



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 122 OF 2008

KENYA ANTI-CORUPTION COMMISSION.....PLAINTIFF

VERSUS

ESTHER NYABATE NGARE.....1ST DEFENDANT

SAMMY SILAS KOMEN MWAITA.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. By a Plaint dated 23rd September, 2008 and amended on 7th December, 2010, the Plaintiff filed suit against the Defendants seeking the following orders:

- a) A declaration that the transfer of the Certificate of Lease registered and issued on 20th June, 2002 in favor of the 1st Defendant over the parcel of land described as KISII BLOCK 3/430 (hereinafter referred to as the suit Property) was issued *ultra vires* the statutes and fraudulently and is thus illegal, *null and void ab initio*;
- b) An order directed to the Land Registrar, Kisii County to rectify the register by cancellation of the entries relating to the transfer of lease and Certificate of Lease registered and issued respectively on 20th June, 2002 in favor of the 1st Defendant over the Suit Property;
- c) An order for the vacant possession of the suit property;
- d) An order for permanent injunction restraining the 1st Defendant whether by herself, servant or agents from alienating, transferring, charging, leasing, entering, taking possession, or in the manner howsoever described from dealing with the suit property other than by way of surrender to the county council of Gusii;
- e) General damages against the 2nd Defendant for misfeasance in office;
- f) Costs of and incidental to this suit together with interest.

2. The Plaintiff pleaded that by virtue of the provisions of the Constitution, the Trust Land Act and Gazette Notice No. 1937 of 31/5/1966, 215.85 acres of land within Kisii town was set apart as Trust Land and vested in the County Council of Gusii (hereinafter referred to as the Council).

3. On 6th February 1995, the Council was issued with a Certificate of Lease in respect of parcel number KISII MUNICIPALITY/BLOCK 3/332 measuring approximately 5.868 hectares (14.4 acres) which was set apart for purposes of establishing a Community Development Centre as per the Part Department Plan No. KSI/37/85/10.

4. Sometime between 1998 and 2000, the Commissioner of Lands without reference to the Council approved and caused to be effected subdivision and change of user of land parcel number KISII MUNICIPALITY/BLOCK 3/332 into 47 different parcels numbered KISII MUNICIPALITY/BLOCK 3/420-467.

5. On 4/6/2002, the Council was registered as the proprietor of one of the subdivisions KISII MUNICIPALITY/BLOCK 3/430 measuring

0.0540 Hectares (hereinafter referred to as the suit property). The suit property was subsequently transferred to the 1st Defendant and she was issued with a Certificate of Lease on 20/6/2002.

6. It is the Plaintiff's case that the subdivision, change of user of KISII MUNICIPALITY BLOCK 3/332 and the transfer of the suit property to the 1st Defendant was carried out fraudulently with the object of improperly alienating public land and is therefore invalid, null and void and conferred no estate, interest or right in or over the suit property to the 1st Defendant.

7. The Plaintiff further pleaded that the 2nd Defendant owed the Government of Kenya as his employer a fiduciary duty to act in good faith which he failed to do and is thus liable for damages for misfeasance in public office.

8. The 1st Defendant filed a statement of Defence dated 23rd June, 2009 in which he denied the Plaintiff's claim and stated that she acquired the leasehold interest in the suit property lawfully and after complying with all the requirements and pre-requisites put forth by the Council. She deponed that the Council, after due deliberations, advised the Commissioner of Lands to allocate the property to her and so there was nothing unprocedural or fraudulent about the transaction. She added that neither the Council nor the Commissioner of Lands had sworn any Affidavit and complained about impropriety or illegality in the allocation of the suit land to her.

9. The 2nd Defendant on his part filed a statement of Defence dated 27th May, 2010 denying all the allegations raised by the Plaintiff against him and stated that all he did concerning the approvals in question was within his statutory mandate.

10. The matter was fixed for hearing on diverse dates between 4th March 2021 and 22nd July 2021 but despite being served with hearing notices, neither the Defendants nor their Advocates attended court. Upon confirming that the Plaintiff had served the Defendants and filed Affidavits of service as proof of service the court proceeded to hear the Plaintiff's case ex parte.

PLAINTIFF'S EVIDENCE

11. At the hearing of the Plaintiff's case, the Plaintiff called three witnesses to testify on its behalf.

12. **Mr. James Cheruiyot** who is Surveyor with the Ministry of Lands and Physical Planning based in Uasin Gishu County and who previously worked in Kisii County testified as PW1. He adopted his witness statement dated 24th January, 2017 as his evidence in this case. He told the court that he was conversant with the case because he worked in Kisii County as a Surveyor between 2005 and 2017. He testified that there were no records in the Kisii Land Survey office authorizing the sub-division of parcel number Kisii Municipality Block 3/332 and that if there was any such subdivision then the same must have been done by a private surveyor. He testified that during his site visit to the suit property in 2008 there was nobody in possession of the same.

13. **Mr. Dedan Ochieng' Okwama** who introduced himself as an Investigator testified as PW2 and adopted his witness statement dated 23rd November, 2021 as his evidence and produced the documents in the Plaintiff's List of Documents as the Plaintiff's exhibits. In his testimony Mr. Okwama testified that in the course of his investigations, he together with his colleagues discovered that the suit property was reserved for public use and specifically for a Community Development Centre. He stated that they established that on the suit property there existed a Nursery School, Community Hall, Home Craft Training Centre and Staff Offices. He contended that the allocation of the suit property to the 1st Defendant was not proper as the same was not available for private use. He further testified that the issuance of the lease certificate to the 1st Defendant was not proper as there was no Council resolution to that effect and that the change of user was authorized without a Part Development Plan. He reiterated that once a property is reserved for public use, it is no longer available for private use unless the procedure laid down in the law is followed and that in this particular case the said procedure was not followed.

14. **Mr. Wenslaus Wekesa Wanyama**, who currently works in Ardhi House Nairobi as a Principal Physical Planner and was formally stationed in Kisii testified as PW3. He adopted his witness statement as his evidence in this case. He testified that the suit property was part of the public land reserved for a Community Centre under the then County Council of Gusii. It was his evidence, that their office did not receive any request for subdivision of parcel no. 332 nor did they receive any Part Development Plan in respect thereof. He told the court that the only Part Development Plan that was prepared was for the Community Development Centre and this is what the Commissioner of Lands used to issue a letter of allotment. He stated that once the land is reserved for public use the same is cannot be allotted for private use without following the procedure he had outlined in Paragraph 2 of his witness statement.

15. Thereafter, the court directed the Plaintiff to file written submissions. The Plaintiff filed its submissions on 22nd August, 2021.

16. In her submissions, learned counsel for the Plaintiff traced the background of the suit property which is as follows. Through a Gazette Notice No. 1937 of 31st May 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County, Council within whose jurisdiction it was situated as provided for under section 115 of the repealed Constitution of Kenya.

17. Through an approved Part Department Plan No. KSI/37/85/10, a portion of the land vested in trust in the County Council of Gusii was reserved for a Community Development Centre, Gusii Training Institute.

18. The County Council of Gusii was issued with a letter of allotment dated 6.2.1986 in respect of the said parcel of land although the Community Development Centre was not issued with a separate title document.

19. On or about 31st January, 1995, the Land Registrar, Kisii, opened a register in respect of the aforesaid reserved land and gave it title number KISII MUNICIPALITY BLOCK 3/332 measuring approximately 5.868 Hectares (14.4 acres). A Certificate of Lease was subsequently issued to the Council on 6th February, 1995 for a term of 99 years from 1.2.1986. One of the terms in the special conditions in

the Certificate of Lease was that “the land and buildings shall only be used for community development centre purposes”

20. KISII MUNICIPLAITY BLOCK 3/332 was developed as a Community Centre and had the following facilities; a nursery school, community hall, a home craft training centre and staff housing for council staff.

21. On or about 17th May, 1995, the then Clerk to the County Council wrote to the 2nd Defendant purporting to enclose an extract of a minute regarding subdivision of the plot. It was to be subdivided into about 15 plots.

22. On 21st July, 1995 an officer purporting to be acting on behalf of the Permanent Secretary, Ministry of Local Government, wrote to the 2nd Defendant stating that the Ministry had no objection to the proposed subdivision.

23. It is counsel’s submission that the suit land which was excised from Kisii Municipality/Block 332 was at all material times public land as it had been reserved in the approved Development Plan No. KSI/37/85/10 of 18.10 1985 and as such, could not be re-allocated to private individuals. She cited that the case of **James Joram Nyaga & Another v A.G & Another (2007 eKLR)** where the court referred to Section 3 of the Government Lands Act and observed as follows:

“The above section clearly limits the power of the Commissioner to executing conveyances on behalf of the President and the provision 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 dated 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 registrable title under the Registration of Titles Act Cap 281 of the Laws of Kenya.”

24. Counsel submitted that under Section 144(3) of the Local Government Act Cap 265 (now repealed), which was in force at the material time, the Minister for local Government had to approve any change of use of land under a local authority such as Gusii County Council. This did not happen in the instant case.

25. It is counsel’s contention that the scheme to sub-divide parcel Kisii Municipality/Block 332 and re-allocate portions thereof to the 1st Defendant among other people was marred by fraud by persons holding office in the then Gusii County Council. PW2 produced exhibit 4 which is a letter dated 18.9.1995 from the Chairman of the Council, Mr. Joseph Rasugu Ntabo to the Commissioner of Lands objecting to the proposed subdivision on account of fraudulent dealings with the land. He also produced Plaintiff’s Exhibit 5 which is a letter dated 21.9.1995 from the Commissioner of Lands to the Gusii County Council stopping further processing of the request for subdivision due to the issues raised by Mr. Ntabo.

26. Counsel submitted that even though the Council obtained approval to sell more identified properties including 4.5 acres out of the land reserved for the Community Development Centre, Gusii County Council purported to hold a meeting in which they approved the subdivision of Kisii Municipality/Block 332 into 44 parcels which were given new numbers and allocated to individual beneficiaries including the 1st Defendant, leaving the Council with only 2.755 acres. It was her submission that the said subdivision was contrary to the Ministerial approval and the applicable statutes such as the Trust Land Act, Land Planning Act, Physical Planning Act and Local Government Act. Counsel submitted that the said alienation was conducted in a manner that constitutes corrupt conduct as envisaged under the Anti-corruption and Economic Crimes Act, 2003. She urged that court to adopt the reasoning in the case of **Kenya Anti-Corruption Commission v Lima Limited & 2 Others (2019) eKLR** where the Court stated as follows:

“The land in dispute was already alienated for public utilities and was fully developed with a High Court Station, district hospital, fire station and Administration Police Camp and therefore it could not be deemed unalienated. The 2nd Defendant therefore had no authority in law to make the alienation and therefore no interest could be conferred upon the 1st Defendant.”

27. Counsel submitted that the purported transfer of land to the 1st Defendant was tantamount to a second allocation which was illegal and fraudulent. She relied on the case of **Kenya Anti-Corruption Commission v Frann Investment Limited & 6 Others (2020) eKLR** where the court was of the view that where land had been specifically assigned for a public purpose, then so long as the purpose remained, that land ought to be considered to be part of Government land that cannot be alienated to private individuals for private use regardless of whether or not an allotment letter or lease had been issued.

28. It was counsel’s contention that the procedure laid down in the law was not followed as there was no evidence of a Council resolution authorizing the Clerk and Chairman of the County Council to execute the Transfer of Lease on the strength of which a Certificate of Lease was issued to the 1st Defendant she was of the view that any person who caused the said lease to be issued acted without authority which conduct amounts to abuse of office and fraudulent disposal of public land.

29. Furthermore, there was no Gazette Notice published by the Council inviting objections from members of the public to the proposed subdivisions or change of user nor was there any evidence that the 1st Defendant paid for the suit land. All these omissions point the fact that the procedure used by the 1st and 2nd Defendant in acquisition and transfer of the lease to the 1st defendant was tainted with fraud and illegality.

30. Counsel submitted that the 2nd Defendant who served as the Commissioner of Lands at the material time had a fiduciary duty by virtue of his office to safeguard public interest but he failed to do so. She urged the court to hold him liable for misfeasance. She relied on the case of **Jones v Swansea City Council (1990) 3 All ER 731** where Slade J held thus:

“the essence of the tort as I understand it is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred upon him not for his personal advantage but for the benefit of the public good or a section of the public, either with intent to injure another or in the knowledge that he was acting ultra vires”.

31. Citing the case of **Republic v Minister for Transport & Communications & 5 Others Ex-parte Waa Ship Garbage Collectors & 15 others (2006)1KLR E&L** counsel urged the court to nullify the 1st Defendant’s title.

ISSUES FOR DETERMINATION

32. The main issues for determination are:

- i. Whether the parcel of land known as KISII MUNICIPALITY /BLOCK/3/430 constitutes land that was set apart as trust land and vested in the County Council of Gusii under the provisions of the Trust Land Act.
- ii. Whether the Defendants acted fraudulently in alienation of the suit property as particularized in paragraph 10 of the Amended Plaintiff.
- iii. Whether the 1st Defendant holds a good title in respect of the suit property.
- iv. Whether the 2nd Defendant is liable for misfeasance in public office.
- v. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

33. The Plaintiff’s case is that the subdivision and change of user, of KISII MUNICIPALITY BLOCK 3/332 and the transfer of parcel number KISII MUNICIPALITY BLOCK 3/430 to the 1st Defendant was carried out fraudulently with the object of improperly alienating trust/public land which was reserved as a Community Development Centre. The said transfer is therefore invalid, null and void. This assertion was supported by both oral and documentary evidence.

34. PW2 testified that when he commenced investigations with regard to the suit property he established that the entire area was reserved for use as a Community Development Centre and it had several facilities. These include a Nursery School, Community Hall, Home Craft Training Centre and staff houses. All these properties were meant for public use and not private use. He produced documents to show that through a Gazette Notice No. 1937 of 31st May 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County. The Community Development Centre was established pursuant to an approved Part Department Plan No. KSI/37/85/10. PW1 told the court that when he visited the suit property it had a school, community hall and staff houses.

35. It is therefore clear that parcel No. KISII MUNICIPALITY/BLOCK 3/430 which is a sub-division of parcel No. KISII MUNICIPALITY BLOCK 3/332 constitutes land that was set apart as trust land and vested in the County Council of Gusii under the provisions of the Trust Land Act.

36. The second issue for determination is whether the Defendants acted fraudulently in alienating the suit property.

37. In his witness statement which was adopted as his evidence PW2 gave an elaborate explanation of the procedure governing the alienation of public land. This procedure was aptly captured by Cheron J in the case of **Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR** where he stated as follows:

*“The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See **Harison Mwangi Nyota v Naivasha Municipal Council & 20 others [2019] eKLR***

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*The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See **Nelson Kazungu Chai & 9 Others vs. Pwani University College (2014) eKLR***

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The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include setting price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which the term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazettelement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

*The sixth step would be for the issuance of an allotment letter to the allottee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: **Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 (Nyeri)**; and in **Dr. Joseph N.K. Arap Ng'ok v Justice Moijo Ole Keiyua & 4 others C.A.60/1997***

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*In order for an allotment letter to become operative, the allottee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: **Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR***

*The allotment letter also must have attached to it a part development plan (PDP). See the decision in **African Line Transport Co. Ltd Vs The Hon .AG, Mombasa HCCC No.276 of 2013** where Njagi J held as follows:*

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The seventh step, which comes after the allottee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease.

38. In the instant case it is clear that the above-mentioned procedure was not followed. In particular, PW2 pointed out that the sub-division that was done was not proper as there was no application for sub-division and no approval was given for the sub-division of the suit property into 48 plots.

39. There is no evidence of that another Part Development Plan was ever drawn and approved by the 2nd Defendant apart from Part Development Plan No. KSI/37/85/10 nor is there any evidence of a gazette notice making the suit property available for disposal to private citizens like the Defendant via public auction. Further, no evidence is presented to show the suit property was acquired through public auction as required.

40. Furthermore, there is no evidence that an allotment letter was issued to the 1st Defendant nor is there any evidence that the 1st Defendant made payment of the price that was expected to have been set out in the Allotment letter.

41. Additionally, there are no cadastral Survey Maps that were authenticated and approved by the Director of Surveys nor is there evidence that there was a beacon certificate issued to the 1st Defendant.

42. PW2 produced exhibit 4 which is a letter dated 18.9.1995 from the Chairman of the Council, Mr. Joseph Rasugu Ntabo to the Commissioner of Lands objecting to the proposed subdivision on account of fraudulent dealings with the land. He also produced Plaintiff's Exhibit 5 which is a letter dated 21.9.1995 from the Commissioner of Lands to the Gusii County Council stopping further processing of the request for subdivision due to the issues raised by Mr. Ntabo. He told the court that he established that the original title for KISII MUNICIPALITY/ BLOCK 3/332 which was reserved for public use was never surrendered to facilitate the sub-division so the whole process was irregular.

43. As correctly submitted by counsel for the Plaintiff, even though the Council obtained approval to sell more identified properties including 4.5 acres out of the land reserved for the Community Development Centre, Gusii County Council purported to hold a meeting in which they approved the sub-division of KISII MUNICIPALITY/BLOCK 332 into 44 parcels which were given new numbers and allocated to individual beneficiaries including the 1st Defendant, leaving the Council with only 2.755 acres.

44. It was her contention that the said sub-division was contrary to the Ministerial approval and the applicable statutes such as the Trust Land Act, Land Planning Act, Physical Planning Act and Local Government Act. Counsel submitted that the said alienation was constructed in a manner that constitutes corrupt conduct as envisaged under the Anti-Corruption and Economic Crimes Act, 2003.

45. In view of the foregoing, I find and hold that the 1st and 2nd Defendants acted fraudulently in alienating parcel KISII MUNICIPALITY BLOCK 3/332.

46. The third issue for determination is whether the 1st Defendant holds a good title in respect of the suit property.

47. Having held that the alienation of KISII MUNICIPALITY BLOCK 3/332 was fraudulent, it follows that the resultant titles including land

parcel no. KISII MUNICIPALITY /BLOCK 3/430 tainted with fraud and it is therefore *ultra vires*, illegal, null and void. In saying so, I am guided by the case of **Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR** the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

48. I also rely on the cases of **Kenya Anti-Corruption v Online Enterprises Limited & 4 Others** and **Kenya Anti-Corruption Commission v Fran Investments Limited & 6 Others (2020) eKLR** where the court declared the Plaintiffs’ titles null and void as they had been acquired through a fraudulent process.

49. The fourth issue I must determine is whether the 2nd Defendant is liable for misfeasance in public office.

50. The tort of misfeasance in public office has been defined in a persuasive authority, **Jones v. Swansea City Council [1990] 1 WLR 55**, at p.71 (*per Slade, L.J.*):

“The essence of the tort, as I understand it, is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public, either with intent to injure another or in the knowledge that he was acting ultra vires.”

51. In the instant case, counsel for the Plaintiff argued that the 2nd Defendant had committed the tort of misfeasance in public office, because as the Commissioner of Lands at the material time, he had a fiduciary duty by virtue of his office to safeguard public interest but he failed to do so.

52. Counsel further submitted that the 2nd Defendant committed the said offence by authorizing or approving the unlawful subdivision, change of user and transfer of land parcel No. KISII MUNICIPALITY BLOCK 3/332 to private individuals including the 1st Defendant outside his statutory mandate and without due regard to section 117 (1) of the repealed Constitution of Kenya, Section 3, 7, 12 and 13 of the repealed Government Land Act, section 13 of the Trust Land Act, Section 41 (3) and 42 Physical Planning Act and Section 144 (3), (5) of the Local Government Act (now repealed). It is counsel’s contention that the actions of the 2nd Defendant being illegal and fraudulent amounted to depriving the Abagusii Community of the use of the Community Development Center.

53. Since of the 2nd Defendant filed a defence but did not offer any evidence to controvert the accusation against him regarding his actions while serving as the Commissioner of Lands and having found that his actions were fraudulent and illegal, I have no hesitation in holding him liable for misfeasance in public office as he acted in breach of the public trust bestowed upon him.

54. The last issue for determination is whether the Plaintiff is entitled to the reliefs sought.

55. The Plaintiff seeks various prayers in his Complaint, all of which I find that he has proved on a balance of probability. I therefore enter judgment for the Plaintiff and make the following final orders:

- a) A declaration is hereby issued that the lease made to the 1st Defendant on 20th June, 2002 in respect of parcel of land described as KISII MUNICIPALITY BLOCK 3/430 was made in excess of statutory powers of the 2nd Defendant and is thus null and void *ab initio*.
- b) An order of permanent injunction is hereby issued restraining the 1st Defendant, his servants, employees, agents or assigns from trespassing upon, transferring, leasing, wasting and or dealing with the suit property that is KISII MUNICIPALITY BLOCK 3/430 other than by way of transferring the said title to Kisii County Government as the successor to County Council of Gusii.
- c) The Land Registrar Kisii County is hereby directed to rectify the Register by cancelling the lease and Certificate of Lease issued on 20th June 2002 in respect of KISII MUNICIPALITY BLOCK 3/430 in favor of the 1st Defendant.
- d) The 2nd Defendant shall pay General Damages in the sum of Kshs. 1,000,000/= for misfeasance in public office.
- e) The costs of this suit shall be borne by the Defendants jointly and severally.

Dated, signed and delivered at Kisii this 1st day of February, 2022.

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J.M ONYANGO

JUDGE