



**Ethics and Anti-Corruption Commission v Gichuru & another (Environment & Land Case 309 of 2019) [2022] KEELC 15338 (KLR) (5 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15338 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 309 OF 2019**

**JO MBOYA, J  
DECEMBER 5, 2022**

**BETWEEN**  
**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**  
**AND**  
**MAJOR GENERAL(RTD) DEDAN NJUGUNA GICHURU ..... 1<sup>ST</sup> DEFENDANT**  
**WILSON GACHANJA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction and Background**

1. Vide Amended Plaintiff dated the 30<sup>th</sup> November 2021, the Plaintiff has approached the Honourable Court seeking the following Orders;
  - i. A Declaration that Land Reference No 164/4 (Original No 164/3/1) measuring approximately 228 acres or thereabout is the property of Lands Limited, a Public Body wholly owned by the Agricultural Development Corporation.
  - ii. A Declaration that the Issuance and registration of Fee Simple Grant in Respect of Land Reference No 14703 in favour of the First Defendant has not in any way derogated from the Interests, Rights, and Title vested in Lands Limited with regard to Land Reference No 164/4(Original No 164/3/1).
  - iii. A Declaration that the First Defendant has not acquired any Title, Rights or Interest in or over Land Reference No 164/4 (Original No 164/3/1) or Land Reference No 14703.
  - iv. An Order for delivery up of possession and *mesne* Profits against the first Defendant.
  - v. An Order for Immediate Delivery up to the Registrar of Titles for rectification by cancellation of the Fee Simple Grant issued and registered in favour of the 1st Defendant with regard to



Land Reference No 14703; in default the Registrar of Titles do rectify the Register accordingly upon service of appropriate Notices, as by law required/provided.

- vi. An Injunction do issue against the Defendants restraining them by themselves or through their agents, servants, or employees or otherwise howsoever from dealing in any manner howsoever with Land Reference No 14703 otherwise than by way of Re-conveyance to Lands Limited or surrender to the Government of Kenya.
  - vii. General Damages for Fraud and Misfeasance in office, and costs of this suit.
  - viii. Any other relief this Honourable Court may deem fit and just to grant in the circumstances of this case.
2. Upon being served with the amended Plaintiff, the 1<sup>st</sup> Defendant filed an amended Statement of Defense dated the 27<sup>th</sup> January 2022 and in respect of which the 1<sup>st</sup> Defendant has denied the claims at the foot of the amended Plaintiff.
  3. On the other hand, the 2<sup>nd</sup> Defendant also filed a Statement of Defense to the original Plaintiff, but which Statement of Defense was adopted as against the amended Plaintiff, albeit *mutatis mutandis*.
  4. Thereafter, the pleadings in respect of the subject matter closed and same was ripe and ready for hearing.
  5. Suffice it to point out that even though the suit herein was filed and lodged in Court on the 9<sup>th</sup> March 2007, however, the first hearing in respect of the suit took place on the 5<sup>th</sup> November 2022. For clarity, the first shot at hearing accrued after a duration of 15 years.
  6. Be that as it may, the hearing in respect of the matter was concluded on even date and thereafter the Honourable court issued directions on the filing and exchange of written submissions, by and on behalf of the respective Parties.

### **Evidence by the Parties:**

#### **a. The Plaintiff's Case:**

7. The Plaintiff's case revolves around the Evidence of two witnesses; namely, Mr. Rodgers Ruthugua and Antony Kahiga, who testified as PW1 and PW2, respectively.
8. On the part of PW1, same indicated that he is the Corporation Secretary of Agricultural Development Corporation, which is stated to be a State Corporation established pursuant to the provisions of the [Agricultural Development Corporation Act](#), chapter 444 Laws of Kenya.
9. Additionally, the witness also stated that same also acts as the Company Secretary of a Company known as Lands Ltd. For clarity, the witness added that the said Lands Ltd is a subsidiary of the Agricultural Development Corporation.
10. It was the further testimony of the Witness that by virtue of his portfolio and office, same has the custody of various documents pertaining to the operations of the Agricultural Development Corporation, as well as the subsidiary company.
11. Further, the witness also testified that Lands Ltd was a company established with a mandate to facilitate Land transfer programmes from the European Settlers to the local citizen after the attainment of Independence.



12. On the other hand, the witness added that the said company bought and acquired the entire piece of land, namely, LR No 164/4(Original Number 164/3/1) and which piece of land was also known as the Muthanga Farm.
13. Be that as it may, the witness further testified that a discussion ensued between the Ministry of Agriculture and Lands Ltd, pertaining to the transfer and handing over of the named property to the Ministry of Agriculture.
14. It was the further testimony of the witness that after the discussion/deliberation between Lands Ltd and the Ministry of Agriculture, the former handed over the entire of LR No 164/4 to the latter, for purposes of use on Livestock Development and Potato Seed Development.
15. Other than the foregoing, the witness further added that despite the handing over of LR No 164/4 to the Ministry of Agriculture for research purposes, the named property was never transferred to and in favor of the Ministry of Agriculture. In this regard, the witness confirmed that the named property remained registered in the name of Lands Ltd.
16. Besides, the witness further testified that there was a purported sale of the named property to the 1<sup>st</sup> Defendant herein, allegedly by Lands Ltd. However, the witness added that the purported sale of the named property to the 1<sup>st</sup> Defendant, was irregular and unlawful.
17. Other than the foregoing, the witness added that LR No 164/4, was handed over to the Ministry of Agriculture for purposes of livestock development and potatoes seed development, respectively.
18. Premised on the foregoing, the witness testified that the entire of LR No 164/4, out of which the suit property was created, constituted alienated Government Land and not otherwise.
19. Other than the foregoing, the witness referred to his witness statement dated the 9<sup>th</sup> May 2022 and sought to adopt and rely on the contents thereof. For completeness, the witness statement dated the 9<sup>th</sup> May 2022 was thereafter admitted and constituted as the Evidence in chief of the witness.
20. On the other hand, the witness also alluded to the List and Bundle of documents filed on behalf of the Plaintiff. For clarity, the witness referred to the list and bundle of documents dated the June 24, 2008.
21. Having identified the various documents contained at the foot of the List and Bundle dated the 24<sup>th</sup> June 2008, the witness invited the Honourable court to admit the named documents as exhibits on behalf of the Plaintiff.
22. Pursuant to and at the instance of the witness, the various documents contained at the foot of the List dated the 24<sup>th</sup> June 2008 were thereafter admitted in evidence and produced as exhibits P1 to 26, respectively.
23. On cross examination by counsel for the 1<sup>st</sup> Defendant, the witness admitted that paragraph 8 of his witness statement alludes to the allegation that the suit property was sold to and in favor of the 1<sup>st</sup> Defendant by Lands Ltd.
24. However, the witness added that same had neither adduced nor tendered in evidence a copy of the said Sale Agreement, between the 1<sup>st</sup> Defendant and Lands Limited.
25. On the other hand, the witness also stated that though the land in question is said to belong to Agricultural Development Corporation and Lands Ltd, neither of the said Parties have been sued or impleaded in respect of the subject matter.



26. Whilst under cross examination by counsel for the 2<sup>nd</sup> Defendant the witness stated that the office of the commissioner of land has several and various Departments.
27. In any event, the witness added that before the letter of allotment is made, the process of allotment has to go through various Departments for purposes of approval and verification.
28. At any rate, the witness also admitted that prior to and before allocation, a Deed Plan would also be prepared to capture the existing ground delineation of the property which is the subject of alienation.
29. On the other hand, it was the testimony of the witness that a Deed Plan is ordinarily prepared and generated by the Director of Survey and not the Office of the Commissioner of lands.
30. Besides, the witness stated that same knew the 2<sup>nd</sup> Defendant, albeit not at a personal capacity/level.
31. Be that as it may, the witness added that the 2<sup>nd</sup> Defendant was hitherto the Commissioner of Land and hence same was a Public/Civil servant.
32. Further, the witness stated that the Grant over and in respect of the suit Property was executed and signed by the 2<sup>nd</sup> Defendant during his tenure as the Commissioner of Lands. In this regard, the witness confirms that the 2<sup>nd</sup> Defendant executed the impugned Grant in his capacity as an officer of the Government and not otherwise.
33. The 2<sup>nd</sup> witness called by and on behalf of the Plaintiff, was Antony Kahiga. For clarity, same testified as PW2.
34. It was the testimony of the witness herein that same is an Investigator with the Ethics & Anti-corruption Commission, namely, the Plaintiff herein.
35. Further, the witness added that previously, same worked in a similar capacity with the Kenya Anti-corruption Commission, now defunct.
36. Other than the foregoing, the witness stated that same was constituted as Investigator and that he carried out and conducted investigations pertaining to and concerning the manner in which a portion of LR No 164/4(Original Number 164/3/1) was allocated to and ultimately registered in the name of the 1<sup>st</sup> Defendant.
37. It was the further testimony of the witness that in the course of carrying out the investigations, same established and discovered that LR No 164/4 was acquired by Lands Ltd, which is a subsidiary of the Agricultural Development Corporation.
38. Besides, the witness testified that after the acquisition of LR No 164/4 by Lands Ltd, a discussion ensued between the Agricultural Development Corporation and the Ministry of Agriculture, whereupon LR No 164/4 was surrendered and handed over to the Ministry of Agriculture for purposes of Livestock Development and Potato Seed Development.
39. Be that as it may, the witness testified that despite the surrender and hand over of LR No 164/4 to the Ministry of Agriculture, no formal transfer was carried out or undertaken to effect the transfer in favor of the Ministry of Agriculture.
40. It was the further testimony of the witness that insofar as no formal transfer was executed and registered in the name of the Ministry of Agriculture, the land in question, LR No 164/4, remained registered in the name of Lands Ltd.



41. At any rate, the witness further added that Lands Ltd was a Public body and that the land in question was Public land, albeit reserved for a designated purpose. For clarity, the witness reiterated that the land in question had been reserved for purposes of Potato research under the Ministry of Agriculture.
42. Notwithstanding the foregoing, the witness further testified that same discovered that on or about the 18<sup>th</sup> November 1998, a portion of LR No 164/4, was allocated to and in favor of the 1<sup>st</sup> Defendant herein. In this regard, the witness alluded to and identified exhibit P21, same being the impugned letter of allotment.
43. On the other hand, the witness pointed out that LR No 164/4, out of which a portion thereof was curved and excised in favor of the 1<sup>st</sup> Defendant, remained registered in the name of Lands Ltd.
44. In view of the foregoing, the witness stated that the purported allotment of a portion of LR No 164/4 by the 2<sup>nd</sup> Defendant was therefore illegal, unlawful and fraudulent.
45. Consequently, the witness testified that to the extent that LR No 164/4 had already been alienated and reserved for Potato research, the said land or any portion thereof ceased to be unalienated Government land capable of being alienated or allocated in any manner whatsoever.
46. Other than the foregoing, the witness referred to his written statement dated the 20<sup>th</sup> December 2021. In this regard, the witness sought liberty to adopt and rely on the said witness statement.
47. Premised on the foregoing, the witness statement dated the 20<sup>th</sup> December 2021 was admitted and constituted as the further Evidence in chief of the witness.
48. On cross examination by counsel for the 1<sup>st</sup> Defendant, the witness pointed out that during the course of investigations, same came across two Letters of allotment. In this regard, the witness identified the letters of allotment dated December 21, 1987 and the November 18, 1998, respectively.
49. Further, the witness also stated that the second letter of allotment, namely, the Letter dated the November 28, 1988 was revising certain terms/conditions that were hitherto conveyed in respect of the earlier Letter of allotment.
50. On the other hand, the witness also confirmed that same also came across a Grant which had been issued to and in favor of the 1<sup>st</sup> Defendant.
51. Be that as it may, the witness added that having examined the letter of allotment dated the December 21, 1987, November 18, 1988 and the Grant in respect of LR No 14703 in favor of the 1<sup>st</sup> Defendant, same confirmed that the said documents are not forgeries. Contrarily, the witness clarified that the said documents were genuine in his view.
52. On the other hand, the witness also added that same did not doubt whether the purchase/consideration for the sum of Kshs 900, 000/= Only, was paid by the 1<sup>st</sup> Defendant.
53. Whilst under cross examination by counsel for the 2<sup>nd</sup> Defendant, the witness stated that the Grant in respect of LR No 14703, was duly signed and issued by the 2<sup>nd</sup> Defendant.
54. Nevertheless, the witness added that same was executed and issued by the 2<sup>nd</sup> Defendant, albeit in his official capacity as the commissioner of lands.
55. For the avoidance of doubt, the witness clarified that a Private citizen could not have signed, executed and issued the impugned Grant.
56. With the foregoing testimony, the Plaintiff's case was duly closed.



**b. 1<sup>st</sup> Defendant's Case:**

57. The 1<sup>st</sup> Defendant's case revolves around the testimony and evidence tendered by the 1<sup>st</sup> Defendant.
58. For clarity, the 1<sup>st</sup> Defendant testified that same is a retired Major General, having worked with the Armed Forces up to and including the year 1989 when same retired from the Forces.
59. It was the further testimony of the witness that on or about the 16<sup>th</sup> April 1986 same applied to be allocated a portion of Government land situated within Tigoni Area- Limuru. In this regard, the witness referred to the application letter to that effect.
60. It was the further testimony of the witness that on the 2<sup>nd</sup> April 1997, the President of the Republic of Kenya, the Chief of General Staff, the Permanent Secretary in the Ministry of Agriculture and the Director, Potato Research Station, Limuru, visited his home for purposes of inspection of the portion of land that same had applied for.
61. Besides, the witness added that upon the inspection of the portion of land which same had applied for, the President of the Republic of Kenya directed that a portion of the said parcel of land, namely, LR No 164/4 be allocated unto him.
62. The witness further added that subsequently the Commissioner of land proceeded to and issued a Letter of allotment relating to the designated portion of land. For clarity, it was clarified by the witness that the said portion was measuring 30 acres.
63. It was the further evidence of the witness that upon being issued with the letter of allotment dated the 21<sup>st</sup> December 1987, same proceeded to and accepted the said offer. In this regard, the witness pointed out and referred to the letter of allotment dated the 24<sup>th</sup> December 1987.
64. On the other hand, the witness added that the original letter of offer was superseded by another Letter of Allotment dated the November 18, 1988, which was duly executed by the Commissioner of Lands.
65. Notwithstanding the foregoing, the witness testified that after the issuance of the Letter of allotment dated the 18<sup>th</sup> November 1988, and following the acceptance thereof, the office of the Commissioner of Land, together with the Director of Survey processed the requisite Deed Plan and thereafter a Grant was issued unto him relating to and concerning LR No 14703.
66. Other than the foregoing, the witness testified that upon being issued with the Grant, same was called upon to pay/remit the purchase price in respect of the portion of land. In this regard, the witness stated that same thereafter paid the sum of Kshs 900, 000/= Only, on the 20<sup>th</sup> August 1993.
67. It was the witness further testimony that the Commissioner of lands facilitated and processed the issuance of the Grant to and in his favor. In any event, the witness reiterated that the process was carried out in accordance with the provisions of the *Government Lands Act*.
68. Nevertheless, the witness added that the portion of land which was allocated unto him was at the material point in time unalienated Government Land and hence the office of the Commissioner of land had the requisite mandate and authority to alienate same.
69. In any event, the witness added that the alienation and allocation of what comprises the suit property, was carried out and undertaken by both the President and the Commissioner of Land in exercise of their statutory mandate as prescribed under the law.



70. In the premises, the witness pointed out that for as long as the exercise of such mandate has not been quashed, in accordance with the law, the Certificate of title that was issued to and in favor of the witness cannot be impeached or challenged.
71. Be that as it may, the witness further added that following the alienation and allocation of the suit property unto him, same took possession thereof and has variously developed the suit property. In this regard, the witness pointed out that the suit property is currently valued at over Kshs 100, 000, 000/= only.
72. Other than the foregoing, the witness referred to the witness statement dated the 24<sup>th</sup> November 2021 and sought to adopt the contents thereof. In this regard, the witness statement dated the 24<sup>th</sup> November 2021 was duly constituted and admitted as the further Evidence of the witness.
73. Other than the foregoing, the witness also alluded to a List and Bundle of documents which same had filed in respect of the said matter. For clarity, the documents at the foot of the list of documents were produced and admitted as exhibit D1 to D21, respectively.
74. On cross examination by counsel for the 2<sup>nd</sup> Defendant, the witness stated that the Letter of allotment was issued and executed by the 2<sup>nd</sup> Defendant, albeit in his official capacity.
75. On the other hand, the witness added that the Grant in respect of the suit property, namely, LR No 14703 was similarly issued and executed by the 2<sup>nd</sup> Defendant in his official capacity.
76. Other than the foregoing, it was further testimony of the witness that there was no evidence of any illegality, in the issuance of the letter of allotment and the consequential Grant over the suit property.
77. On cross examination by counsel for the Plaintiff, the witness stated that the land in question hitherto belonged to the National Potato Research and hence same was Government land.
78. Additionally, the witness added that the Land was under the use of the National Potato Center, which is similarly a Government Entity.
79. With the foregoing testimony, the 1<sup>st</sup> Defendant's case was duly closed.

**c. 2<sup>nd</sup> Defendant's Case:**

80. Though the 2<sup>nd</sup> Defendant herein duly entered appearance and filed a Statement of Defense, however, same did not testify or tendered any evidence.
81. Similarly, no documentary evidence was produced on behalf of the 2<sup>nd</sup> Defendant.
82. Essentially, the 2<sup>nd</sup> Defendant's case was closed without any evidence being tendered or adduced before the Honourable court.

**Submissions by the Parties:**

**a. Plaintiff's Written Submissions:**

83. The Plaintiff filed written submissions dated the 15<sup>th</sup> September 2022 and in respect of which the Plaintiff has identified and highlighted three issues for consideration by the Honourable court.
84. First and foremost, the counsel for the Plaintiff has submitted that LR No 164/4 (Original Number 164/3/1) out of which the suit property was excised and created from was never unalienated Government land.



85. Further, counsel has pointed out that LR No 164/4 was hitherto purchased and acquired by Lands Ltd, which is a wholly owned subsidiary of the Agricultural Development Corporation. In this regard, counsel has pointed out that the land in question was therefore Public land.
86. On the other hand, counsel has submitted that after the acquisition of LR No 164/4 by the Lands Ltd, a discussion ensued between the Agricultural Development Corporation and the Ministry of Agriculture, whereupon an agreement was reached that LR No 164/4 was to be surrendered and handed over to the Ministry of Agriculture for purposes of Livestock Development and Potato Seed Development, respectively.
87. Nevertheless, counsel has contended that despite the surrender and hand over of LR No 164/4 to the Ministry of Agriculture, the title over and in respect the property, namely, LR No 164/4 was never formally transferred to and registered in the name of the Ministry of Agriculture.
88. For the avoidance of doubt, the counsel added that the title remained in the name of Lands Ltd, being a wholly owned subsidiary of Agricultural Development Corporation.
89. Be that as it may, counsel has pointed out that LR No 164/4 was never unalienated Government land, in accordance with the provisions of the [Government Lands Act](#), Chapter 280 Laws of Kenya (now repealed).
90. Additionally, counsel has submitted that to the extent that LR No 164/4 had been acquired and reserved for public purposes, the land in question could not be converted to private use or better still, be available for alienation.
91. In support of the foregoing submissions, counsel for the Plaintiff has cited and quoted various decisions *inter-alia*, [James Joram Nyaga & another v The Hon Attorney General & another](#) (2019) eKLR, [Republic v Minister for Transport & Communication & 5 others Ex-parte Waa ship Garbage Collector & 15 others](#) (2006) 1 KLR (E&L)563 and [Republic v Permanent Secretary, Ministry of Public Works & Housing Ex-parte Tom Maliachi Sitima](#) (2014) eKLR.
92. Secondly, counsel for the Plaintiff has submitted that to the extent that LR No 164/4 was already alienated Government land, same was therefore not available for alienation or allocation in the manner purported vide the letter of allotment issued on the 18<sup>th</sup> November 1988 or at all.
93. To this end, counsel has submitted that the office of the commissioner of land and the President of the Republic of Kenya could only allocate and alienate/ allocate unalienated Public land under the provisions of Section 3 and 7 of the [Government Lands Act](#), Chapter 280 Laws of Kenya.
94. Nevertheless, counsel added that insofar as LR No 164/4 had already been alienated, same therefore ceased to be available for alienation or allocation, either in the manner purported vide the impugned Letter of Allotment, or at all.
95. Premised on the foregoing, counsel has therefore submitted that the purported alienation of the suit property to and in favor of the 1<sup>st</sup> Defendant was therefore an illegality and constituted a contravention of the provisions of the law.
96. In respect of the foregoing submissions counsel has cited and relied on the holding in the case of [Henry Muthee Kathurima v The Commissioner of Lands & another](#) (2015) eKLR.
97. The third issue that has been deliberated upon by counsel for the Plaintiff relates to and concerns whether the 2<sup>nd</sup> Defendant can be sued in his personal capacity for actions and activities that were taken and carried out in his official capacity.



98. According to counsel, the impugned actions and activities were carried out and undertaken by the 2<sup>nd</sup> Defendant in the discharge of his official functions and not otherwise.
99. Nevertheless, counsel has pointed out that even though same were carried out in his official capacity, the 2<sup>nd</sup> Defendant exceeded his mandate and jurisdiction and therefore acted ultra – vires.
100. Consequently, counsel for the Plaintiff has submitted that to the extent that the impugned actions and activities were carried out contrary to the provisions of the law, the 2<sup>nd</sup> Defendant was therefore personally liable. In this regard, it has been submitted that the 2<sup>nd</sup> Defendant has properly been impleaded in his personal capacity.
101. To this end, counsel has cited and relied on the decision in the case of *Ethics and Anti-corruption Commission v Judith Marilyn Okungu & another* (2017)eKLR, wherein the Honourable Court of Appeal underscored that a Public officer who exceeds his/hers statutory mandate is amenable to be sued in his/her Personal capacity.
102. In view of the foregoing, counsel has invited the Honourable court to find and hold that the Plaintiff has proved her case to the requisite standard and hence same ought to be granted.

**b. Submissions by the 1<sup>st</sup> Defendant:**

103. The 1<sup>st</sup> Defendant filed submissions dated the 3<sup>rd</sup> October 2022 and same has raised four issues for consideration.
104. The first issue for consideration which has been raised by and on behalf of the 1<sup>st</sup> Defendant touches on ownership of LR No 164/4 (Original Number 164/3/1).
105. According to counsel for the 1<sup>st</sup> Defendant, the said parcel of land which was hitherto registered in the name of Lands Ltd was bought and purchased by the Ministry of Agriculture and a cheque dated the 25<sup>th</sup> May 1970 was paid out to the General Manager of Agricultural Development Corporation.
106. Further, counsel for the 1<sup>st</sup> Defendant has submitted that upon the payment of the Cheque to and in favor of the General Manager of the Agricultural Development Corporation, the Land in question vested in the Ministry of Agriculture and hence same became Public/Government land.
107. Premised on the foregoing, counsel has added that L.N No 164/4, therefore ceased to be the property of either Lands Ltd or Agricultural Development Corporation, either as contended by the Plaintiff or at all.
108. Premised on the foregoing, counsel has therefore contended that LR No 164/4 was therefore unalienated Government land and thus available for alienation pursuant and under the provisions of the *Government Lands Act*, Chapter 280 Laws of Kenya.
109. Secondly, counsel for the 1<sup>st</sup> Defendant has submitted that having being unalienated Government land, the President of the Republic of Kenya through the Commissioner of Land was therefore at liberty to alienate the whole or a portion of the said property. In this regard, counsel for the 1<sup>st</sup> Defendant has therefore contended that the Letter of allotment issued on the 18<sup>th</sup> November 1988 was therefore lawful and legitimate.
110. In any event, counsel has pointed out that the alienation of what now comprises the suit property was preceded by the preparation of the requisite Survey Plan, Deed Plan and ultimately the Grant which was letter registered as I.R Number 74788 pertaining to LR No 14703.



111. In short, counsel for the 1<sup>st</sup> Defendant has submitted that the allotment and incidental alienation of what now comprises the suit property was lawfully and legitimately undertaken by the Commissioner of lands.
112. Thirdly, Counsel for the 1<sup>st</sup> Defendant has submitted that to the extent that the suit Property, namely, LR No 14703 was lawfully and legitimately allocated to and registered in favor of the 1<sup>st</sup> Defendant, such allocation cannot be defeated, in a manner that it is proposed by the Plaintiff.
113. In any event, counsel has added that the allocation, alienation and ultimately registration of the suit property in favor of the 1<sup>st</sup> Defendant was neither informed by fraud nor misrepresentation or at all.
114. In the premises, counsel submitted that until and unless evidence is tendered to show that acquisition was fraudulent, then it behooves the Honourable court to protect the rights of the title holder.
115. In support of the foregoing submissions, counsel has cited and quoted the decision of the Honourable Court of Appeal in *Tarabana Company Ltd v Haruharan Singh Semi & others* (2021)KECA 76 (KLR), to support and vindicate the fact that the 1<sup>st</sup> Defendant's title ought to be protected and vindicated under the law.
116. In view of the foregoing, counsel therefore implored the Honourable court to find and hold that the Plaintiff has neither proved nor established the claims contained at the foot of the amended Plaintiff.

**c. 2<sup>nd</sup> Defendant's Submissions:**

117. The 2<sup>nd</sup> Defendant filed written submissions dated the 19<sup>th</sup> October 2022 and in respect of which same similarly identified, isolated and highlighted three issues for determination.
118. The first issue which has been raised and amplified by the 2<sup>nd</sup> Defendant touches on and concerns whether the Plaintiff has discharged the Burden of proof laid on her, to warrant the grant of the orders sought at the foot of the amended Plaintiff.
119. According to the 2<sup>nd</sup> Defendant, it was incumbent upon the Plaintiff to prove and establish that it was the 2<sup>nd</sup> Defendant who generated and issued the impugned Letter of allotment and similarly, to show that the issuance thereof was irregular.
120. However, counsel for the 2<sup>nd</sup> Defendant has submitted that the impugned letter of allotment dated the 18<sup>th</sup> November 1988, was neither signed nor executed by the 2<sup>nd</sup> Defendant. For clarity, it has been pointed out that same was signed by one G. M Mburu on behalf of the Commissioner of Land.
121. Be that as it may, counsel has added that the person who signed the Letter of allotment has neither been joined nor impleaded in the subject matter.
122. Notwithstanding the foregoing, counsel has further submitted that both the initial letter of allotment dated the 21<sup>st</sup> December 1987, and the subsequent letter of allotment dated the 18<sup>th</sup> November 1988, were generated and signed long before the 2<sup>nd</sup> Defendant assumed the office of the Commissioner of Lands in 1989.
123. In short, counsel for the 2<sup>nd</sup> Defendant has submitted that the claim as against the 2<sup>nd</sup> Defendant has neither been proved nor established. In this regard, it has been pointed out that the 2<sup>nd</sup> Defendant did not allocate or alienate the suit property to and in favor of the 1<sup>st</sup> Defendant as alleged.



124. Secondly, counsel for the 2<sup>nd</sup> Defendant has submitted that though the Plaintiff had alleged that the allocation and alienation of the suit property was fraudulent and illegal, the Plaintiff has failed to prove the claim founded on Fraud to the requisite Standard.
125. In this regard, counsel has submitted that proof of fraud requires cogent, credible and convincing evidence and not mere allegations which are imprecise, ambiguous and general in nature.
126. In support of the foregoing submissions, the counsel for the 2<sup>nd</sup> Defendant has cited and quoted the decision in the case of *Insurance Company of East Africa Ltd v The Attorney General* (2001)eKLR, to vindicate the submissions that fraud must be particularly pleaded and thereafter, sufficiently and duly proved.
127. Thirdly, counsel for the 2<sup>nd</sup> Defendant has submitted that the suit against the 2<sup>nd</sup> Defendant is discriminative and unconstitutional. In this regard, counsel has submitted that the letters of allotment which culminated into the allocation and eventual registration of the suit property in the name of the 1<sup>st</sup> Defendant were neither signed nor executed by the 2<sup>nd</sup> Defendant.
128. Nevertheless, despite the fact that the said Letters of allotment were never issued nor signed by the 2<sup>nd</sup> Defendant, the persons who are responsible for the issuance of the impugned letters of allotment have not been sued or impleaded.
129. In any event, counsel has added that other than the Letter of allotment, a Survey Plan and a Deed plan were also prepared by the office of the Director of Survey and yet again no such persons, have been impleaded and sued in respect of the subject matter.
130. In view of the foregoing, counsel for the 2<sup>nd</sup> Defendant has therefore relied on the Provisions of Articles 25(c), 27, 47 and 50 of the *Constitution* 2010, to contend that the suit against the 2<sup>nd</sup> Defendant is unconstitutional.
131. Finally, counsel for the 2<sup>nd</sup> Defendant has submitted that the impugned actions and activities culminating into the issuance and registration of the Grant in favor of 1<sup>st</sup> Defendant were carried out and undertaken by the Government officers, including the 2<sup>nd</sup> Defendant, albeit in execution of official functions.
132. To the extent that the impugned activities were carried out and undertaken in exercise official mandate, counsel has contended that such actions cannot render the 2<sup>nd</sup> Defendant personally liable.
133. Owing to the foregoing, counsel for the 2<sup>nd</sup> Defendant has therefore submitted that the suit and the claims against the 2<sup>nd</sup> Defendant in his personal capacity are therefore misconceived, mischievous and otherwise legally untenable.
134. To vindicate the foregoing submissions, counsel for the 2<sup>nd</sup> Defendant has therefore cited and relied on the provisions of Section 8 of the *Government Lands Act*, Chapter 280 Laws of Kenya (now repealed).
135. In a nutshell, counsel for the 2<sup>nd</sup> Defendant has submitted that the Plaintiff's suit and claim as against the 2<sup>nd</sup> Defendant therefore ought to be dismissed.

### **Issues for Determination**

136. Having evaluated the amended Plaint dated the 30<sup>th</sup> November 2021, the witness statement and the bundle of documents which were filed by the Plaintiff and having evaluated the Statement of Defense and the related witness statement and bundle of documents; and upon considering the oral evidence



adduced, as well as the written submissions filed by the respective Parties, the following issues are pertinent and worthy of determination;

- i. Whether LR No 164/4 (Original Number 164//3/1) out of which the suit Property was excised was unalienated Government land or otherwise.
- ii. Whether the alienation/allocation of the suit Property, namely, LR No 14703 to and in favor of the 1<sup>st</sup> Defendant was lawful, legal and valid in accordance with the provisions of the *Government Lands Act*, Chapter 280 Laws of Kenya, now repealed.
- iii. Whether the 1<sup>st</sup> Defendant acquired lawful Interests and Rights over and in respect of the suit property.
- iv. What Reliefs ought to be granted.

### **Analysis and Determination:**

#### **Issue Number 1: Whether LR No 164/4 (Original Number 164/3/1) out of which the suit Property was excised was unalienated Government land or otherwise.**

137. The Plaintiff tendered and adduced evidence that LR No 164/4 (Original Number 164/3/1) hitherto belonged to and was registered in the name of James Edward Kidman, now deceased, whose estate sold the entire of LR No 164/4 to Lands Ltd vide conveyance which was registered on the 8<sup>th</sup> October 1969.
138. Pursuant to and upon the transfer and registration of LR No 164/4 to Lands Ltd, the said property lawfully belonged to Lands Ltd, which was a wholly owned subsidiary of Agricultural Development Corporation.
139. Suffice it to point out that evidence was tendered before the Honourable court that indeed Lands Ltd was wholly owned by Agricultural Development Corporation and hence Lands Ltd was a Public body and not otherwise.
140. Besides, evidence was also tendered that after Lands Ltd acquired and became the registered owners of LR No 164/4, a discussion/deliberation ensued between Agricultural Development Corporation and the Ministry of Agriculture pertaining to and concerning surrender of the parcel of land herein for purposes of Livestock Developments and Potato Seed Development, respectively.
141. As a result of the discussions between Agricultural Development Corporation and the Ministry of Agriculture, LR No 164/4 was indeed surrendered and handed over to the Ministry of Agriculture for purposes of Potato research.
142. Nevertheless, despite the surrender and hand over of LR No 164/4 to the Ministry of Agriculture and which hand over was duly confirmed by the Ministry of Agriculture in terms of the letter dated 11<sup>th</sup> March 1972, however no formal transfer was effected over and as concerns the title of LR No 164/4 to the Ministry of Agriculture.
143. Be that as it may, upon the handing over and surrender of the land to the Ministry of Agriculture, the Ministry reserved the said parcel of land and used same for Potato research. For clarity, the National Potato Research Center was established and used the said parcel of land for her various research activities.
144. On the other hand, it is imperative to state and underscore that despite the surrender and hand over of the Original Parcel of Land, the certificate of title in respect of LR No 164/4 remained in the name of Lands Ltd, which I have pointed out elsewhere herein, was a Public body.



145. Other than the foregoing, it is also important to note that the entire LR No 164/4 had actually been purchased and acquired using public money for a specific and designated Purpose.
146. Be that as it may, long after the surrender and hand over of LR No 164/4 to the Ministry of Agriculture, the Commissioner of land generated and issued a Letter of allotment dated the 21<sup>st</sup> December 1987 to and in favor of the 1<sup>st</sup> Defendant, whereupon the Commissioner of land was (sic) allocating un-surveyed portion of LR No 164/4-Limuru to the 1<sup>st</sup> Defendant.
147. However, the letter of allotment dated the 21<sup>st</sup> December 1987 was thereafter revoked vide another/ subsequent, Letter of allotment issued on the 18<sup>th</sup> November 1988.
148. For clarity, the subsequent letter of allotment was similarly relating to the allotment of un-surveyed portion of LR No 164/4.
149. It is common ground that upon the issuance of letter of allotment dated the 18<sup>th</sup> November 1988, the office of the commissioner of land in conjunction with the office of the Director of survey prepared and generated a Deed Plan culminating into the registration and ultimate Issuance of a Grant.
150. Notwithstanding the foregoing, the critical point and question for determination at this juncture is whether LR No 164/4 (Original Number 164/3/1) was unalienated Government land to warrant the impugned allocation/alienation by the Commissioner of land.
151. Before endeavoring to answer the question, it is imperative to appreciate and discern what then constitutes unalienated Government land.
152. To this end, it is essential to refer to and to take cognizance of the Provisions of Section 2 of the *Governments Lands Act*, Chapter 280 laws of Kenya, now repealed.
153. For convenience, same is reproduced as hereunder;
 

“Unalienated Government land” means 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.
154. Other than the foregoing, the issue of what constitutes and comprises unalienated Government Land was also addressed and deliberated upon by the Honourable court in the case of *Kenya Anti-corruption Commission v Online Omega Enterprises Ltd & others* (2019)eKLR, where the court stated and observed as hereunder;

“Further in the case of *Milankumarn Shar & Two others v City Council of Nairobi & others*, Nairobi HCCC No 1024 of 2005 the Court found 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. The learned Judges in this case quoted with approval the case of *Paul Nderitu Ndung’u & 20 others v Pashito Holdings Limited & another* (Nairobi HCCC No 3063 of 1996) where it was held that the Commissioner of Lands had no legal authority to allocate the two pieces of land which had been reserved for a Police Post and a Water Reservoir as they had already been alienated. In the *Paul Nderitu Ndung’u case* Justice Mbogholi Msagha said:

“Under the *Government Lands Act* (Cap 280, Laws of Kenya) the Commissioner of Lands can only make grants or dispositions of any estates, interests or rights in



over unalienated government land. (Section 3). 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 alienated was void ab initio.”

The above tackles the issue that the 5<sup>th</sup> defendant acted illegally and contrary to the provisions of the [Government Lands Act](#) (Cap 280), the [Kenya Railways Corporation Act](#) (Cap 397) and the [State Corporations Act](#) (Cap 446) when he purported to issue a lease over the suit property to the 1<sup>st</sup> defendant.

155. From the foregoing discourse, it is evident and apparent that unalienated Government land constitutes;
- i. Land that has not been alienated and allocated to anyone/entity.
  - ii. Which has not been reserved or designated for a particular purpose.
  - iii. Which has not been leased to anyone or entity.
156. Clearly, in a situation where a particular piece or portion of land has been leased out to a particular Organization/ Entity or a certificate of title/lease has hitherto been issued, then such parcel of land does not comprise on unalienated Government land.
157. Having taken into consideration the import and tenor of Section 2 of the [Government Lands Act](#), Chapter 280, Laws of Kenya, now repealed, it is now appropriate to discern whether LR No 164/4 was indeed unalienated Government land.
158. To my mind, there is no gainsaying that LR No 164/4 was long alienated and a Certificate of title was issued in favor of Lands Ltd, who continued to hold the certificate of title up to and including the time of the purported allotment of a portion thereof to the 1<sup>st</sup> Defendant.
159. On the other hand, it is also common ground that the Land in question and for which the Certificate of title inhered/ vested in Lands Ltd, had been surrendered and handed over to the Ministry of Agriculture, albeit for specific and designated purpose.
160. It would be recalled that prior to the hand over, the Ministry of Land intended to use the named parcel of land for Livestock Development and Potato Seed Development, respectively.
161. In any event, even as at the time when the land was purported to be allocated to the 1<sup>st</sup> Defendant, the Permanent Secretary, Ministry of Agriculture generated a Letter dated 4<sup>th</sup> May 1987, where same stated *inter-alia*

“It has been decided that Major General Gichuru be allocated 30 acres of Land from LR. No 164/4/4 of the Potato Research Centre, Tigoni. The enclosed sketch map indicates the marked area to be excised.

The Ministry of Agriculture relinquishes its interest on the 30 acres of land to be excised. Please get the Director of Survey to excise the 30 acres and for you to act accordingly”.  
[Emphasis added].

162. Clearly, even the Ministry of Agriculture confirms and concedes that LR No 164/4 was designated and reserved as a Potato Research Center. In this regard, there is no debate that the land was indeed reserved and was being used for research purposes.



163. Premised on the foregoing, it is common ground that the entire of LR No 164/4, out of which the proposed 30 acres was being allocated to the 1<sup>st</sup> Defendant was not unalienated Government land, in accordance with the provisions of Section 2 of the *Government Lands Act*, Chapter 280, now repealed.

**Issue Number 2 Whether the alienation/allocation of the suit property, namely, LR No 14703 to and in favor of the 1<sup>st</sup> Defendant was lawful, legal and valid in accordance with the provisions of the *Government Lands Act*, Chapter 280 Laws of Kenya, now repealed.**

164. It is imperative to note and state that the office of the commissioner of land was created and established by dint of the provisions of the *Government Lands Act*, Chapter 280 Laws of Kenya (now repealed).

165. Other than the establishment of the office of the commissioner of land, the powers and Functions of the office holder were similarly stipulated and delineated vide the provisions of the same Act. In this regard, it is imperative to take cognizance of Section 3, 7 11 and 12 of the said Act.

166. Pursuant to the provisions of Sections 3 and 7 of the *Government Lands Act*, Chapter 280 Laws of Kenya, the Commissioner of Lands had limited and circumscribed powers to allocate unalienated Government land for named and stipulated purposes.

167. For convenience, it is imperative to reproduce the provisions of Sections 3 and 7 of the *Government Lands Act*, Chapter 280 Laws of Kenya.

168. Same are reproduced as hereunder;

“The above section 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 18<sup>th</sup> 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 Registrarion of Titles Act Cap. 281 of the Laws of Kenya.”

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for an 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.”

169. My understanding of the foregoing provisions is first and foremost that the commissioner of land could only allocate/alienate unalienated Government land and not otherwise.

170. Consequently, where the land which is the subject of the intended alienation or allocation, has already been allocated or reserved for a designated purpose, then such parcel or portion of land ceases to be available for alienation.

171. In such circumstances, the land stands alienated and hence neither the Commissioner of Land nor the President of the Republic of Kenya could purport to exercise any powers under the *Government Lands Act*, to seek alienate or allocate same.



172. Put differently, Government Land which stood allocated or alienated became committed and thus was unavailable for a further alienation or allocation, either under the Provisions of the Government Land or otherwise.
173. To this end, it is appropriate to take cognizance of and to reiterate the holding of the Honourable Court of Appeal in the case of *Benja Properties Limited v Syedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR, where the court stated and observed as hereunder;
- “In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5<sup>th</sup> respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum.
174. Additionally, it is also important to take cognizance of the holding of the Honourable Court of Appeal in the case of *Henry Muthee Kathurima v Commissioner Of Lands & another* [2015] eKLR, where the court stated and observed as hereunder;
- “We note that it is not in dispute that the 2<sup>nd</sup> respondent has always been in actual and physical occupation of the suit property from 1989 to-date. The appellant must have known of this fact when he applied for the suit property to be allotted to him. In his application for allotment of a commercial plot made by letter dated 21<sup>st</sup> March, 1997, the appellant identified the suit property and marked it red in the attachment. The inference to be drawn is that the appellant identified and knew the specific plot he desired and knew that the 2<sup>nd</sup> respondent was in physical possession; it was the appellant’s clear intention not only to dispose the 2<sup>nd</sup> appellant of the suit property but to acquire a public utility land that was in possession of a public entity. The bona fides of the appellant in applying for the specific suit property knowing that it was in possession and occupation of a public entity is put in issue”.
175. Guided by the foregoing decisions, there is no gainsaying that the Commissioner of Land could not purport to alienate land that was already alienated, committed and reserved for a specific public purpose.
176. In the premises, the letter of allotment which was issued to and in favor of the 1<sup>st</sup> Defendant did not confer or convey to the 1<sup>st</sup> Defendant any known rights or at all.
177. Notwithstanding the foregoing, it is imperative to recall that the commissioner of land was neither vested nor conferred with the mandate to allocate and/or alienate Government Land for purposes other than those named in the statute.
178. Clearly, the commissioner of land could not alienate or allocate Government land for purposes of agriculture, unless such allocation or alienation was with express direction and under the authority of the President of the Republic of Kenya.
179. In respect of the subject matter, the 1<sup>st</sup> Defendant contended that same had applied for allocation of land to the President of the Republic of Kenya and that (*sic*) the President had approved the allocation of the named portion of the land in favor of the witness. However, no such letter, authority or endorsement by the President was ever tendered or produced in evidence.



180. In short, if the 1<sup>st</sup> Defendant was keen to establish that indeed the allocation or alienation was done on the advice and under the authority of the President, then it behooved same to place such authority or endorsement before the court.
181. Suffice it to point out that it was not enough for the 1<sup>st</sup> Defendant to mention in his letter dated the 9<sup>th</sup> May 1991 that the President had authorized the allotment of 30 acres out of LR No 164/4-Limuru in 1988.
182. In the absence of such authority or endorsement by the President of the Republic of Kenya, what remains before the Honourable court is the impugned letter of allotment issued on the 18<sup>th</sup> November 1988 and which does not allude or refer to the authority of the President.
183. Simply put, the allocation or alienation of the suit property to the 1<sup>st</sup> Defendant was similarly carried out and undertaken ultra vires the powers of the Commissioner of Lands.
184. To buttress the foregoing observations, I can do no better than to quote the holding of the Honourable Court of Appeal in the same case of *Henry Muthee Kathurima v Commissioner Of Lands & another* [2015] eKLR, where the court stated and observed as hereunder;

“We have examined the provisions of Sections, 3, 7, 9 and 12 of the *Government Lands Act* and we are satisfied that the Commissioner of Lands had no power or authority to alienate the suit property and issue the Certificate of Lease. In *Republic v Kenya Revenue Authority, ex parte Aberdare Freight Services Limited*, [2004] 2 eKLR 530 it was held:

“...a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.... Purported authorization, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims...”.

We have considered the submissions by the appellant in this appeal and have no hesitation to state that we concur with the findings and decision of the trial court. The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity.”

185. In my humble, albeit considered view, the allocation or alienation of the suit property, which was curved out of and excised from LR No 164/4, was illegal, unlawful and void for all intents and purposes.

**Issue Number 3 Whether the 1<sup>st</sup> Defendant acquired Lawful Interests and Rights over and in respect of the suit Property.**

186. In the course of addressing and dealing with issue number two herein before, I have held that the suit property was being curved out and excised from a parcel of land which had hitherto been alienated.
187. Additionally, I have also found and held that the commissioner of land had no power, mandate or jurisdiction to allocate the suit property to and in favor of the 1<sup>st</sup> Defendant. For clarity, it is worth recalling that I have also held that the impugned letter of allotment was issued ultra vires the powers of the commissioner of lands. See Section 3 and 7 of the *Government Lands Act*, Chapter 280 Laws of Kenya, now repealed.



188. Notwithstanding the foregoing, it is also imperative to note that the impugned Letter of allotment dated the 18<sup>th</sup> November 1988 also contained various stipulations and conditions. For clarity, one of the conditions was that the allottee/ Offeree was to pay the named and stipulated amounts within 30 days from the date of the letter of offer.
189. On the other hand, the allottee/ Offeree was also called upon to accept the letter of offer within 30 days from the date of issuance.
190. Suffice it to point out that indeed the 1<sup>st</sup> Defendant duly wrote a letter of acceptance dated the 15<sup>th</sup> December 1988, but which was received at the Department of lands on the 30<sup>th</sup> December 1988.
191. Clearly, by the time the Letter of acceptance was being received, the stipulated 30-day period had long lapsed and expired.
192. In my humble view, by the time the Letter of acceptance was being submitted and tendered to the office of the commissioner of land, to signal acceptance, there was no more offer capable of being validly accepted.
193. On the other hand, there is also the issue of whether the monies stipulated at the foot of the Letter of allotment dated the 18<sup>th</sup> November 1988, were ever paid, either within the stipulated duration or at all.
194. To this end, it is imperative to take cognizance of what the 1<sup>st</sup> Defendant indicated at the foot of his Letter dated the 15<sup>th</sup> December 1988, but which was (sic) received by the Office of the commissioner of land on the 30<sup>th</sup> December 1988.
195. For convenience, the 1<sup>st</sup> Defendant wrote as hereunder;

“ As for the remittance of the various amounts in respect of the rent, conveyance fees e.t.c, I would request the earlier amounts paid under your letter reference 31677 of 21<sup>st</sup> December 1987 be offset against the rest of the new assessment. The balance which is due to me can be credited to my account towards next year’s fees”.
196. From the foregoing excerpt, it is apparent that the 1<sup>st</sup> Defendant was imploring the office of the commissioner of land to transfer payment made at the foot of a separate and distinct Letter of allotment to the current one.
197. Whether or not such a transfer could be undertaken by the office of the commissioner of land is debatable. Nevertheless, it is not lost on this Honourable court that the previous Letter of allotment constituted a separate and distinct offer and separate contract.
198. In my humble view, the payments which had hitherto been made in respect of the Letter of allotment dated the 21<sup>st</sup> December 1987, were attached to and inseverable from the said Letter of allotment.
199. In any event, even assuming that the payments made at the foot of the Letter of allotment dated the 21<sup>st</sup> December 1987, were transferable, the concurrence and consent of the commissioner of land would be imperative and significant.
200. However, it is evident that despite the proposal by the 1<sup>st</sup> Defendant for the said monies to be offset against the demands at the foot of the letter of allotment dated the 18<sup>th</sup> November 1988, no response or concurrence was ever availed or at all.



201. Other than the foregoing, there is yet another aspect which deserves due mention. For clarity, this aspect relates to the fact that the proposal to offset was similarly being made long after the lapse of the 30-day period.
202. In view of the foregoing, the question that arises for determination is whether a letter of offer which was neither accepted nor paid for within the stipulated duration could be acted upon ex-post-facto.
203. The incidental question that would also arise is whether any further transactions and conveyance could legally and validly be undertaken on the basis of an extinct and extinguished Letter of allotment.
204. Without belaboring the point, it is imperative to take cognizance of the holding of the Honourable Court in the case of *H.H. Dr. Syedna Mohammed Burbannuddin Sabeel & 2 others v Benja Properties Ltd & 2 others* [2007] eKLR, where the Court observed as hereunder;
- “In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant’s argument, that the expired letter, when acted upon, had been “revived” through conduct. The letter had expired. It was dead. There was nothing to “revive”.
205. Additionally, the implication of a letter of allotment whose terms are not timeously complied with was also discussed in the case of *Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands & 2 others* [2014] eKLR.
206. For coherence, the Honourable court stated and observed as hereunder;
- “I have considered the evidence on record and the submission of the parties and do find that a letter of allotment was issued to Mr. Joseph K. Mugambi on 21/10/1971 with a condition to accept the offer within 30 days. He did not do so and thereafter the offer lapsed 30 days after it was made in accordance with the allotment letter. Having failed to accept the offer as stipulated in the letter of allotment Mr. J.K. Mugambi did not acquire interest in the unsurveyed lorry depot and therefore had no interest to transfer to the plaintiff. This court holds that a letter of allotment does not confer any property rights to a person unless there is acceptance and payment of the stand premium and ground rent. In the letter dated 17/6/1988 which was written about 17 years after the allotment letter was issued, the Commissioner of Lands confirmed that the plot was allocated to Joseph M. Mugambi in 1971 for lorry depot. However, the plot had neither been paid for nor an acceptance of the offer in the allotment letter made. The implication of this letter was that the allottee had not complied with the terms of the allotment letter and therefore the offer had lapsed. The offer having lapsed, the allottee Mr. Joseph M. Mugambi did not have any interest to transfer to the plaintiff and therefore all transactions between the allottee and the plaintiff were a nullity in law.
207. Premised on the foregoing, it is my humble view that even though a Certificate of Title/ Grant was subsequently generated, executed and ultimately registered in favor of the 1<sup>st</sup> Defendant, the subsequent transactions were carried out and were undertaken in vacuum.
208. Consequently, even though the 1<sup>st</sup> Defendant was issued with a Grant/Certificate of title, I am afraid that same did not confer any legitimate and valid rights or interest to the 1<sup>st</sup> Defendant.



209. Respectfully, the entire transactions commencing with the issuance of the letter of allotment, the excision of a portion of LR No 164/4 and the ultimate issuance and registration of Grant were all void for all intents and purposes.
210. Suffice it to point out that where an act is void, it is void and Dead. Consequently, no amount of panel beating or whitewashing can imbue or infuse such an act with any legitimacy or at all.
211. Without belaboring the point as pertains to the meaning and import of what is void, it suffices to invoke and reiterate the Dictum in the case of *Macfoy v United Africa Co. Ltd* [1961] 3 All E.R. 1169, where Lord Denning while delivering the opinion of the Privy Council at page 1172 (1) made succinct observations.
212. For clarity, the revered Judge said;
- “If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so.
- And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
213. In view of the foregoing, I come to the conclusion that the 1<sup>st</sup> Defendant did not acquire any legitimate or lawful rights and interests over the suit property capable of protection by dint of the Provision of Sections 24 and 25 of the *Land Registration Act, 2012* (2016).

#### **Issue Number 4 What Reliefs ought to be granted.**

214. Vide the amended Plaintiff, the Plaintiff has sought for various albeit numerous reliefs as against both of the Defendants.
215. Nevertheless, two of the reliefs that have been sought for merits appropriate deliberations and exposition. For clarity, this relates to the claim for *mesne* Profits and General Damages for fraud and Misfeasance in office.
216. In respect of the claim for *mesne* Profits, it is appropriate to mention and underscore that it was incumbent upon the Plaintiff to particularly plead and specifically prove *mesne* Profits. For clarity, a claim for *mesne* Profits is akin to Special Damages.
217. Nevertheless, it is important to note that the Plaintiff neither pleaded nor proved the claim for *mesne* Profits. To my mind there was no iota or scintilla of evidence to even show what had been lost as a result of the unlawful occupation of the suit property by the 1<sup>st</sup> Defendant.
218. In the alternative, it is also worthy to recall that there was no attempt to value the suit property and neither was any valuation report placed before the Honourable court.
219. In my humble view, no case for *mesne* Profits was sufficiently pleaded nor proved. In this regard, the holding in the case of *Mistry Valji v Janendra Raichand & 2 others* [2016] eKLR, is apt and succinct.



220. For coherence, the Court of Appeal stated and observed as hereunder;

“Measure for *mesne* profit was described in the Privy Council decision in *Invergue Investments v Hackett* (1995) 3 All ER 842 cited with approval in the Kenya Hotel Property Ltd case (*supra*) as follows:

“This is form of an ordinary claim for *mesne* profit, that is to say, a claim for damages for trespass to land....The question for decision is the appropriate measure of damages.”

The privy council observed that that measure of damages must be reasonable rent. The usual practice is to assess *mesne* profits down to the date when possession is given.

221. Additionally, the manner of pleading and proving a claim for *mesne* Profits was deliberated upon in the case of [Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees](#) [2020] eKLR.

222. For clarity, the Court of Appeal stated and stated as hereunder;

“It is settled law that where a party claims for both *mesne* profits and damages for trespass, the court can only grant one and not both. *mesne* Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: [Black's Law Dictionary](#) 9th edition). *mesne* Profits must be pleaded and proved. In the case *Peter Mwangi Msuitia & another v Samow Edin Osman* [2014] eKLR, this Court held as follows:

“As regards the payment of *mesne* profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as *mesne* profit and it appears to us *prima facie*, that there was no evidence to support the actual figure awarded...”

223. In respect of the prayer for General damages for fraud and mis-feasance in office, it is imperative to recall that the impugned Letter of allotment issued on the 18<sup>th</sup> November 1988 was generated and executed long before the 2<sup>nd</sup> Defendant was appointed as the Commissioner of land.

224. Secondly, it is appropriate to note that other than the letter of allotment, there were other important processes and procedures that were taken by other Third Parties other than the 2<sup>nd</sup> Defendants.

225. Finally, it is important to underscore that what the 2<sup>nd</sup> Defendant did was merely to conclude a process that had long been commenced and started by persons other than himself.

226. In this regard, the actions by and on behalf of the 2<sup>nd</sup> Defendant cannot wholly attribute blame unto him to warrant the claim for General Damages in the manner sought.

227. In the circumstances, I am inclined to find and hold that the prayer for *mesne* Profits and General Damages for Fraud and mis-feasance in office, had neither been established nor proven, either as required under the law or at all.

### **Final Disposition:**

228. Having analyzed and considered the various nuances and perspectives that were highlighted in the body of the Judgment, it is appropriate to render the final and dispositive orders.

229. Nevertheless, it must have become apparent and evident that the Plaintiff's case is well grounded, deserving and meritorious.



230. Consequently and in the premises, I am minded to enter Judgment in favor of the Plaintiff on the following terms;

- i. A Declaration be and is hereby issued that Land Reference No 164/4 (Original No 164/3/1) measuring approximately 228 acres or thereabout is the property of Lands Limited, a public body wholly owned by the Agricultural Development Corporation.
- ii. A Declaration be and is hereby issued that the issuance and registration of fee simple Grant in Respect of Land Reference No 14703 in favour of the first Defendant has not in any way derogated from the Interests, right and title vested in Lands Limited with regard to Land Reference No 164/4(Original No 164/3/1).
- iii. A Declaration be and is hereby issued that the first Defendant has not acquired any title, right or interest in or over Land Reference No 164/4 (Original No 164/3/1) or Land Reference No 14703.
- iv. The 1<sup>st</sup> Defendant be and is hereby Ordered and directed to deliver vacant possession and surrender the entire of the suit property, namely, LR No 14703 to the Plaintiff on behalf of Lands Ltd, for purposes of public use.
- v. The delivery of the vacant possession by the 1<sup>st</sup> Defendant shall be undertaken and completed within a period of Twelve (12) Months from the date hereof.
- vi. In default to vacate and deliver vacant possession over and in respect of LR No 14703 to the Plaintiff, on behalf of Lands Ltd, the Plaintiff shall be at liberty to levy Eviction against the 1<sup>st</sup> Defendant, without further reference to court.
- vii. In the event that the 1<sup>st</sup> Defendant fails to vacate and hand over vacant possession of LR No 14703, to the Plaintiff within the stipulated duration and an Eviction is thereafter undertaken, the 1<sup>st</sup> Defendant shall bear the costs/charges of such Eviction.
- viii. An Order be and is hereby made for immediate delivery up to the Registrar of Titles for rectification by cancellation of the Fee Simple Grant issued and registered in favour of the 1st Defendant with regard to Land Reference No 14703 and same to be surrendered for such cancelation within six (6) months from the date hereof.
- ix. In default to comply with the preceding order, then the Registrar of Titles/Chief Land Registrar shall proceed to and rectify the Register accordingly, albeit upon service of appropriate notices, in accordance with the provision of Section 79 of the [Land Registration Act](#).
- x. An Order of Permanent Injunction be and is hereby issued against the Defendants restraining them by themselves or through their agents, servants, or employees or otherwise howsoever from dealing in any manner howsoever with Land Reference No 14703 otherwise than by way of re-conveyance to Lands Limited or surrender to the Government of Kenya.
- xi. The Plaintiffs claim as against the 2<sup>nd</sup> Defendant be and is hereby dismissed.
- xii. Any other claim/reliefs not expressly granted is hereby Dismissed.
- xiii. Costs of the suit shall be borne by the 1<sup>st</sup> Defendant

231. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5<sup>TH</sup> DAY OF DECEMBER, 2022.**



**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Benson - Court Assistant.

Mr. Wambugu for the Plaintiff.

Mr. Nelson Havi for the 1<sup>st</sup> Defendant.

Ms. Ngure for the 2<sup>nd</sup> Defendant.

