acquired the titles for the suit properties irregularly in violation of the Government Lands Act. The 1st Defendant reiterated that the suit properties consisted of alienated government land. The 1st Defendant submitted that even if the suit properties were not alienated, the Commissioner of Lands had no authority to allocate the same. The 1st Defendant submitted that there was no Presidential written approval for the grants in favour of the Plaintiff.

75. The 1st Defendant cited Timothy Ingosi & 87 others v Kenya Forestry Services & 2 others [2015] eKLR, James Joram Nyaga & Another v Attorney General [2007] eKLR, Ali Mohammed Dagane (Granted Power of Attorney by Abdullahi Muhamed Dagane, suing on behalf of the Estate of Mohammed Haji Dagane) v Hakar Abshir & 3 Others [2021] eKLR, Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR, John Kiguru Karume v Kenya Institute of Administration & 4 others [2017] eKLR and Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 Others [2019] eKLR and urged the court to cancel the titles held by the Plaintiff in respect of the suit properties.

76. The 2nd Defendant and the 3rd Party filed their submissions dated 21st September 2021. The 2nd Defendant and the 3rd Party submitted that the suit properties were public land and that the same had been occupied and were in possession of the 1st Defendant even before independence when the 1st Defendant was known as Kenya Institute of Administration (KIA). They submitted that the Plaintiff acquired the suit properties illegally.

77. The 2nd Defendant and the 3rd Party submitted further that from the evidence placed before the court all action with regard to the shopping centre that was to be set up on the suit properties were in consultation with KIA, Ministry of Lands, City Council of Nairobi, Ministry of Public Works and all other relevant arms of Government. The 2nd and 3rd Party submitted that no consensus was reached that the suit properties be alienated and the same were not advertised for alienation neither were the same sold by public auction.

78. In support their submissions that the Plaintiff acquired the suit properties illegally, the 2nd Defendant and the 3rd Party cited Joseph Kuria Kiburu v Attorney General [2018] eKLR, Republic v Minister For Transport & Communication & 5 Others ExParte Waa Ship Garbage Collector & 15 Others. Mombasa HCMCA No.617of 2003[2006]1KLR(E&L)563, Mureithi & 2 Others (For Mbari Ya Murathimi Clan) v Attorney General & 5 Others. Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443, Chemei Investments Limited v The Attorney General & Others Nairobi Petition No. 94 of 2005 at para. 64, Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another. CA No. 298 of 2013 among others.

79. The 2nd Defendant and the 3rd Party submitted that the former Commissioners of Lands who issued the allotments and signed the grants in favour of the Plaintiff exceeded their mandates by alienating and allocating the suit properties that were not available for alienation. The 2nd Defendant and the 3rd Party submitted that the said Commissioners who are Defendants in ELC No. 324 of 2010 and ELC No. 325 of 2010 did to tender any evidence at the trial to rebut the averments by EACC.

80. Gacanja, the 2nd Defendant in ELC No. 324 of 2010 filed his submissions dated 23rd August 2021. In summary, he submitted that EACC failed to prove fraud attributed to him in the allocation of the suit properties to the Plaintiff. In support of this submission, he cited Mbuthia Macharia v Annah Mutua Ndwiga & another [2017] eKLR and Insurance Company of East Africa v The Attorney General [2001] eKLR.

81. Gacanja submitted that the suit against him was discriminative, biased, unconstitutional and an abuse of court process as it was filed against one government official in his personal capacity noting that allocation of land was a result of several processes that involved vetting and approval by different officers in the then Office of the Commissioner of lands. He submitted that the suit was a violation of his constitutional rights as the same was filed over 10 years after he left office hence he had no access to any evidence. In support of this submission, he cited Kenya Anti-Corruption Commission v Wilson Gacanja & 3 others, ELC No. 5 of 2008 and Joshua Okungu & Another v CM'S Court, Anti-Corruption Court & Another [2014] eKLR.

82. Gacanja submitted further that he was a public officer acting in his capacity as a Commissioner of Lands and as such the proper course should have been to sue the Attorney General or the particular office.

83. EACC filed submissions dated 14th September 2021 in which it supported the 1st Defendant's case that the titles acquired by the Plaintiff in respect of the suit properties were illegally issued in contravention of the provisions of the Government Lands Act, the Registration of Titles Act and all other provisions of the law.

84. EACC submitted that the Plot No. 11509 was originally in use by the 1st Defendant and the then Commissioner of Lands confirmed that

position in a letter dated 2nd January 1981 to the Minister of state, Office of the President while seeking approval to allocate the same to the Plaintiff. EACC submitted that the suit properties were part of government land that was reserved for use by KIA.

85. EACC submitted that the Plaintiff failed to produce any evidence on how she applied to be allocated Plot No. 11510 and Plot No. 11511. EACC submitted further that the Plaintiff did not also produce in evidence letters of Allotment for these parcels of land. EACC urged the court to cancel the titles held by the Plaintiff. In support of its submissions, EACC cited Leah Magoma Ongai v Attorney General [2015]eKLR, Farooq Imtiaz Mohamed Malik v Director of Police Investments & 3 Others [2018]eKLR, Kenya National Highway Authority v Shalien Masood Mughal & 5 others [2017]eKLR and Peter Mureithi & 2 others v Attorney General & 4 others [2006]eKLR.

86. EACC submitted further that the Commissioners of Lands sued herein acted outside their mandate in allocating the suit properties to the Plaintiff knowing well that they had no authority to do so. EACC submitted that the Plaintiff did not acquire good titles over the suit properties. In support of this submission, EACC relied on Chemey Investment Limited v Attorney General & 2 others [2018]eKLR, Adan Abdirahani Hassan & 2 others v Registrar of Titles, Ministry of Lands & 2 others [2013]eKLR, James Joram Nyaga & another v Attorney General & another [2019]eKLR, Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019]eKLR among others.

87. EACC submitted that the Plaintiff's titles having been acquired illegally, the same should be revoked without compensation. In support of this submission, the EACC cited Supa Nova Properties Limited & another v District Land Registrar Mombasa & 2 others, Kenya Anti-Corruption Commission & 2 others (Interested Parties) [2018]eKLR and Republic v Land Registrar Mombasa & 2 others Ex Parte Bhangra Limited [2012]eKLR.

88. Issues for determination:

From the pleadings and submissions by the advocates for the parties, the following in my view are the issues arising for determination in the consolidated suits;

- a) Whether the Plaintiff acquired the suit properties lawfully.
- b) Whether the Plaintiff holds valid titles in respect of the suit properties.
- c) Whether the 1st Defendant trespassed on the suit properties.
- d) Whether the titles held by the Plaintiff were lawfully revoked.
- e) Whether the Plaintiff is entitled to the reliefs sought in its amended plaint dated 30th June 2015 in ELC No. 679 of 2006.
- f) Whether the 1st Defendant is entitled to the reliefs sought in its counter-claim dated 25th September 2006 in ELC No. 679 of 2006.
- g) Whether EACC is entitled to the reliefs sought in ELC No. 324 of 2010 and ELC No. 325 of 2010.

Analysis and determination of the issues arising:

Whether the Plaintiff acquired the suit properties legally:

89. The history of the suit properties is not disputed. Kenya School of Government (the 1st Defendant) is a body corporate with perpetual succession. It was established under the Kenya School of Government Act, No. 9 of 2012. The 1st Defendant was formerly known as Kenya Institute of Administration (KIA). KIA was established by the Kenya Institute of Administration Act, No. 2 of 1996 (now repealed). KIA land initially extended to what was known as Jeane's School in early 1960s. Under the Kenya School of Government Act, No. 9 of 2012, all the rights, duties, obligations, assets and liabilities of KIA were automatically transferred to the 1st Defendant and any reference to KIA is deemed to be a reference to the 1st Defendant. It is not disputed that the 1st Defendant is a Public entity clothed with statutory mandate to provide among others learning and development programmes to build capacity for the Public Service in Kenya.

90. From the evidence on record, I am satisfied that the 1st Defendant has been in possession of the suit properties from 1960s to date. There is no time when the 1st Defendant was dispossessed of the suit properties. The suit properties were surveyed and demarcated in 1964 for the purposes of a shopping centre project that never took off. Even after the demarcation, the suit properties remained in possession of the 1st Defendant. The suit properties are developed. There are government buildings on the same which are rented out to tenants by the 1st Defendant. When the suit properties were allocated to the Plaintiff they were allocated together with the government buildings. There is no evidence that the Plaintiff paid for the buildings. That may explain why the letters of allotments for two of the suit properties are missing.

91. After being allocated the suit properties the Plaintiff did not know what to do with the government buildings that were standing thereon. The Plaintiff's attempt to have the buildings demolished by the Ministry of Public Works did not bear fruit. Attempts by arsonists to burn down the buildings did not succeed either. Attempts by the Plaintiff to fence the properties were also resisted by the 1st Defendant. What I am trying to say is that the 1st Defendant has remained in possession of the suit properties and the developments thereon from 1960s to date.

92. The suit properties are part of seven (7) plots that were created in 1964 through Survey Plan Folio No. 102 Register No. 98. It is not

disputed that the land from which the suit properties were created was government land and that the same extended to what was known as Jeane's Training School and that the same was reserved for use by KIA the predecessor of Kenya School of Government, the 1st Defendant herein. The fact that this parcel of land was reserved for KIA is captured in a letter dated 4th June 1969 at page 85 of DExh. 1 and L.D Plan No. 18869/II/70A at page 86 of the same exhibit. This position is also reinforced by a letter dated 14th June 2006 from the Commissioner of Lands to KIA's director at page 32 of DExh. 2.

93. It is common ground that if the suit properties were reserved for KIA (hereinafter referred to only as "the 1st Defendant" where the context so permits), the same was not available for alienation as the Commissioner of Lands could only allocate unalienated government land. Section 3(a) of Government Lands Act, Cap.280 Laws of Kenya (now repealed) provides that;

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

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

94. Section 7 of the Government Lands Act provides that:

"The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act:

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128."

95. Unalienated Government land is defined in section 2 of the Government Lands Act as: **"Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment"**.

96. It is common ground that land that is reserved by the government for a particular use is not unalienated government land unless the same is surrendered or the reservation is revoked or cancelled. As I have stated earlier, it is not disputed that the suit properties were reserved by the Government for use by the 1st Defendant. What is in dispute is whether the same were surrendered back to the Government by the 1st Defendant. The Plaintiff has contended that in a meeting that was held on 19th November 1965, the 1st Defendant surrendered the suit properties to the Government for the development of a shopping center and as such the land became available for alienation. The 1st Defendant, the 3rd Party and EACC have on the other hand denied that the suit properties were surrendered.

97. I have perused the minutes of the meeting that was held on 19th November 1965 at which the 1st Defendant is alleged to have surrendered the suit properties. I am in agreement with the 1st Defendant and the 3rd Party that from the totality of the evidence tendered with regard to the establishment of the shopping centre, the shopping centre was a project of the 1st Defendant. There was no intention whatsoever that the land that was to be set aside for the shopping centre was to be allocated to third parties. There was also no intention at all to surrender back the land to the Government to be unalienated land. The survey plans that were produced in evidence show that as at the time when the discussions were going on regarding the establishment of a shopping centre, there were already shops on the ground. From the evidence on record, I am in agreement with the 1st Defendant's contention that its intention was to re-plan the area so that the training ground or the school was separated from the shopping centre that was already in place.

98. The only plot that was discussed for possible alienation was Plot No. 11509 that was to be alienated for use as a petrol station. Even for this plot, the manner of alienation that was proposed was advertisement. The alienation was also subject to acceptance of the proposal by all the departments concerned. No evidence was tendered showing that the alienation of this plot was ultimately agreed on by the parties concerned. The evidence before the court shows that the idea of establishing of the shopping centre did not materialize and the whole plan was abandoned.

99. This means that the suit properties remained reserved for the 1st Defendant's use. It was not disputed that the 1st Defendant continued to be in possession of the suit properties that were let to tenants who were operating shops and a petrol pump thereon. It follows therefore that at as at the time the suit properties were allocated to the Plaintiff, the same were not unalienated government land. The same were therefore not available for allocation to the Plaintiff or to anyone else.

100. I am also in agreement with the 1st Defendant that even if the suit properties were unalienated, the Commissioners of Lands who allocated the same to the Plaintiff had no power to do so. The proviso to section 7 of the Government Lands Act on the powers of the Commissioner of Lands that I have reproduced above provides as follows:

"Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128."

101. In James Joram Nyaga & Another v The Hon. Attorney General & Another [2007] eKLR, the court stated as follows on section 7 of the Government Lands Act:

"The above section (7 of GLA) clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of

the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya.”

102. I am fully in agreement with this decision. The Commissioners of Lands who allocated the suit properties to the Plaintiff had no power to do so. The power was vested in the President. In the absence of evidence that the President approved the allocation, the same was illegal having been made in excess of the powers that was conferred upon the said Commissioners of Lands. It also appears that the Plaintiff was allocated the suit properties through political connections. A letter dated 2nd January 1981 at page 14 of the common bundle of documents (PEXh.2) by Njenga, the former Commissioner of Lands who allocated Plot No. 11509 to the Plaintiff addressed to Hon. G.G.Kariuki the then Minister of State in the Office of the President leaves no doubt that Plot No. 11509 was allocated to the Plaintiff through the influence of Hon. G.G. Kariuki who had “expressed...wish that the above mentioned plot measuring 0.2284 acres should be allocated to Mrs. Julie N. Mathenge.” According to the letter, Hon. G.G.Kariuki had called Njenga on 4th November 1980. It is on the same date that the Plaintiff purported to have applied for the plot.

103. It is also common ground that as at the time the suit properties were being allocated to the Plaintiff, the same were within the City of Nairobi. Under Part III of the Government Lands Act, land in townships could only be disposed of by the Commissioner of Lands through public auction that had to be advertised in the Kenya Gazette in which the terms of sale had to be set out. See sections 9 to 18B of the Act. It is not disputed that Plot No. 11509 was not allocated to the Plaintiff through the public auction procedure that was provided for in law. The allocation was therefore unlawful.

104. For Plot No. 11510 and Plot No. 11511, it is not clear at all how the Plaintiff acquired them. The only documents that the Plaintiff placed before the court in proof of her ownership were the Grants issued to her by the former Commissioner of Lands, Gacanja. Although the Plaintiff claimed that the documents relating to Plot No. 11510 and Plot No. 11511 were stolen on 23rd July 1997, the Police Abstract that was produced in evidence only referred to theft of a briefcase. In her affidavit sworn on 22nd August 1997 when she applied for a provisional title in respect of Plot No. 11509, the Plaintiff indicated that for Plot No. 11510 and Plot No. 11511, the documents that were stolen were only letters of allotment. There is no reference as to the theft of the application for the two plots. In her witness statement, the Plaintiff stated that she applied for the two plots. The Plaintiff reiterated that it is the letters of allotment for the two plots that were stolen.

105. In the circumstances, the Plaintiff was expected to place before the court a copy of her application said to have been made on or about 1996 and evidence of the payments that she made when the properties were allocated to her. It is therefore not clear whether the Plaintiff applied for the two plots, whether the same were allocated to her and the terms of such allocation. What the Plaintiff has are titles. I have also noted that the Plaintiff has produced several documents in evidence that she claimed to have obtained from the office of the Commissioner of Lands on the history of the suit properties. The Plaintiff has produced correspondence going back to 1960s. Curiously, the Plaintiff appears to have been unable to obtain copies of documents on the basis of which Plot No. 11510 and Plot No. 11511 were allocated to her. This casts strong doubt as to the legality of the process through which these two parcels of land were allocated to the Plaintiff. In Munyu Maina v Hiram Gathiha Maina [2013] eKLR the court stated that:

“.....When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”

106. It is worth noting that the two parcels of land were allocated to the Plaintiff despite very strong protest from the 1st Defendant. The evidence before the court shows that the title for Plot No. 11510 and Plot No. 11511 were issued to the Plaintiff by Gacanja on 30th July 1997. As at this time, the Principal of the then KIA had written to Gacanja several letters from 2019 protesting against people including a former Senior Staff of KIA who were conspiring to have the suit properties allocated to them by Gacanja. All these letters including those from the Permanent Secretary Ministry of Lands and Settlement that was called upon by KIA to intervene in the matter were ignored by Gacanja when he issued grants to the Plaintiff in respect of the two parcels of land after he had assured the Permanent Secretary that KIA’s land was safe and was asked to issue a letter of allotment to KIA. See a letter dated 16th May 1997 from the Permanent Secretary Ministry of Lands and Settlement addressed to Gacanja which is part of DEXh.2. It appears as if Gacanja was determined to issue grants to the Plaintiff in respect of the two plots at all cost.

107. It is not disputed however that the two parcels of land like Plot No. 11509 were not disposed of by Gacanja to the Plaintiff in accordance with the provisions of the Government Lands Act that required that the disposal be conducted by way of public auction.

108. It is my finding from the foregoing that the suit properties were acquired by the Plaintiff unlawfully and unprocedurally. The properties having been reserved for the 1st Defendant were not available for allocation and even if they were, the process through which the same were allocated were irregular and unlawful as demonstrated above. I concur fully with the findings of my sister G.J. Kemei J. in Nairobi ELC No. 80 of 2009 that concerned the properties that were created together with the suit properties and allocated to private entities.

Whether the Plaintiff holds valid titles in respect of the suit properties.

109. The plaintiff relied on section 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed) in support of the validity of her title. That section has been reproduced in section 26(1) of the Land Registration Act, 2012. Section 23 of the Registration of Land Act states as follows:

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor

thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party”.

110. Section 26 of the Land Registration Act, Act, 2012, provides as follows:

26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

Article 40 of the Constitution provides that:

(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person—

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).

(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

111. I am of the view that the said provisions of the law cannot protect a title that was created and acquired illegally. I have set out hereunder various decisions of the superior courts made over the years in which they are unanimous that a title that has been acquired unlawfully is not a valid title and cannot confer interest in land to the holder.

112. In 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.”

113. In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), Milankumar Shah & 2 others v The City Council of Nairobi & another, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.

114. In the case Henry Muthee Kathurima v Commissioner of Lands & Another (2015) eKLR, the Court of Appeal stated that:

115. “We have considered the provisions of Section 26 of the Land Registration Act in light of the provisions of Article 40(6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the Constitution. Guided by Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that the title to the property was unlawfully acquired.”

116. In Arthi Highways Developers Limited v West End Butchery Limited & 6 others(supra) the court stated as follows with regard to the protection accorded under section 23(1) of the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed):

“66. We have found already, on evaluation of the recorded evidence, that fraud was committed both at the registry of companies as well as the Lands office. The consequence is that West End did not divest its registered interest in the disputed land which was not an equitable one. It was the proprietor of the legal interest in the disputed land and did not part with it, as alleged or at all. The trial court held, following previous court decisions, that an innocent holder of legal Title to land cannot be dispossessed of that interest by a fraudster, and that Section 23 protects “Title issued to a purchaser upon the transfer or transmission by the proprietor thereof”. Those decisions are the Alberta Mae Gacie case (supra) and the Iqbal Singh Rai case (supra) which emanated from the High Court. With respect, we are persuaded by the reasoning in those cases as it accords with the law.”

117. In Adan Abdirahani Hassan & 2 others v Registrar of Titles & 2 others [2013] eKLR, the court stated as follows:

“19. Section 75 of the repealed Constitution recognised the doctrine of public trust which applies to land set aside for public purpose. Such parcels of land are held by the Government in trust for the public and any purported allocation to individuals or legal persons cannot be said to fall under the purview of the protected property pursuant to the provisions of Section 75 of the repealed Constitution. It is true that under section 23 of the Registration of Titles Act cap 281, a title is sacrosanct and indefeasible and can only be challenged on the ground of fraud and misrepresentation. However, any alienation of land contrary to the provisions of section 75 of the repealed Constitution or the provisions of the Government Land Act or any other Act of parliament would be *null and void ab initio*.

20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that the Constitution protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by the Constitution, he must show that he has followed the due process in acquiring that which he wants to be protected.

24. There has been a long chain of authorities by the High Court which have stated that the Registrar of Titles or the Registrar of Lands, as the case may be, has no authority to cancel a title. My take is that the Commissioner of Lands or his subordinates, while alienating Government land, can only do so over unalienated Government land as defined in the Constitution and under the repealed Government of Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose.

25. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Titles Act, cap 281 or the Registered Land Act, cap 300 is *null and void ab initio*. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. The cancellation of such a “title,” which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office.

26. This is the position that was taken by Justices J.G. Nyamu and R. Wendo in Miscellaneous Civil Application No. 1732 of 2004; James Joram Nyaga & Another -Vs- The Hon. Attorney General and two others where they held as follows:-

“The Commissioner of Lands cannot have purported to pass any valid title under the Government Lands Act or the Registration of Titles Act when acting contrary to the express constitutional provisions. The question of fraud under section 23 of the Registration of Titles Act does not therefore arise and there would be no need to prove it in this case..... The applicants have challenged the process by which the land was repossessed from them. From our findings above, the Applicants had no title to the land and the result is that the action of the Respondent was not a compulsory acquisition of that land. The land belonged to the public and the custodians were the Respondents. The notices issued by the Respondent were proper and sufficient time was given for verification for those who ought to have been in doubt of their titles.....Due process was followed in the repossession of the suit land.”

118. On the basis of the foregoing it is my finding that the Plaintiff having acquired the suit properties through an illegal process has no valid titles in respect thereof. The titles held by the Plaintiff are illegal, null and void *ab initio*. The same are not protected under Article 40 of the Constitution and section 23(1) of the Registration of Titles Act which in any event applies only to a title issued to a purchaser through a transfer or transmission by the proprietor. The Plaintiff was the first allottee of the suit properties. She was therefore not a purchaser of the suit properties.

Whether the 1st Defendant trespassed on the suit properties.

119. Trespass is defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page, 923, paragraph, 18-01. From what I have held above, the plaintiff had and still has no valid proprietary interest in the suit properties. The evidence that was adduced in court also shows that the plaintiff was not in possession of the suit properties. In the absence of any interest in the suit properties, the plaintiff cannot maintain an action against the 1st Defendant for trespass. The 1st Defendant which owns the suit properties and who have been in possession of the same since 1960s had a right to enter and occupy the same and to prevent the Plaintiff from fencing or conducting any activities on the land. In the circumstances, it cannot be said that the 1st Defendant had no justifiable cause for resisting the Plaintiff's attempt to take possession of the suit properties after the buildings thereon were burnt down partially by a mysterious fire outbreak. It is my finding therefore that the 1st Defendants did not trespass of the suit property when it resisted the Plaintiff's attempt to take possession thereof.

Whether the titles held by the Plaintiff in respect of the suit properties were lawfully revoked.

120. From my findings above, the Plaintiff held invalid titles that were acquired irregularly in violation of the law. That notwithstanding, the 2nd Defendant had to follow due process before revoking the illegal titles. No evidence was placed before the court showing that the rules of natural justice were followed in the revocation of the said titles. It follows therefore that the Plaintiff was not accorded fair administrative action. The revocation of the said titles was in circumstances carried out unlawfully more so because as at the time of the purported revocation, this suit had been filed and the same was pending and orders had been issued for the maintenance of status quo.

Whether the Plaintiff is entitled to the reliefs sought in its amended plaint dated 30th June 2015 in ELC No. 679 of 2006.

121. Having held that the Plaintiff acquired the suit properties illegally and that the titles held by the Plaintiff are illegal, null and void, there is no basis upon which the orders sought by the Plaintiff can be granted. Although I have held that the revocation of the said titles was unlawful, it will serve no purposes to reinstate a null and void title. Due to the foregoing, the Plaintiff has failed to prove her claim against the Defendants in ELC No. 679 of 2006. The Plaintiff is in the circumstances not entitled to any of the reliefs sought in her amended plaint.

Whether the 1st Defendant is entitled to the reliefs sought in its counter-claim dated 25th September 2006 in ELC No. 679 of 2006.

122. The 1st Defendant has established that the Plaintiff acquired the suit properties illegally and that the titles held by the Plaintiff are null and void. The 1st Defendant has therefore proved its counter-claim against the Plaintiff and as such it is entitled to the reliefs sought against the Plaintiff in its counter-claim.

Whether EACC is entitled to the reliefs sought in ELC No. 324 of 2010 and ELC No. 325 of 2010.

123. It has been proved by the evidence adduced by the 1st Defendant that Njenga and Gacanja acted outside their statutory powers when they purported to allocate the suit properties that were reserved for the 1st Defendant and that had government buildings to the Plaintiff. It has also been proved that Njenga and Gacanja acted in breach of the trust that was bestowed upon them by virtue of their office. The claims by EACC against the Defendants in ELC No. 324 of 2010 and ELC No. 325 of 2010 have therefore been proved. EACC is therefore entitled to the reliefs sought in the two suits.

124. Who is liable for the costs of the suit?

Costs is at the discretion of the court. The Plaintiff has failed to prove her case against the Defendants while the 1st Defendant and EACC have succeeded in their claims against the Plaintiff. I have noted that EACC did not call witnesses but adopted the evidence that was adduced by the 1st Defendant. I will award the costs of ELC No. 679 of 2006 and the Counter-claim filed therein to the 1st Defendant. EACC will have half (1/2) the costs of ELC No. 324 of 2010 and ELC No. 325 of 2010. The costs for the two parties shall be paid by the Plaintiff, Julie Nyawira Mathenge. I decline to award the 2nd Defendant and the 3rd Party (the Attorney General) in ELC No. 679 of 2006 costs because of my finding that the 2nd Defendant had acted illegally in revoking the titles for the suit properties.

Conclusion:

In conclusion, I hereby make the following orders;

a) The claim by the Plaintiff in ELC No. 679 of 2006 is dismissed.

b) The Counter-Claim by the 1st Defendant in ELC No. 679 of 2006 and the claims by EACC in ELC No. 324 of 2010 and ELC No. 325 of 2010 are allowed as follows:

i. It is declared that the Grants made to the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 324

of 2010 on 30th July 1997 and registered on 28th August 1997 in respect of L.R No. 11510, I.R No. 74300 and L.R No. 11511, I.R No. 74301 were made in excess of the statutory powers of 2nd Defendant in ELC No. 324 of 2010 who was holding the office of the Commissioner of Lands and as such the same are illegal, null and void.

ii. It is declared that the Grant made to the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 325 of 2010 on 28th September 1982 and registered on 23rd October 1982 in respect of L.R No. 11509, I.R No. 36911 was made in excess of the statutory powers of 2nd Defendant in ELC No. 325 of 2010 who was holding the office of the Commissioner of Lands and as such the same is illegal, null and void.

iii. It is declared that Grants made to the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 324 of 2010 on 30th July 1997 and registered on 28th August 1997 in respect of L.R No. 11510, I.R No. 74300 and L.R No. 11511, I.R No. 74301 conferred no estate, interest or right on the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 324 of 2010.

iv. It is declared that the Grant made to the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 325 of 2010 on 28th September 1982 and registered on 23rd October 1982 in respect of L.R No. 11509, I.R No. 36911 conferred no estate, interest or right on the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 325 of 2010.

v. The Grants made to the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 324 of 2010 on 30th July 1997 and registered on 28th August 1997 in respect of L.R No. 11510, I.R No. 74300 and L.R No. 11511, I.R No. 74301 are cancelled.

vi. The Grant made to the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 325 of 2010 on 28th September 1982 and registered on 23rd October 1982 in respect of L.R No. 11509, I.R No. 36911 is cancelled.

vii. A permanent injunction is issued restraining the Plaintiff in ELC No. 679 of 2006 who is also the 1st Defendant in ELC No. 324 of 2010 and ELC No. 325 of 2010 by herself or through her agents, servants and/or employees from trespassing upon, transferring, leasing or dealing in any other manner with all those parcels of land known L.R No. 11510(I.R No. 74300), L.R No. 11511(I.R No. 74301) and L.R No. 11509(I.R No. 36911) or interfering with the 1st Defendant in ELC No. 679 of 2006's occupation and ownership of the same.

c) The costs of ELC No. 679 of 2006 and the Counter-claim made therein are awarded to the 1st Defendant in ELC No. 679 of 2006 and shall be paid by the Plaintiff in ELC No. 679 of 2006.

d) EACC which is the Plaintiff in ELC No. 324 of 2010 and ELC No. 325 of 2010 is awarded half (1/2) the costs of the two suits.

Dated and Delivered at Nairobi this 17th day of March 2022

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Wangechi h/b for Mr. Gitonga for the Plaintiff in ELC No. 679 of 2006 and 1st Defendant in ELC No. 324 and 325 of 2010

Mr. Karanja h/b for Mr. Muraya for the 1st Defendant in ELC No. 679 of 2006

Mr. Motari for the Attorney General

Mrs. Okwara for the Plaintiffs in ELC No. 324 and 325 of 2010

Mrs. Omutimba for the 2nd Defendant in ELC NO. 324 of 2010

N/A for the 2nd Defendant in ELC No. 325 of 2010

Ms. C. Nyokabi - Court Assistant