



REPUBLIC OF KENYA



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**Mughal v Chief Land Registrar & 2 others (Environment & Land Case
302 of 2018) [2022] KEELC 2263 (KLR) (17 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 302 OF 2018**

JA MOGENI, J

MAY 17, 2022

BETWEEN

SALIEN MASOOD MUGHAL PLAINTIFF

AND

CHIEF LAND REGISTRAR 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

ATTORNEY GENERAL OF KENYA 3RD DEFENDANT

JUDGMENT

- 1) The dispute in this suit revolves around the question of validity of Grant Number 90629, which property was previously owned by one Peter Njuguna and Beatrice Wairimu who were issued with the grant by the President of the Republic of Kenya for Kenya Shillings Two Million and Seven Hundred Thousand (Kshs. 2,700,000).
- 2) On 5/05/2005, a valid transfer was registered by the 1st defendant against the title in the name of the plaintiff. The plaintiff in his undated plaint which was filed in court on 20/06/2018 contend that he has been in quiet and peaceful possession of the said suit property LR No. 209/12258.
- 3) Through a plaint, the plaintiff contends that on 24/07/2008 there was a transboundary dispute between the owner of the adjacent property and the plaintiff and upon writing to the Principal Secretary of the Ministry of Lands requesting for confirmation of ownership of the suit property, the Principal Registrar of Titles confirmed vide a letter dated 7/09/2008 that the plaintiff was registered owner of L.R Number 209/12258.
- 4) Further the plaintiff avers that in 2010 the City Council of Nairobi approved the plaintiff's plan to build an office block and penthouse apartments on the suit property. The plaintiff avers that on or



- about February 2013 Kenya National Highways Authority entered the plaintiff's land and started excavating to make a slip road on a large portion of the plaintiff's portion of land.
- 5) The plaintiff later discovered the said parcel of suit property was alienated for purposes of construction of a slip road connecting the main Mombasa highway to Likoni road.
 - 6) That the plaintiff vide a Petition Number 186 of 2013 sought a constitutional relief and the High Court declared him the owner of the said parcel of land and this position was confirmed through the Civil Appeal Number 327 of 2014 where it was held that the plaintiff was a bona fide purchaser of the said parcel of land.
 - 7) The plaintiff avers that the 1st defendant as the Chief Land Registrar was responsible for the administration of the Registered Titles Act Cap 281 Laws of Kenya and was authorized to perform duties under the Act which include issuance of title to land.
 - 8) The plaintiff contends that the Chief Land Registrar in breach of his duties caused the issuance of an original Grant I.R No. 90629 and caused the subsequent transfer of the said title to the plaintiff knowing very well that it was a nullity since the property was earmarked as an access road.
 - 9) In the plaint, the plaintiff itemized the particulars of breach by the 1st defendant, particulars of misrepresentation by the 1st defendant and particulars of loss occasioned by the actions of the 1st defendant.

Particulars of Breach

- i) Making a title in respect of land whereupon when the same was already alienated
- ii) Failing to conduct a proper search with regards to the said land to ascertain whether the land herein was already public land
- iii) Permitting the plaintiff to pay Land Rent
- iv) Failing to act in any way so as to prevent the title of the Plaintiff taking effect
- v) Permitting the said title without due regard of the same in the Lands Registry.
In the alternative that the 1st defendant is guilty of misrepresentation

Particulars of Misrepresentation

- a) Misrepresenting to the plaintiff that he was the rightful owner of all that L.R. No. 209/12258
- b) Misrepresenting to the plaintiff that the previous owner of L.R No. 209/12258 was one Peter Njuguna and Beatrice Wairimu
- c) Misrepresenting to the plaintiff that the Original Grant I.R. No. 90629 was issued from the President of the Republic of Kenya

Particulars of losses

- a) The plaintiff paid land rent of Kesh 16,000/=per annum as well as land rates amounting to Kesh 3,538.25 per annum that increase progressively during the period of ownership (13 years) totaling to Kesh 253,997.25/=



- b) The plaintiff had to halt construction of offices and penthouse apartment despite having obtained approval to build on the said parcel of land in the year 2010
 - c) Purchase price paid on the transfer of I.R Number 90629 amounting to Kesh 2,700,000 and
 - d) A loss which is in excess of Kesh 125,000,000 which was the market value of the property as of 12th July 2013.
- 10) The plaintiff therefore avers that as a result of being deprived of his property he has suffered loss and damages. Consequently, the plaintiff sought the following verbatim reliefs against the defendants:
- i) Damages amounting to a sum of Kesh 127,953,997.
 - ii) General damages
 - iii) Exemplary damages
 - iv) Costs of the suit
 - v) Interest on (a), (b), (c) and (d) above from the date of filing suit until payment thereof in full.
- 11) The 1st and 3rd defendants filed a joint statement of defence on 9/07/2018 denying each and every allegation of the fact and or law pleaded in the plaint as if set out herein seriatim and traversed verbatim except for paragraphs 14 and 15 in the plaint since the same refer to court matters which were before this honorable court.
- 12) The 1st and 3rd defendants further aver that the suit property falls within an area planned for slip and any allocation to the party that bought the property is null and void since the suit property was earmarked as early as 1976 for the slip road which is a public utility.
- 13) The 1st and 3rd defendants pray that the plaintiff's suit/claims be dismissed with costs.
- 14) The 2nd defendant despite entering appearance on 1/08/2018 did not file any documents against the plaintiff's claim.

The Plaintiff's Evidence

- 15) PW1- Mr. Shalien Masood Mughal, the plaintiff testified on 25/01/2022 and adopted his statement dated 27/06/2018 and all the documents indexed and paginated for the plaintiff dated 27/06/2018. He reiterated most of the matters set out in the plaint and the written submissions filed by the firm of Tariq Khan & Associates on 28/03/2022.
- 16) In summary he testified that he purchased the property 05/05/2005 but he did not produce a copy of the sale agreement further that he knew the property was available for sale through common friends. He stated that they did a search which he did not present to the court and neither did he have it before the court when he appeared in court and that they just engaged with the sale after he saw a copy of the title but never did any due diligence. In his witness statement he also stated that he purchased the property in 2002.



- 17) The plaintiff also produced a report of the valuer, but he stated that did not have a survey report done to accompany the valuer's report. The plaintiff testified that he had plans to develop an office block on the property and he had construction plans which he submitted to the Nairobi City County he stated that he did not have the Bill of Quantities to accompany the plan.
- 18) The plaintiff stated that he had been paying land rates but he did not have the receipts with him neither did have the receipt for the sale agreement which cost him Kshs. 2,700,000. He testified that he had not sued the people who sold him the land and therefore the Chief Land Registrar is innocent.
- 19) In cross examination he stated that he erroneously stated that he bought the land in 2002 whereas the correct date was 2005. That the road was constructed after he had purchased the property.
- 20) During re-examination the plaintiff stated that he did not know anything about the Ndung'u report, and that from his valuation report the valuer approximated the market value of the land to be Kesh 125,000,000 million. The plaintiff relied on some of the following cases; *Onyango and others vs Town Council of Awendo* [2010] 1EACA, *Fletcher vs Peck* [1810] US Supreme Court, *Kuria Greens v Registrar of Titles and another* [2011] eKLR, *Eunice Grace Njambi Kamau & another v The Honorable Attorney General*, ELC Civil Suit No 976 [2012]eKLR, *Isaac Gathungu Wanjohi & another v The Attorney General and 6 others* Petition 154 of 2011 [2012]eKLR among others.

1st and 3rd Defendant's Case

- 21) The 1st and 3rd defendants filed a witness statement dated 6/01/2022 and signed by Charles Ngetich the Land Registrar. In the statement the 1st defendant stated that the suit property LR 209/12258 was in the middle of Mombasa Likoni road and was therefore not available for allocation to any party. Further that the Survey Report dated 26/11/2013 which was filed in court show that the suit property was identified in the Nairobi Development plan No. 305 and FR 178/104 as being part of the Mombasa Road and road reserve. Further the suit property was identified in the Ndung'u Report on illegally acquired public utility lands.
- 22) The 1st and 3rd defendants testified that if the plaintiff was to seek any compensation then he should seek this from the party who sold him the land. Further that the claim for allocation of public land is within the mandate of National Land Commission and they are well placed to speak to the issue of whether the land was available for allocation.
- 23) In cross-examination by Mr Khan Counsel for the plaintiff, Mr Charles Kipkurui Ngetich, Deputy Chief Land Registrar, DW1 stated that the work of the Chief Land Registrar is registration of title deeds and any other registrable instrument. He further stated that the title document in the plaintiff's bundle was a genuine title which the office of the Chief Land Registrar issued. He further testified that the office of the chief land registrar register an interest in title but the office does not allocate land.
- 24) When he was further cross-examined he stated that the deed plan on is also correct although it is a document by the survey department but he also stated that a deed plan is always attached to a title deed. He further testified that on the transfer at Page 5 of the bundle of documents there is a transfer from Peter Njuguna to the plaintiff and based on this record he stated that it shows that the plaintiff would be the innocent purchaser. In his testimony he referred to the document on page 48 which was a letter from the Principal Registrar of Titles which state that the owner of the property LR 209/12258 is the plaintiff.
- 25) He stated in cross-examination that whereas the 1st and 3rd defendant witness statement stated that the suit property was not available for sale, the letter for 7/09/2008 stated that the plaintiff was the owner of the land. Further that the title in 2005 confirmed that he plaintiff was the owner of the land.



- The witness, DW1 also produced the Physical Development Plan (PDP) and testified that this is the document that the 1st and 3rd defendant had been relying on to show that the plaintiff's property was on a road reserve. He stated that under the law the plaintiff's name on the title shows sanctity of title.
- 26) He further stated that the plaintiff had the property for 20 years prior to the matter being taken to court in 2013 and so the plaintiff may not have known that the property was on a road reserve. When he was cross-examined further, he stated that the plaintiff was in a mess due to the actions of the Ministry of Lands.
 26. When he was further cross-examined by Counsel for the second defendant, he stated that if the plaintiff had contacted the Ministry of Road and the defunct Nairobi City Council they would have advised him that the land he was purchasing was on a road reserve because they had the PDP.
 - 27) In re-examination DW1 confirmed that there was no document to show that the plaintiff wrote to the Ministry of Lands to confirm authenticity or existence of that land. Further whereas in the bundle of documents at page 48 there is a response from the Ministry of Lands there is however no letter to the Ministry of Lands by the plaintiff.
 - 29). Further in re-examination DW 1 stated that the Ndung'u report was in public domain published in 2004 and the plaintiff's suit CA No. 327 of 2013 is mentioned in this report at page 70. He further testified that the PDP was approved on 20/06/1986 and the plaintiff's land does not appear in the PDP. He finally stated that if a person applied for a title they needed to get the PDP since this is provided for in the Physical Planning Act.
 - 30) The Counsel for the 1st and 3rd defendant closed its case at this point.
 - 31) The second defendant neither led evidence nor filed submissions. In her address to court on 25/01/2022 Counsel for the 1st defendant informed the court that she was not going to call any witnesses in the matter.
 - 32) The 1st and 3rd defendants relied on some of the following cases; *Adan Abdirahani Hassan & 2 others v Registrar of Titles, Ministry of Lands & 2 others* [2013] eKLR, *Cycad Properties Limited v The Attorney General & others*, H.C. Petition No. 70 of 2010, *Republic v Registrar of Lands in Kilifi ex parte Daniel Ricci, Malindi* HCJR No.6 of 2013 [2013] eKLR, *Mistry Amar Singh v Kulobya* [1963] EA.
 - 33) The defendants submitted that the plaintiff did not suffer any loss to be entitled to compensation. Further that, the plaintiff confessed that the land was on a road reserve and that they did not carry out any due diligence which according to the defendants is negligence.
 - 34) Counsel submitted that section 25(1) of the *Land Registration Act* provided for the rights of a proprietor together with all privileges and appurtenances which it states should be held free from all interest and claims. Further that Section 28 of the *Land Registration Act* does not require noting on the register such liabilities, rights and interests referred to in section 25(1).
 - 35) On whether the plaintiff is entitled to the remedies sought, counsel submitted that the plaintiff would be entitled to the remedies sought only if the court were to find that its right to property had been violated. Counsel argued that the right to property is afforded only to legitimate owners of property. Counsel further submitted that because the title held by the plaintiff related to a road reserve, the plaintiff was not entitled to the reliefs sought. Counsel added that the persons whom the plaintiff should pursue for relief are the vendors who sold to them the suit property.



Analysis and Determination

- 36) This matter was litigated very ably by both counsels for the plaintiff and the defendants and I thank them for their elaborate submissions with very relevant authorities. I have considered the authorities in arriving at the decision in this matter though I may not be in a position to make reference to all in the judgement. I have also considered relevant legal frameworks and jurisprudence on the key issues falling for determination in the suit.
- 37) Parties did not file an agreed common statement of issues falling for determination in the suit. Having looked at the parties' pleadings, evidence and submissions, the following are the four key issues falling for determination in this suit:
- i. Whether Grant Number IR 90629, comprising of Land Reference Number 209/12258, held by the plaintiff, relates to a public road reserve;
 - ii. Whether the alienation of the said land and the procurement of the said Grant were lawful;
 - iii. Whether the plaintiff is entitled to the reliefs sought against the defendants.
Whether Grant Number IR 90629, comprising of Land Reference Number 209/12258 held by the plaintiff relates to a public road reserve
- 38) The plaintiff in this case purchased his land according to his evidence from one Peter Njuguna however he did not invite Peter to give evidence in court on how he was allocated land considered as a public road reserve. he plaintiff did not lead evidence by the allottees of the suit property to demonstrate the physical planning status of the land at the time they procured the allotment letter. The plaintiff did not, similarly, join the said allottee as parties to this suit, to demonstrate to the court the circumstances under which they procured the alienation and the impugned grant. Further, the plaintiff did not present evidence relating to any approved physical plan (part development plan) which formed the basis of the alienation of the land.
- 39) On his part, the Attorney General led evidence by DW1 who produced Survey Report dated 26/11/2013 which shows that the suit property was identified in the Nairobi Development Plan No. 305 and No FR 178/104 as being part of Mombasa Road and the other portion as a road reserve. In addition, DW1 referred to the court to the Part Development Plan which was approved on 20/06/1986 and he stated that the plaintiff's land does not appear on the said Part Development Plan. Further, DW1 stated that once the land was reserved as a public road reserve and so declared through an approved part development plan, it ceased to be available for alienation, subdivision or adverse dealing.
- 40) The evidence of DW1 was not, in my view, controverted. All the plaintiff did was to present a valuation report that clearly stated that there was no survey done on the land. He referred to his plan to construct a supermarket and some office blocks again there were not Bills of Quantities attached and neither could the plaintiff remember whether the proposed plan was submitted to Nairobi County for approval or not.
- 41) In my view, the totality of the evidence presented to the court by the Attorney General sufficiently demonstrates that the suit property was a public road reserve and at no time was the suit property alienated for allocation for private purposes nor was it available for alienation the suit property was and has been a public road and road reserve at all time.



42) For avoidance of doubt, Section 42 of the said *Physical Planning Act (Repealed)* provided as follows:-

“(1) Subject to the provisions of the Government Lands Act (cap. 280), the Trust Land Act (Cap. 282) and any other written law relating to the administration of land, no subdivision, consolidation, lease or renewal of lease of an unalienated Government Land or Trust Land or of a private land shall be effected without due regard being had to the requirements of the relevant physical development plan.”

43) From the evidence led by the plaintiff, I do not believe that the suit property was at any time alienated for private use, I will still clarify that the effect of procuring alienation of a planned and surveyed public road reserve without a fresh physical plan within the requirements of Section 42 of the Physical Planning Act 1996 is that the alienation was illegal and the resultant title was and remains a nullity. The suit property was and remains a public road reserve not available for alienation except in accordance with the law. Infact the slip road that was envisaged in 1976 has already been constructed and therefore there is no land to be alienated.

44) The plaintiff seems to state that since the Ministry of Lands confirmed that the title they were holding was genuine and that their name was on the title and in the register at the Ministry then it follows that he correctly purchased the land to the person who was allotted. I have a different viewpoint. The plaintiff having come to court with a grant and a subsequent title of that which was procured in relation to what was contended to be a public road reserve at the time of initiating the suit, they had the burden of demonstrating that the alienation, grant and title they were waving were procedurally and lawfully procured. Indeed, the Court of Appeal in *Munyu Maina vs- Hiram Gathina Maina* (2013) eKLR, outlined the following principle regarding the duty of the holder of an impeached title:

“When a registered proprietor’s proof of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership; the registered proprietor must go beyond the instrument and prove the legality on how he acquired the title and show that the acquisition was lawful, formal and free from any encumbrances”

45) In *Chemey Investment Limited v Attorney General & 2 others* [2018] eKLR, the Court of Appeal outlined the following principle regarding the fate of a title that is obtained fraudulently or in violation of the provisions of the statute:

“Decisions abound where courts in this land have consistently declined to recognize and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor. See for example *Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 others* [1196]eKLR; *Funzi Island Development Ltd & 2 others exparte Waa Shi Garbage Collectors & 15 others* KLR (E&L) 1, 563; *John Peter Mureithi & 2 others v Attorney General & 4 others* [2006] eKLR; *Kenya National High Authority v Shalien Masood Mughal & 5 others* [2017]eKLR; *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR; *Munyu Maina v Hiram Gathiba Maina* [2013]eKLR and *Milan Kumarn Shah & 3 others v City Council of Nairobi & others*, HCCC No 1024 of 2005.

The effect of all those decisions is that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.”



46) The plaintiff herein was involved in a Court of Appeal matter on the issue of compensation from the Kenya National Highways Authority and the Court to Appeal had this to say about the status of a title procured in relation to illegal encroachment on planned public road reserve in *Kenya National Highways Authority v Shalien Masood Mughal & 5 others* [2017] eKLR, :

“The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest.”

47) For the above reasons, it is the finding of this court that Grant Number IR 90629, comprising of Land Reference Number 209/12258, relates to a public road reserve. Further, it is the finding of this court that alienation of the land comprised in the said Grant and processing and issuance of the said Grant were not lawfully procured because the requirements of Sections 22, 27 and 42 of the *Physical Planning Act 1996* [repealed] were not complied with in the sense that there was no prior approved re-planning to change the user of the land from public road reserve to any other user.

48) On the first issue therefore I find that the suit property was public land and was not therefore available for allocation for private purposes

Whether the alienation of the said land and the procurement of the said Grant were lawful

49) The plaintiff held a title whose grant had been allocated prior to the promulgation of the new Constitution 2010. Before 2010 public land was held by the Commissioner of Lands. After 2010 Constitution the role to manage public land was endowed in the National Land Commission. In the case of *Milankumarn Shah & Two others v City Council of Nairobi & others*, Nairobi HCCC No. 1024 of 2005 as cited by Justice M.A. Odeny in *Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others* [2019] eKLR, the court stated that the Commissioner of Lands did not have authority under Section 3 of the *Government Lands Act* to make any grant or disposition of any estate, interest or right in or over a portion that was a part of a public road and therefore not unalienated Government Land.

50) In *Paul Nderitu Ndung'u & 20 others v Pashito Holdings Limited & another* (Nairobi HCCC No. 3063 of 1996) the court held that the Commissioner of Lands had no legal authority to allocate two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. Justice Mbogholi Msagha stated that,

“In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienation was void ab initio.”

51) In the instant suit even if I was to find that the Suit property was un-alienated hence available for allocation, the Commissioner of Lands still had no authority to alienate the suit property as Section 3 of the GLA vested the power to alienate un-alienated Government land in the President. The power to alienate is delegated to the Commissioner of Lands in limited circumstances for educational, charitable, sports and other purposes as set out in the GLA. None of the exceptions set out there in apply in this case.

52) Since the promulgation of the new Constitution this power now vests with the National Land Commission and there is a procedure to be followed in alienating public land.



- 53) From the foregoing, it clear that whereas the alienation purportedly was done prior to the 2010 constitution, even then the Commissioner of Lands had no power whatsoever to allocate the Suit Property to the Plaintiff or confer any title. The purported allocation was therefore null and void. The Suit Property remains a road reserve to be used for public purposes only.
- 54) I note from the evidence of DW1 – Deputy Chief Land Registrar who stated that the work of the Chief Land Registrar is to confer title and not allocate land and therefore castigating blame and shifting responsibility to the Ministry of Land. I do not agree with this view point. The Land Registry is the body conferred with the responsibility of being the custodian of all records relating to land in Kenya. Therefore, an officer working in this office should be awake to the fact that any document bearing their stamp, signature, mark should be speaking to the truthful situation on the ground.
- 55) This office cannot run away from responsibility and say “ours is just to confer title and not allocate land”! No wonder hospital, military bases, schools, roads, rivers and very soon oceans have been conferred with private titles. It is a shame and very saddening to hear officers employed to deal with a delicate and emotive issue as land non-chalantly addressing such serious issues with such absurdity.

Whether the plaintiff is entitled to the reliefs sought against the defendants

- 56) The last issue is whether plaintiff is entitled to the reliefs sought against the defendants. I have considered the five prayers set out in the plaint. Having made the above findings, it follows that, the plaintiff is not entitled to the reliefs set out in the plaint as against the defendants. The plaintiff knew the people who procured the illegal alienation of the public road reserve together with the title which has been found to be a nullity. Regrettably, the plaintiff elected not to join the said persons as defendants in this suit. The two individuals who procured the illegal alienation of the public road reserve and procured the illegal title are the ones the plaintiff should pursue for relief, if indeed the plaintiff paid them consideration for the title.
- 57) As stated above, the Suit Property was already alienated for public purposes and as we already know it a matter of public knowledge that there is already a slip road constructed along Mombasa road. Therefore, the suit property was not un-alienated. Having declared the purported alienation null and void, the Plaintiff’s title which also arose from that process cannot be good title.
- 58) Section 26 of the *Land Registration Act* provides for cancellation of a title obtained under certain circumstances. The section states as follows;
- “(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, procedurally or through a corrupt scheme.



59) Therefore this court agrees with the pronouncement of the court in *Moses Okata Owuor & another* 2017] eKLR where the court held that:

“This court having found that the Plaintiff’s title was obtained irregularly, the court finds it null and void and further, this court finds that it has no option but to cancel the certificate of title issued to the Plaintiff herein”.

Disposal orders

60) In the end, this suit is disposed in the following terms:-

- a. All the prayers sought by the Plaintiff are rejected on the grounds that the said grant relates to a public road reserve; was issued irregularly and illegally; and the allocation is illegal, null and void.
- b. Parties shall bear their respective costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 17TH DAY OF MAY 2022

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MOGENI J

JUDGE

In the Presence of: -

Mr. Khan for the Plaintiff

Mr. Motari for the 1st and 3rd Defendants

Ms. Masinde for the 2nd Defendant

Mr. Vincent OwuorCourt Assistant

