



**Ethics and Anti-Corruption Commission v Harjot Singh Dhanjal (Sued as the Legal Representative of the Estate of Satwant Singh Dhanjal) & 2 others; Kenya Railways Corporation (Interested Party) (Environment and Land Case Civil Suit E020 of 2022) [2024] KEELC 5077 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5077 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E020 OF 2022  
SO OKONG'O, J  
JULY 4, 2024**

**BETWEEN**

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

**AND**

**HARJOT SINGH DHANJAL (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SATWANT SINGH DHANJAL) ..... 1<sup>ST</sup> DEFENDANT**

**CHERAMBA ENTERPRISE LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**WILSON GACHANJA ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**KENYA RAILWAYS CORPORATION ..... INTERESTED PARTY**

**JUDGMENT**

**The pleadings**

1. In its plaint, the Plaintiff averred that it is a body corporate established under Section 3 of the *Ethics and Anti-Corruption Commission Act* 2011(EACA). The Plaintiff averred that it brought this suit under the provisions of Section 11(1)(j) of the EACA, the *Anti-Corruption and Economic Crimes Act* 2003(ACECA) and other enabling provisions of the law for the recovery of all that parcel of land known as Kisumu Municipality/Block 7/446 a public property initially acquired and registered in the name of Kenya Railways Corporation (hereinafter referred to only as “the Interested Party”).
2. The Plaintiff averred that the said parcel of land known as Kisumu Municipality/Block 7/446 (hereinafter referred to as “the suit property”) was illegally and irregularly allocated to the 2<sup>nd</sup> Defendant by the 3<sup>rd</sup> Defendant on 17<sup>th</sup> December 1990 as unsurveyed commercial plot. The Plaintiff



- averred that on 24<sup>th</sup> January 1991, the 2<sup>nd</sup> Defendant transferred the suit property to the 1<sup>st</sup> Defendant with the approval and consent of the 3<sup>rd</sup> Defendant. The Plaintiff averred that the 1<sup>st</sup> Defendant was issued with a certificate of lease in respect of the suit property on 14<sup>th</sup> January 1992.
3. The Plaintiff averred that the suit property was not available for transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by the 3<sup>rd</sup> Defendant and that the purported certificate of lease that was issued to the 1<sup>st</sup> Defendant was fraudulent, illegal, null and void for all intents and purposes in that the same was issued without the approval of the Interested Party. The Plaintiff pleaded several particulars of fraud against the Defendants.
  4. The Plaintiff averred that the 2<sup>nd</sup> Defendant's interest in the suit property was fraudulent, illegal, null and void and as such could not be transferred to the 1<sup>st</sup> Defendant. The Plaintiff averred further that the illegal alienation of the suit property for private purposes was contrary to the intended public purpose for which it was vested upon the Interested Party.
  5. The Plaintiff sought judgment against the Defendants jointly and severally for;
    - a. A declaration that the allocation of the suit property by the 3<sup>rd</sup> Defendant to the 2<sup>nd</sup> Defendant was null and void and was ineffectual to confer any right, interest or title upon the 2<sup>nd</sup> Defendant.
    - b. A declaration that the issuance of a lease by the 3<sup>rd</sup> Defendant to the 2<sup>nd</sup> Defendant over the suit property was null and void and ineffectual to confer any right, interest or title upon the 2<sup>nd</sup> Defendant.
    - c. A declaration that the subsequent transfer of the lease in respect of the suit property and the issuance of a certificate of lease to the 1<sup>st</sup> Defendant was null and void and ineffectual to confer any right, interest or title upon the 1<sup>st</sup> Defendant.
    - d. An order directing the Chief Land Registrar to rectify the register of the suit property by cancelling the lease registered over the suit property in favour of the 1<sup>st</sup> Defendant and restoring the property to the Interested Party.
    - e. An order for vacant possession of the suit property and all the improvements thereon.
    - f. An order for a permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from trespassing, transferring, developing, entering upon, leasing, wasting and/or dealing in any manner with the suit property save by transferring the property to the Interested Party.
    - g. Mesne profits for loss of user by the Interested Party in the form of rental income payable from the date of transfer of the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants up to the date of judgment and in the alternative, general damages for loss of user of the suit property by the Interested Party.
    - h. Costs of the suit.
    - i. Interest on mesne profits/general damages and costs at court rates.
  6. The 1<sup>st</sup> Defendant filed a statement of defence on 22<sup>nd</sup> August 2022. The 1<sup>st</sup> Defendant averred that Satwant Singh Dhanjal, deceased (hereinafter referred to only as "the 1<sup>st</sup> Defendant") was the lawfully registered proprietor of the suit property and a holder of a certificate of lease issued on 14<sup>th</sup> January 1992 for a term of 99 years from 1<sup>st</sup> January 1991. The 1<sup>st</sup> Defendant averred that the suit property was sold to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant through an agreement of sale dated 11<sup>th</sup> January



- 1991 after the Commissioner of Lands issued the 2<sup>nd</sup> Defendant with a letter of allotment dated 17<sup>th</sup> December 1990. The 1<sup>st</sup> Defendant averred that the suit property was informally transferred to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant with the approval and consent of the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant denied all the particulars of fraud and illegality pleaded against the 1<sup>st</sup> Defendant.
7. The 1<sup>st</sup> Defendant averred that the 1<sup>st</sup> Defendant was the legal and registered proprietor of the suit property and had over the years paid land rates and land rent to the Government of Kenya. The 1<sup>st</sup> Defendant averred that the Plaintiff had failed to disclose any illegality and/fraud on the part of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant averred further that the 1<sup>st</sup> Defendant was a bona fide purchaser of the suit property for value.
  8. The 1<sup>st</sup> Defendant averred that his interest in the suit property was indefeasible under both the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) and the *Land Registration Act* 2012. The 1<sup>st</sup> Defendant averred that the suit property did not belong to the Interested Party. The 1<sup>st</sup> Defendant averred that the suit property was situated outside the boundary of the Interested Party's premises. The 1<sup>st</sup> Defendant averred that the Plaintiff's suit was brought in bad faith. The 1<sup>st</sup> Defendant averred that the suit was brought dishonestly with the connivance of the Interested Party who was not joined as a party to the suit although it was the complainant.
  9. The 3<sup>rd</sup> Defendant filed a statement of defence on 4<sup>th</sup> August 2022. The 3<sup>rd</sup> Defendant denied that the suit property was part of a larger parcel of land belonging to the Interested Party that was illegally and irregularly allocated to private persons. The 3<sup>rd</sup> Defendant averred that the suit property was not reserved as a railway reserve neither was it vested upon the Interested Party upon the dissolution of the East Africa Railways Corporation. The 3<sup>rd</sup> Defendant averred that allocation of land was a process that involved several persons and that the part that he played in the process of allocating and transferring the suit property to 2<sup>nd</sup> and 1<sup>st</sup> Defendants was within his powers as the Commissioner of Lands.
  10. The 3<sup>rd</sup> Defendant denied all the particulars of fraud and illegality pleaded against him in the plaint. The 3<sup>rd</sup> Defendant averred that the alienation of the suit property was legal and within the powers of the Commissioner of Lands conferred upon him under the Government Lands Act, Chapter 280 Laws of Kenya (now repealed). The 3<sup>rd</sup> Defendant averred that the allocation of the suit property was legal and for that reason, the Plaintiff was not entitled to mesne profits or damages for loss of use. The 3<sup>rd</sup> Defendant averred that the Plaintiff's suit was unconstitutional, selective, frivolous, scandalous and disclosed no cause of action against the 3<sup>rd</sup> Defendant in his personal capacity. The 3<sup>rd</sup> Defendant averred that he ceased to hold the office of the Commissioner of Lands 23 years ago and as such the suit against him offended Section 6 of the *Government Contracts Act*, Chapter 25 Laws of Kenya. The 3<sup>rd</sup> Defendant averred further the suit violated his fundamental rights guaranteed under Articles 25, 27, 40, 47 and 50 of *the Constitution* of Kenya 2010. The 3<sup>rd</sup> Defendant averred that he would raise a preliminary objection to the competency of the suit against him.

### **The evidence tendered by the parties**

11. At the trial, the Plaintiff called GEOFRREY WEKESA NYONGESA (PW1) as the first witness. PW1 testified that he was working with the Interested Party as a Senior Cartographer at its headquarters in Nairobi. He stated that he dealt with mapping and surveys and was also involved in the land acquisition process for the Interested Party. He adopted his witness statement dated 9<sup>th</sup> June 2022 at page 59 of the Plaintiff's bundle of documents as part of his evidence in chief.
12. He stated further as follows: The document at page 82 of the Plaintiff's bundle of documents was the first map showing Uganda Railways. The map was dated 19<sup>th</sup> July 1902. The map showed Uganda



- Railways Port Florence station, now known as Kisumu. Florence was the name of the wife of the Engineer who was working on the Railways. The map was a survey engineering drawing which captured the dimensions in terms of distance which was annotated as feet. It also showed the bearings and the geographical location of the facilities including the rails and housing units. On the lower side, there was Lake Victoria Nyanza. The suit property was marked on the map with a blue marker pen. The suit property was within the boundary of Kisumu Railways land.
13. The second document was a 1908 map. It was a clearer version of the 1902 map. The map showed developments that were done at Kisumu Railways. The map showed Railway offices, Residential quarters, a temple, a mosque and others. It also showed Railway girder opening which was a channel near the suit property. The map showed that the suit property was accessible through the Indian Bazaar Road (now Oginga Odinga Street). The map showed that the suit property was within Railways land.
  14. PW1 stated further that, at page 85 of the Plaintiff's bundle of documents there was a vesting order dated 12<sup>th</sup> July 1963 by the Governor vesting the Railways land upon the East African Railways & Harbours Administration and at page 86 of the same bundle, there was another legal notice dated 22<sup>nd</sup> February 1986 vesting the Railways land on the Interested Party, Kenya Railways Corporation.
  15. He stated that on 21<sup>st</sup> September 2001, the Interested Party wrote to the Plaintiff seeking assistance in the recovery of its land. The letter at page 104 of the Plaintiff's bundle of documents sought assistance towards the recovery of the suit property. He stated that he did not find any document seeking approval for the alienation of the suit property to the Defendants. He stated that the suit property falls within the land that was vested in the Interested Party. He produced the 1902 and 1908 maps as P.EXH. 1(a) and 1 (b) respectively, the legal notice dated 12<sup>th</sup> July 1963 at page 85 of the Plaintiff's bundle as P.EXH. 1 (C), the legal notice dated 22<sup>nd</sup> February 1986 at pages 86 and 87 of the Plaintiff's bundle as P.EXH. 1 (d). The letter dated 22<sup>nd</sup> September 2021 at pages 104 to 108 of the same bundle as P.EXH. 1 (e) and the letters dated 11<sup>th</sup> June 2019 and 29<sup>th</sup> June 2015 at pages 136 to 153 of the Plaintiff's further bundle of documents as P.EXH. 1 (f).
  16. The Plaintiff's next witness was GORDON ODEKA OCHIENG (PW2). PW2 told the court that he was working at the Ministry of Lands as a director of land administration. He adopted as part of his evidence in chief his witness statement dated 10<sup>th</sup> June 2022. He confirmed that the letter of allotment of unsurveyed commercial plot dated 17<sup>th</sup> December 1990 to the 2<sup>nd</sup> defendant was issued by the Commissioner of Lands. He also confirmed that the form of transfer through which the said plot was transferred by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant was being used at the time to transfer unregistered land. He stated that the letter of allotment dated 17<sup>th</sup> December 1990 allocated to the 2<sup>nd</sup> Defendant a portion of land that formed part of a larger parcel of land that belonged to the Interested Party. He stated that the parcel of land in question was already committed and was not available for allocation. He produced the letter of allotment dated 17<sup>th</sup> December 1990 and the transfer form dated 24<sup>th</sup> January 1991 as P.EXH. 2 (a) and 2 (b) respectively.
  17. The Plaintiff's next witness was JOSEPH KARAGU KARIUKI(PW3). PW3 told the court that he was a retired land officer. He stated that he retired as a Principal Land Administration Officer. He stated that he joined the Ministry of Lands in 1988, moved to the National Land Commission in 2015 and retired in 2022. He adopted his witness statement dated 10<sup>th</sup> June 2022 at pages 65 to 68 of the Plaintiff's bundle of documents as his evidence in chief and produced the special issue of Kenya Gazette dated 26<sup>th</sup> November 2010 as P.EXH.3. He stated that the Kenya Gazette contained a list of various parcels of land whose titles were revoked by the Ministry of Lands. He stated that the suit property was not on the said list.



18. The Plaintiff's next witness was GEORGE ORWARU NYANGWESO (PW4). PW4 told the court that he was a land registration officer stationed at the Mombasa Land Registry. He adopted his witness statement dated 10<sup>th</sup> June 2022 as part of his evidence in chief. He stated that between 2014 and 2021, he worked at Kisumu Land Registry as the officer in charge. He stated that he was the custodian of all the land records at the registry. He stated that on 25<sup>th</sup> July 2019, he received a request from the Plaintiff to supply it with documents set out in his statement. The documents sought concerned properties whose particulars were set out in paragraph 5 of his statement. The suit property was among the said properties. Among the documents he gave out to the Plaintiff was a lease for the suit property issued to the 1<sup>st</sup> Defendant on 4<sup>th</sup> December 1991 and registered on 14<sup>th</sup> January 1992. He stated that the Plaintiff also requested for documents relating to Kisumu Municipality/Block 7/567.
19. He stated that Kisumu Municipality/Block 7/567(Plot No.567) was registered in the name of the Interested Party on 24<sup>th</sup> February 2014. He stated that he supplied the Plaintiff with the extract of the register for the property. He stated that Plot No. 567 measured 72.38 hectares. PW4 produced the lease for the suit property at page 96 of the Plaintiff's bundle of documents as P.EXH. 30, the instructions to prepare a lease at pages 99 to 101 as P.EXH. 31 (a), (b) and (c) respectively, the letter dated 3<sup>rd</sup> April 2019 at page 134 of the Plaintiff's bundle and the extract of the register at page 135 of the same bundle as P.EXH. 32 and P.EXH. 33 respectively. He stated that the suit property overlapped on Kisumu Municipality Block 7/567(Plot No. 567) which belonged to the Interested Party.
20. The Plaintiff's next witness was HASSAN ZAKARIA MOSOSI (PW5). PW5 told the court that he was working at the Ministry of Lands in the Department of Surveys and Mapping. He adopted his witness statement dated 13<sup>th</sup> June 2022 as his evidence in chief. He referred the court to the survey plan No. 43/53 of 24/8/1935 at page 83 of the Plaintiff's bundle of documents. He stated that the plan showed the land that was surveyed and reserved for East African Railways and Harbours now Kenya Railways Corporation, the Interested Party. He stated that the land was registered under three sections namely, Section 55 (LV), Section 58 (LVIII) and Section 60 (LX).
21. He stated that the three sections combined made L.R. No. 11458 the whole of which was reserved for the Interested Party. He stated that he had highlighted the land, L.R No. 11458 in Green and the suit property in Red. He stated that the suit property was within the boundaries of L.R No. 1148. He produced the survey plan as P.EXH. 34. He referred the court to the Registry Index Map (RIM) for Kisumu Block 7 at page 84 of the Plaintiff's bundle of documents. He stated that in that RIM, the Interested Party's land was parcel No.575 which was the larger parcel in the RIM. He stated that the RIM had been amended to show the land that was reserved for the Interested Party, Kenya Railways Corporation after the titles for several parcels of land that had encroached on the Interested Party's land were cancelled.
22. He stated that this RIM restored the Interested Party's land to its original boundary. He stated that land parcel No. 575 was part of L.R No. 1148. He stated that land Parcel No. 575 measured 72.38 hectares. He stated that in the earlier survey plan, the land measured 257 acres (104.01 hectares). He stated that he had marked the suit property in Red. He stated that it was clear that the suit property was within the Interested Party's land. He produced the RIM as P.EXH. 35. PW5 referred the court to the letter dated 7<sup>th</sup> July 1965 at page 126 of the Plaintiff's bundle of documents. He stated that the letter confirmed the survey plan that he had produced as P.EXH. 34 to show the land that was reserved for the Interested Party.
23. PW5 produced the letter as P.EXH. 36. He also referred to the letters dated 24<sup>th</sup> January 1991 and 15<sup>th</sup> November 1991 at pages 129 and 130 respectively of the Plaintiff's bundle. He stated that in the letter dated 24<sup>th</sup> January 1991, the Commissioner of lands asked the Director of Surveys to carry out a survey



- in respect of the land that was allocated to the 2<sup>nd</sup> Defendant and the letter dated 15<sup>th</sup> November 1991 at page 130 of the same bundle was the response. He stated that in the letter, the Director of Surveys confirmed that the land had been surveyed and given parcel No. 446. He stated that although the survey was initiated by the Commissioner of Lands, the land was not available for alienation because it was reserved for the Interested Party. He produced the two letters as P.EXB. 37 (a) and P.EXH. 37 (b).
24. The Plaintiff's last witness was JEMIMAH WANJIRU GITHUNGU (PW6). PW6 told the court that she was working with the plaintiff in the asset tracing department. She adopted her witness statement dated 9<sup>th</sup> June 2022 as part of her evidence in chief. She testified further as follows: In the course of her investigations, she collected several documents. The first was the Kenya Gazette of 4<sup>th</sup> January 1991. In the said Kenya Gazette, there was Gazette Notice No. 99. It contained a list of companies that had been incorporated between 1<sup>st</sup> May to 31<sup>st</sup> May 1990. The company No. 4 in the list of companies was Cheramba Enterprises Ltd. (Reg. No. 42858). See pages 88 to 91 of the Plaintiff's bundle of documents.
  25. She also came across Special Issue of Kenya Gazette published on 26<sup>th</sup> November 2010. The Kenya Gazette contained Gazette Notice No. 15577 which had a notice of revocation of land titles within Kisumu Municipality. The revocation followed analysis that was done by the Ministry of Lands. The Ministry of Lands concluded that the properties concerned belonged to the Interested Party, Kenya Railways Corporation. It was on that basis that the titles were revoked. See pages 102 and 103 of the Plaintiff's bundle of documents. There was a suit between the 1<sup>st</sup> Defendant, and the Attorney General and the Interested Party. That was Kisumu ELC Petition No. 19 of 2019. In the Judgment that was delivered in the matter on 29<sup>th</sup> April 2020, the court found that the suit property belonged to the Interested Party. See page 109 of the Plaintiff's bundle of documents.
  26. At page 114 of the Plaintiff's bundle of documents was a search that was conducted on 8<sup>th</sup> August 2019 on the suit property. It showed that the title was leasehold for a term of 99 years with effect from 1<sup>st</sup> January 1991. The search showed that there was a restriction placed by the Criminal Investigations Department. At page 116 of the Plaintiff's bundle of documents were advertisements by the Plaintiff. There were public notices to the effect that the Plaintiff was conducting investigations on among others the suit property. At page 117 of the Plaintiff's bundle was a letter from the Business Registration Service dated 20<sup>th</sup> May 2022 to the Plaintiff giving the particulars of the directors of the 2<sup>nd</sup> Defendant, Cheramba Enterprises Ltd.
  27. At page 124 of the Plaintiff's bundle was a certificate of lease that was issued to the Interested Party. The lease was for a term of 99 with effect from 1<sup>st</sup> October 2012 in respect of Kisumu/Municipality/Block 7/567(Plot No. 567). This lease was issued after the revocation of titles mentioned earlier. PW6 produced the Kenya Gazette dated 4<sup>th</sup> January 1991 as P.EXH. 38 "A" (see page 88 of the Plaintiff's bundle), the special issue of Kenya Gazette dated 26<sup>th</sup> November 2010 (See page 102 of the bundle) as PEXH. 38 "B", the Judgment of the court in ELC Petition No. 19 of 2019 (See page 109 of the bundle) as P.EXH. 38 "C", the certificate of official search dated 8<sup>th</sup> August 2019 (See page 114 of the Plaintiff's bundle) as P.EXH. 38 "D", the public notice in the Daily Nation of 29<sup>th</sup> August 2019 (See page 116 of the Plaintiff's bundle) as P.EXH. 38 "E", the letter from Business Registration Service dated 20<sup>th</sup> May 2022 (See page 117 of the Plaintiff's bundle) as P.EXH. 38 "F", and the certificate of lease for Kisumu/Municipality/Block 7/567 (See page 124 of the Plaintiff's bundle) as P.EXH. 38 "G".
  28. PW6 stated that from her investigations, the suit property was within the land that belonged to the Interested Party. She stated that the maps that the Plaintiff produced in evidence confirmed that fact. She stated that the allocation of the suit property to the 2<sup>nd</sup> Defendant was illegal. She stated that she had not seen the Part Development Plan (PDP) on the basis of which the allocation was based.



29. After the close of the Plaintiff's case, the 1<sup>st</sup> Defendant, HARJOT SINGH DHANJAL (DW1) gave evidence. He told the court that he was a businessman in Kisumu. He adopted his witness statement dated 22<sup>nd</sup> August 2022 as his evidence in chief and produced the documents in his bundle of documents of the same date as a bundle as D.EXH. 1. He stated that the suit had been brought in bad faith in that Kenya Railways Corporation on whose behalf the suit was brought had not been joined as a party.
30. The 2<sup>nd</sup> Defendant did not defend the suit while the 3<sup>rd</sup> Defendant did not give evidence at the trial. After the close of evidence, the parties were directed to make closing submissions in writing.

### **The Submissions**

31. The Plaintiff filed submissions dated 1<sup>st</sup> February 2024. The Plaintiff framed several issues for determination by the court. The first issue was whether the suit property constituted part of the land set apart as a Railway reserve and vested in the Interested Party. The Plaintiff submitted that the suit property was part of a large parcel of land which was vested in the Manager of the defunct East Africa Railways & Harbours Administration through Legal Notice No.440 of 1963 and assigned L.R. No. 1148/ Section LV, and set aside as Railways reserve. The Plaintiff submitted that following the dissolution of the East Africa Community in 1977, the assets of East Africa Railways Corporation, including the suit property was subsequently vested in the Interested Party through Legal Notice No. 24 of 1986 issued under *Kenya Railways Corporation Act*, Chapter 397 Laws of Kenya. The Plaintiff submitted that PW1 produced the legal notices that vested the entire L.R. No 1148/section LV, in the Interested Party as Plaintiff's exhibits together with the station layout map of 1902 and an upgraded Kisumu township Map of 1908 showing the entire Railway Land which included the suit property.
32. The Plaintiff submitted that the evidence of PW5 and the Registry Index Map of Kisumu Municipality Block 7 sufficiently established that the suit property as indicated in the said Registry Index Map was located within the area designated as the Railway reserve in the Survey Plan F/R No. 43/53 dated 24<sup>th</sup> August 1935. See P.EXH. 5(a), (b) and (c). The Plaintiff submitted that had the 1<sup>st</sup> and 2<sup>nd</sup> Defendants examined the land records before the allocation and the purchase of the suit property was done, they would have discovered that the land was not available for alienation. The Plaintiff submitted that the suit property was part of land reserved for the Interested Party and was not unalienated Government land. The Plaintiff submitted that the 3<sup>rd</sup> Defendant who was the Commissioner for Lands at the material time had no power to allocate the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants
33. The second issue framed by the Plaintiff was, whether the 3<sup>rd</sup> Defendant unlawfully and fraudulently alienated the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiff cited Sections 2, 3 and 7 of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed) and submitted that the power of the Commissioner of Lands to allocate land was limited by the law. The Plaintiff submitted that the 3<sup>rd</sup> Defendant did not have the power to allocate land that was reserved for the Interested Party. The Plaintiff submitted further that the process through which the 3<sup>rd</sup> Defendant allocated the suit property to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was irregular, illegal, fraudulent, null and void. In support of this submission, the Plaintiff cited *James Joram Nyaga & Another V. The Hon. Attorney General & another* [2007] EKL.R, where the court stated as follows about Sections 3 and 7 of the Government Lands Act:

“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 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya."

34. The Plaintiff also cited *Henry Muthee Kathurima V. Commissioner Of Lands & Another* [2015] EKLK in which the Court of Appeal stated as follows on the power of the Commissioner of Lands:

"The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v. Shariff Mohammed Shatry*, (1940) 19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity...we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired. Further, it is our view that the Government's title to an un-alienated public land stems from the concept of radical title or eminent domain. Based on radical title, the government has superior title to all un-alienated public land and the appellant cannot challenge radical or eminent title."

35. The Plaintiff also cited *Robert Mutiso Lelli V. Kenya Medical Training College & 2 Others* [2021] EKLK, where the Court of Appeal stated that: "We have found that the allocation and issuance of titles to the subject plots to the appellant was irregular and unlawful. And though Article 40 guarantees the right of every person to acquire property, Article 40 (6) qualifies this right to exclude "...any property that has been found to be unlawfully acquired."

36. The Plaintiff submitted that since the suit property was vested in the Interested Party, only the Interested Party could alienate the same. The Plaintiff submitted that there was no evidence that the suit property was alienated by the Interested Party. The Plaintiff submitted further that there was also no evidence that the Minister responsible gave consent to the alienation as was required by the law. The Plaintiff submitted that an alienated public land cannot be allocated for private use. The Plaintiff submitted that in any event, there was no application requesting for allocation of the suit property. The Plaintiff submitted that there was no basis for allocating the suit property in the circumstances. The Plaintiff submitted that before the allocation of the suit property, there were processes to be followed and that the court cannot on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. The Plaintiff submitted that it was not enough for the 1<sup>st</sup> Defendant to state that he had a lease or a title to the suit property. The Plaintiff submitted that the alienation of the suit property and the transfer thereof to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was null and void ab initio and the said Defendants could not derive any benefit therefrom. The Plaintiff submitted that the 2<sup>nd</sup> Defendant had no valid interest in the suit property that it could pass to the 1<sup>st</sup> Defendant. The Plaintiff submitted that the 3<sup>rd</sup> Defendant could not pass any valid title to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through the letter of allotment and, the lease and certificate of lease produced by the 1<sup>st</sup> Defendant in evidence. The Plaintiff submitted that the certificate of lease issued to the 1<sup>st</sup> Defendant was not protected by the provisions of Section 26(1) of the *Land Registration Act* 2012 and Article 40(6) of *the Constitution* and the same was liable to impeachment.

37. The third issue framed by the Plaintiff was, whether the 1<sup>st</sup> Defendant was a bona fide purchaser of the suit property for value. On this issue, the Plaintiff cited paragraphs 93 and 94 of the Supreme Court



judgment in *Dina Management Limited V. County Government Of Mombasa & 5 Others*, (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court stated that:

“93. As held by the Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* Civil Appeal No.239 of 2009 [2013] eKLR, where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register...

94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter”.

38. The Plaintiff submitted that the 1<sup>st</sup> Defendant did not conduct due diligence before acquiring the suit property. The Plaintiff submitted that the 3<sup>rd</sup> Defendant played a fiduciary role in the exercise of his powers over public land. The Plaintiff submitted that the 3<sup>rd</sup> Defendant abused his office and acted illegally and fraudulently when he allocated the suit property to the 2<sup>nd</sup> Defendant, transferred and registered it in the name of the 1<sup>st</sup> Defendant. The Plaintiff submitted that the 1<sup>st</sup> Defendant was not an innocent purchaser of the suit property for value without notice. The Plaintiff relied on *Chemey Investment Limited v. AG and 2 others* C.A No 349 of 2012, where the court stated that:

“in *Denis Noel Mukhulo & Another v Elizabeth Murungari Nioroge & Another*, CA No. 298 of 2013, this Court explained the situation as follows: “While we agree with the appellants that title registered under the Registered *Land Act* was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act which really does not afford the blanket protection that the appellants claim it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows...The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”

39. The Plaintiff submitted that it was entitled to an order for the rectification of the register of the suit property by the cancellation of the registration of the 1<sup>st</sup> Defendant as the owner of the suit property. The Plaintiff submitted that it was also entitled to an order for mesne profits based on the rent payable under the sublease that the 1<sup>st</sup> Defendant had entered into with the tenant which was occupying the suit property. The Plaintiff submitted that it was entitled to mesne profits at the rate of Kshs. 450,000/- per month from 1<sup>st</sup> September 2020 up to 31<sup>st</sup> August 2021 exclusive of VAT and at the rate of Kshs. 472,000/- per month from 1<sup>st</sup> September 2021 until 31<sup>st</sup> August 2022 also exclusive of VAT.

40. The Plaintiff submitted that the 1<sup>st</sup> Defendant remained in occupation of the suit property as a trespasser. The Plaintiff submitted that it was entitled to an order of injunction to restrain the trespass and an order for vacant possession. On the issue of costs, the Plaintiff submitted that the costs follow the event unless the court for good reason orders otherwise. The Plaintiff submitted that it had proved



its case against the Defendants on a balance of probabilities and urged the court to enter judgment in its favour.

41. The Interested Party filed submissions dated 14<sup>th</sup> February 2024. The Interested Party submitted that the Interested Party was the owner of the properties known as Block 3 and 7 situated in Kisumu County as delineated in survey plan FR/43/53 of 1935. The Interested Party submitted that these parcels of land were designated for workshops, station building, staff quarters and railway expansion within Kisumu industrial area. The Interested Party submitted that the 1<sup>st</sup> Defendant was irregularly allotted Kisumu Municipality/Block 7/446(the suit property) that was excised from the Interested Party's land without its authority, knowledge or consent. The Interested Party submitted that the 1<sup>st</sup> Defendant irregularly acquired the suit property in collusion with officials from the Ministry of Lands and was irregularly issued with a title. The Interested Party submitted that the irregular acquisition of the suit property by the 1<sup>st</sup> Defendant greatly affects the operations of the Interested Party which is constrained of space in light of the structures built on its property by the 1<sup>st</sup> Defendant.
42. The Interested Party submitted that the suit property was the subject of Kisumu ELC Petition No. 19 of 2019, Harjot Singh Dhanjal v. The Hon. Attorney General and Kenya Railways Corporation in which the court in a judgment delivered on 29<sup>th</sup> April 2020 found that the suit property falls within the land vested in the Interested Party, Kenya Railways Corporation through Legal Notice No. 24 of 1986.
43. The Interested Party submitted that the title held by the 1<sup>st</sup> Defendant in respect of the suit property should be cancelled since the land was not available for allocation to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Interested Party relied on Dina Management Limited v. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) (supra) where the court stated that:

“The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to HE Daniel T Arap Moi or for further alienation... We therefore agree with the appellate court that the appellant's title is not protected under article 40 of *the Constitution* and the land automatically vests to the 1st respondent pursuant to article 62(2) of *the Constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence.”

44. The Interested Party submitted that the Commissioner of Lands was exercising delegated powers and as such had to exercise those powers as provided in the enabling statute, the Government Lands Act, Chapter 280 Laws of Kenya (now repealed). The Interested party also cited James Joram Nyaga & Another v. the Hon. Attorney General & Another(supra) in support of this submission.
45. The Interested Party submitted that in the judgment delivered in Kisumu ELC Petition No. 19 of 2019, Harjot Singh Dhanjal v. The Hon. Attorney General and Kenya Railways Corporation on 29<sup>th</sup> April 2020, the court made the following finding:

“I have scrutinized a copy of the survey plan FR/43/53 and the legal notice no. 245 of 1963 and 24 of 1986 and do find that the suit property falls within the land vested to the Kenya Railways Corporation. The suit property is public land vested to Kenya Railways”

46. The Interested Party submitted that the Plaintiff's suit should succeed and the suit property reverted to the Interested Party.



47. The 1<sup>st</sup> Defendant did not file submissions. I did not see the 1<sup>st</sup> Defendant's submissions on record when writing this judgment.

### **Issues for determination**

48. From the pleadings and submissions on record, the following in my view are the issues arising for determination in this suit;
- a. Whether the allocation of the suit property to the 2<sup>nd</sup> Defendant and the subsequent transfer of the same to the 1<sup>st</sup> Defendant was lawful;
  - b. Whether the transfer of the suit property by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant conferred upon the 1<sup>st</sup> Defendant any interest in the suit property;
  - c. Whether the Plaintiff is entitled to the reliefs sought in the plaint, and
  - d. Who is liable for the costs of the suit?

### **49 Analysis and determination of the issues arising**

#### **Whether the allocation of the suit property to the 2<sup>nd</sup> Defendant was lawful**

50. It is common ground that this is not the first time that the dispute over the ownership of the suit property has been before the court. The suit property was in dispute in Kisumu ELC Petition No. 19 of 2019, Harjot Singh Dhanjal v. Attorney General & Kenya Railways Corporation [2020] eKLR. Harjot Singh Dhanjal, the 1<sup>st</sup> Defendant herein, brought the petition to challenge what he termed as arbitrary deprivation of the suit property by the Interested Party and the Attorney General jointly and severally. In the judgment delivered in that matter on 29<sup>th</sup> April 2020, the judge captured Harjot Singh Dhanjal's complaint as follows:

“...On 26<sup>th</sup> September 2019 officers from the Kenya Railways Corporation and the ethics and anti-corruption commission visited the property and verbally informed the Petitioner's tenant that the suit parcel belongs to Kenya Railways Corporation and that they were in the process of forcibly recovering it for the said Corporation. That the Kenya Railways Corporation published notices in the Daily Nation newspaper to the effect that the Corporation was through the EACC reclaiming and possessing its properties. That the government and the 2<sup>nd</sup> Respondent have been undertaking a wave of demolition of structures across the city on the claim that they were built on the 2<sup>nd</sup> Respondent's land. That the Petitioner is justifiably apprehensive that unless the Respondents are restrained they will demolish and bring down the Petitioner's building. The Petitioner asserted that the actions of the government, its officers and the 2<sup>nd</sup> Respondent offend the provisions of Articles 47, 50 and Sections 4 and 12 of the Fair Administrative Actions Act. That the Respondents have been acting and continue to act with gross impunity without any regard for the rights of citizens and the provisions of *the Constitution* and statutes. That the Petitioner's right to a fair hearing has been violated by his being punished without being heard. That he has been subjected to severe anxiety mental torture suffering and indignity in violation of Articles 10 and 28 of *the Constitution*.”



51. In the said judgment, the court (Ombwayo J.) stated as follows:

“There is evidence that the suit property vests in the Kenya Railways Corporation vide legal notice number 24 of 1986 wherein it was declared that all land of the East Africa Railways Corporation vested in the corporation by any written law as well as any land conveyed to that corporation or otherwise placed at that corporation's disposal whether such land was in use or reserved for use by that corporation including premises used for the administration and control of the services provided by the administration, railway lines, workshops and training schools together with the curtilage thereof or other land then enjoyed therewith.

I have scrutinised the copy of survey plan FR/43/53 and the legal notice no 245 of 1963 and 24 of 1986 and do find that the suit property falls within land vesting to The Kenya Railways Corporation. The suit property is part of public land vested to Kenya Railways.

However, I do find that the actions of the Respondents jointly and severally to enter into, invade the suit property registered in the petitioners name and erect a fence around it with the intention of blocking access and egress onto and out of the property and interfering with the quiet enjoyment thereof without his consent, permission or concurrence and against his will as protected by Articles 40 & 60 of *the Constitution* was a violation of his right, and without following due Constitutional and statutory processes is a violation of the Petitioner's Constitutional right to fair administrative action protected by Articles 47 & 50 of *the Constitution*.”

52. In the said petition, the court found that the suit property was created from the land that was reserved for the Interested Party. The court was of the view however that the Interested Party was required to follow the due process in recovering the suit property from the 1<sup>st</sup> Defendant which entailed filing a suit, serving the 1<sup>st</sup> Defendant, tendering evidence in proof of its claim over the property to the satisfaction of the court and obtaining judgment for cancellation of the 1<sup>st</sup> Defendant's title and possession of the suit property. This suit was brought in compliance with the aforesaid due process requirements.

53. There is no evidence that the 1<sup>st</sup> Defendant appealed to the Court of Appeal against the findings by the court in Harjot Singh Dhanjal v. Attorney General & Kenya Railways Corporation (supra). The court that determined the earlier petition by the 1<sup>st</sup> Defendant had more or less the same material that was placed before this court by the Plaintiff herein and the 1<sup>st</sup> Defendant. I have reviewed the same material. I have reached the same conclusion that the suit property was created from land that was reserved for the Interested Party. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not challenge the evidence that was presented by the Plaintiff in the form of; Kisumu Station Plan showing Railways Boundary dated 19<sup>th</sup> July 1902 (PEXH.1A), Uganda Railways Plan of Port Florence Township (now Kisumu Town) prepared in 1908 (P.EXH.1B) which also showed the boundary of Railways land, and the Plan of Kenya Uganda Railways and Harbours (FR 43/53) dated 24<sup>th</sup> August 1935 showing Railway Reserve, Sections LV, LVIII and LX (P.EXH.34). These plans showed the boundaries and size of the land that was reserved for the Railway. All the plans placed the suit property within the land that was reserved for the Railway. The land was initially vested in East African Railways Corporation through Legal Notice No. 440 of 1963. After the dissolution of the East African Community, the land was vested in Kenya Railways Corporation, the Interested Party through Legal Notice No. 24 of 1986.

54. There is no evidence that the land from which the suit property was created was de-gazetted from being part of the land that was vested in the Interested Party through Legal Notice No. 24 of 1986 before the same was allocated to the 2<sup>nd</sup> Defendant on 17<sup>th</sup> December 1990. It is therefore my finding that the



suit property was reserved for the Interested Party when it was allocated to the 2<sup>nd</sup> Defendant on 17<sup>th</sup> December 1990 as Kisumu Municipality-Unsurveyed Commercial Plot.

55. I agree with the Plaintiff and the Interested Party that since the suit property was reserved for the Interested Party, the same was not available to the Commissioner of Lands for alienation. The Commissioner of Lands could only allocate unalienated government land. Section 3(a) of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed) provides that;

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

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

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

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

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

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

58. It is not disputed that land that is reserved by the government for public use is not unalienated government land unless the same is surrendered or the reservation is revoked or cancelled. There is no evidence that the Interested Party surrendered the suit property to the government or that the same was de-gazetted as part of the Railway reserve. This means that the suit property remained reserved for the Interested Party’s use at the time it was allocated to the 2<sup>nd</sup> Defendant.

59. I also agree with the Plaintiff that even if the suit property was unalienated government land, the Commissioners of Lands who allocated the same to the 2<sup>nd</sup> Defendant had no power to do so. The proviso to section 7 of the Government Lands Act (now repealed) on the powers of the Commissioner of Lands that I have reproduced above provides as follows:

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

60. In *James Joram Nyaga & Another v. The Hon. Attorney General & Another* (supra), the court stated that Section 7 of the Government Lands Act limited the power of the Commissioner of Lands to execute leases or, conveyances on behalf of the President and that the proviso to the section specifically limited the power to alienate unalienated land to the President. The court found that the Commissioner of Lands had no authority to alienate the land that was in dispute since the allocation was the preserve of the President.



61. I agree with the Plaintiff that the Commissioners of Lands who allocated the suit property to the 2<sup>nd</sup> Defendant had no power to do so. The power was vested in the President. In the absence of evidence that the President approved the allocation, the same was illegal having been made in excess of the powers that were conferred upon the said Commissioners of Lands. As submitted by the Plaintiff, there was also no evidence that the 2<sup>nd</sup> Defendant applied to be allocated the suit property. From the evidence on record, the 2<sup>nd</sup> Defendant was incorporated in May 1990. On 17<sup>th</sup> December 1990, it was allocated the suit property. Even before he accepted the allotment and paid the requisite charges, it transferred the suit property informally to the 1<sup>st</sup> Defendant on 24<sup>th</sup> January 1991 barely a month after allocation. The evidence before the court shows that the 2<sup>nd</sup> Defendant wrote to the Commissioner of Lands on 17<sup>th</sup> January 1991 seeking to transfer the suit property to the 1<sup>st</sup> Defendant so that he could “develop another plot which I have been allocated”. There is no doubt that the allocation was for speculative purposes. According to the letter of allotment, the 2<sup>nd</sup> Defendant was to pay a total of Kshs. 195,510/- for the allotment. Even before the 2<sup>nd</sup> Defendant accepted the allotment and paid the said amount, it had already got a purchaser for the land in the name of the 1<sup>st</sup> Defendant who paid it Kshs. 400,000/- for the property. Before accepting the allotment, paying the necessary charges and having the title issued in its name, the 2<sup>nd</sup> Defendant had no proprietary interest in the suit property that it could sell to the 1<sup>st</sup> Defendant. The Commissioner of Lands closed its eyes to this illegal transaction which was contrary to the terms of the allotment and even consented to it. I cannot agree more with the Plaintiff that the 3<sup>rd</sup> Defendant who was the then Commissioner of Lands abused his powers in the purported allocation of the suit property to the 2<sup>nd</sup> Defendant and the subsequent transfer of the same to the 1<sup>st</sup> Defendant.
62. In *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR the court stated that:
- “...When a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”
63. It is my finding from the foregoing that the suit property was allocated to the 2<sup>nd</sup> Defendant and transferred to the 1<sup>st</sup> Defendant unlawfully and unprocedurally. The property having been reserved for the Interested Party was not available for allocation and even if it was, the process through which the same was allocated was irregular and unlawful as demonstrated above.

**Whether the transfer of the suit property by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant conferred upon the 1<sup>st</sup> Defendant any interest in the suit property;**

64. In its defence, the 1<sup>st</sup> Defendant relied on Sections 27 and 28 of the Registered *Land Act*, Chapter 300 Laws of Kenya (now repealed) and Section 26(1) of the *Land Registration Act* 2012 in support of its title to the suit property. Sections 27 and 28 of the Registered *Land Act* provide as follows:

27. Subject to this Act -

- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
- (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed



rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -
- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
- Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.
65. Section 143(1) and (2) of the Registered *Land Act* provides as follows:
- (1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.
  - (2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default.
66. Sections 24, 25, 26 and 80 of the *Land Registration Act* 2012 provide as follows:
24. Subject to this Act—
- (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and
  - (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
- 25.
- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

67. 80. (1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

- (2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.

68. Article 40 of *the Constitution* provides that:

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).
- (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
  - (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
  - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—



- (i) requires prompt payment in full, of just compensation to the person; and
  - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

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

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

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

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

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

24. There has been a long chain of authorities by the High Court which have stated that the Registrar of Titles or the Registrar of Lands, as the case may be, has no authority to cancel a title. My take is that the Commissioner of Lands or his subordinates, while alienating Government land, can only do so



over unalienated Government land as defined in the Constitution and under the repealed Government of Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose.

25. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Titles Act, cap 281 or the Registered Land Act, cap 300 is null and void ab initio. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. The cancellation of such a “title,” which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office.
26. This is the position that was taken by Justices J.G. Nyamu and R. Wendo in Miscellaneous Civil Application No. 1732 of 2004; James Joram Nyaga & Another -Vs- The Hon. Attorney General and two others where they held as follows:-

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

71. I am of the view that the provisions of the law I have set out above cannot protect a title that was created and acquired illegally. As I have stated, the allocation of the suit property to the 2<sup>nd</sup> Defendant was illegal and irregular. This means that the 2<sup>nd</sup> Defendant did not have a proprietary interest in the suit property that it could pass to the 1<sup>st</sup> Defendant. The purported proprietary interest that the 2<sup>nd</sup> Defendant held was null and void. In *Macfoy v. United Africa Co. Ltd.*[1961] 3 All E.R 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

“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 much ado, though it is sometimes convenient to have the Court to 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”.



72. It was this null and void title that was passed to the 1<sup>st</sup> Defendant. The purported transfer of the suit property by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant did not therefore confer upon the 1<sup>st</sup> Defendant any valid interest in the suit property. In *Wambui v. Mwangi & 3 others, (Civil Appeal 465 of 2019)* [2021] KECA 144 (KLR) the Court of Appeal stated as follows:

“70. Sixth, the title was also tainted with nullity in that the court process on the basis of which the title to the suit property was anchored was subsequently declared null and void abinitio. The position in law as we have already highlighted above is that anything founded on nullity is also null and void and of no consequence. The title allegedly vested in the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having stemmed from court proceedings that were subsequently declared null and void also stood vitiated by the same nullity and of no consequence. The Judge cannot therefore be faulted for stating the correct position in law in the manner done.

71. Seventh, section 80 of the Act is explicit that any title founded on irregularity, unprocedurally or a corrupt scheme stands vitiated. The title purportedly acquired by the 3<sup>rd</sup> respondent and subsequently passed on to the appellant having been demonstrably shown to have been tainted with fraud, deceit and nullity fits the description of title that has been acquired not only irregularly and unprocedurally but also through a corrupt scheme. The corrupt scheme herein arises from the facts informing the vitiated High Court proceedings which we find no need to rehash but adopt as already highlighted above.

72. In light of all the above, we reiterate that the Judge’s reasoning as to why appellant’s title to the suit property was vitiated was well founded both in fact and in law and is therefore unassailable.”

73. Due to the foregoing, it is my finding that the 1<sup>st</sup> Defendant did not acquire valid title to the suit property.

#### **Whether the Plaintiff is entitled to the reliefs sought in the plaint**

74. From the foregoing findings, I am satisfied that the Plaintiff has proved its claim against the Defendants on a balance of probabilities. I have set out earlier in the judgment the reliefs sought by the Plaintiff against the Defendants. In my view the Plaintiff has established a case for the grant of prayers (i) to (vi) of the Plaint. I am not inclined to award the Plaintiff mesne profits or general damages for trespass. I am of the view that the Interested Party slept on its rights for too long. The suit property was allocated to the 2<sup>nd</sup> Defendant in 1990. The same was transferred to the 1<sup>st</sup> Defendant in 1991 and the 1<sup>st</sup> Defendant was issued with a title in 1992. The 1<sup>st</sup> Defendant started developing the suit property in February 2004 and completed the construction it was undertaking on the property in August 2004. The 1<sup>st</sup> Defendant developed and occupied the suit property under the watch of the Interested Party. It was until 2019, 15 years later after the 1<sup>st</sup> Defendant had developed the property and occupied the same that the Plaintiff and the Interested woke up from slumber and started the recovery proceedings. It would be unfair in the circumstances to condemn the 1<sup>st</sup> Defendant to pay mesne profits or damages to the Plaintiff. The Plaintiff and the Interested Party should be contented with the recovery of the property from the 1<sup>st</sup> Defendant. For the same reason, I decline to award the Plaintiff and the Interested Party the costs of the suit.



## **Conclusion**

75. In conclusion, I enter judgment for the Plaintiff against the Defendants for;
- a. A declaration that the allocation of all that property known as Kisumu Municipality/Block 7/446 (the suit property) by the 3<sup>rd</sup> Defendant to the 2<sup>nd</sup> Defendant as Kisumu Municipality-Uns. Commercial Plot was null and void and was ineffectual to confer any right, interest or title in the property upon the 2<sup>nd</sup> Defendant.
  - b. A declaration that the subsequent transfer of the suit property by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant and the issuance of a lease and a certificate of lease to the 1<sup>st</sup> Defendant by the 3<sup>rd</sup> Defendant in respect thereof was null and void and ineffectual to confer any right, interest or title in the property upon the 1<sup>st</sup> Defendant.
  - c. An order directing the Chief Land Registrar to rectify the register of the suit property by cancelling the registration of the 1<sup>st</sup> Defendant as the leasehold proprietor of the suit property together with the lease and certificate of lease that were issued to the 1<sup>st</sup> Defendant and restoring the property in the name of the Interested Party as the leasehold proprietor thereof.
  - d. An order for vacant possession of the suit property. The 1<sup>st</sup> Defendant shall vacate and handover possession of the suit property to the Plaintiff and the Interested Party within 90 days from the date hereof in default of which the Plaintiff shall be at liberty to apply for warrants for the 1<sup>st</sup> Defendant's forceful eviction from the property.
  - e. An order for a permanent injunction subject to order (d) above restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves or through their agents, servants or employees from trespassing, transferring, developing, entering upon, leasing, wasting and/or dealing in any manner whatsoever with the suit property save by transferring or handing over possession of the property to the Interested Party.
  - f. Each party shall bear its costs of the suit.

**DATED AND DELIVERED AT KISUMU ON THIS 4<sup>TH</sup> DAY OF JULY 2024**

**S. OKONG'O**

**JUDGE**

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

Ms. Ochola for the Plaintiff

Mr. Maganga for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant

Mr. Obuya for the Interested Party

Ms. J. Omondi-Court Assistant

