



REPUBLIC OF KENYA



**Kenya Anti-Corruption Commission v Bhangra Limited & 4 others (Environment & Land Case 9 of 2008) [2022] KEELC 2977 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2977 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 9 OF 2008**

**M SILA, J**

**MAY 5, 2022**

**BETWEEN**

**KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**BHANGRA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**CASTLE DOM PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**DIM AGENCIES LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**LILLYWHITES LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**WILSON GACANJA ..... 5<sup>TH</sup> DEFENDANT**

**The Commissioner of Lands does not have the power to convert a public road into a private plot of land**

*The instant suit challenged the carving out of a plot from a public road by the Commissioner of Lands. The court held that the Commissioner of Lands could not simply, by a stroke of his pen, declare that a public road was no more and that in place thereof was a private plot. The court further held that once land had been set aside for public purpose, it could not be alienated further. The court noted that it had not been shown any law which allowed the municipal councils to create plots out of roads, allocate them to the public and have the Commissioner of Lands issue title to them.*

Reported by Kakai Toili

**Local Governments** - municipal councils - powers of municipal councils - nature of the power of municipal councils to close down roads - whether municipal councils had the authority to create plots out of roads, allocate them to the public and have the Commissioner of Lands issue title to them -, Cap 265 sections 185(2)(b) and (e).

**Land Law** - Commissioner of Lands - powers of the Commissioner of Lands - power to allocate a plot carved out of a road - whether the Commissioner of Lands had power to allocate a plot carved out of a road - whether once land had been set aside for public purpose, it could not be alienated further.



## Brief facts

The plaintiff contended that the suit property was illegally carved out of Tom Mboya Road (Tudor Road), a public road located in Mombasa Island. It was the plaintiff's case that the former Commissioner of Lands (the 5<sup>th</sup> defendant) illegally alienated the suit property and issued an allotment letter to the 1<sup>st</sup> defendant and subsequently a lease dated August 29, 1997 was issued to the 2<sup>nd</sup> defendant. That lease was registered on September 18, 1997 and it was for a term of 99 years. The lease was later transferred to the 3<sup>rd</sup> defendant. Another transfer was effected to the 4<sup>th</sup> defendant. At the time of filing suit, it was the 4<sup>th</sup> defendant holding a leasehold title to the suit property.

The plaintiff contended that all the four companies (1<sup>st</sup>-4<sup>th</sup> defendants) were related and shared directors and ownership, and that the transfers were effected so as to pretend that there was an innocent purchaser for value without notice and to defeat the course of justice. The plaintiff pleaded that the creation of the plot was done fraudulently, *inter alia* because the 5<sup>th</sup> defendant had knowledge that the suit property was a road reserve. It is pleaded that the requisite council resolutions were not given. The 5<sup>th</sup> defendant was pleaded to be guilty of misfeasance in public office and in breach of his fiduciary duties. It was contended that the 1<sup>st</sup> to 4<sup>th</sup> defendants participated in the fraudulent scheme to alienate the land.

The plaintiff sought for among others; a declaration that the lease registered in favour of the 2<sup>nd</sup> defendant over the suit property was issued *ultra vires* the 5<sup>th</sup> defendant's statutory powers and was thus illegal; and an order directed to the Land Registrar, Mombasa District Registry, to rectify the register by cancellation of the entries relating to the transfers made.

The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants pleaded that they were innocent purchasers for value and that the Government and the plaintiff were estopped from disputing the title of the 3<sup>rd</sup> and 4<sup>th</sup> defendants. They denied that the property was alienated fraudulently and added that the title of the 4<sup>th</sup> defendant was not liable to be defeated under the repealed (RLA). They prayed for the suit to be dismissed with costs. The 5<sup>th</sup> defendant denied that the suit property was an unclassified road vested in the Municipal Council of Mombasa (Council) for a public purpose. He further claimed that the issuance of the lease was lawfully done within the provisions of the repealed (GLA) and all particulars of fraud were denied. He pleaded that he acted *intra vires* his powers under the GLA.

## Issues

- i. Whether the Commissioner of Lands had power to allocate a plot carved out of a road.
- ii. Whether municipal councils had the authority to create plots out of roads, allocate them to the public and have the Commissioner of Lands issue title to them.
- iii. Whether once land had been set aside for public purpose, it could not be alienated further.
- iv. What was the nature of the power of municipal councils to close down roads?

## Held

1. The suit property was initially part of the road reserve of Tom Mboya Road. The surveyor who did the survey that created the suit land and three other plots, who testified as PW-3, himself stated he created the suit property from the Tom Mboya Road reserve. The surveyor who created the plots knew from which land the plots were being created from. He had said that it was from the road reserve and the court did not have a reason to doubt it. That position was supported by PW-2, the physical planning officer, and PW-4, the engineering surveyor. They were all experts in that field, and their expert opinion had the consensus that the plot was from a road reserve.
2. Apart from the oral evidence, there was also documentary evidence through the registry index map (RIM), the survey plan of the surveyor and the part development plan (PDP) used to create the plot. A RIM had an amendment section which showed the dates of amendment of the map. A careful study of the RIM in issue showed amendments done on June 17, 1996, that created Plots No. 934 – 937. If a person wanted to know what was there before, s/he simply ignored that amendment, and if s/he



- ignored it, s/he would see the plots being part of the road reserve. It was also there in the survey plan and in the impugned PDP. All that showed how the plots were created. They were not being created from any pre-existing plot, but from the reserve abutting the main Tom Mboya Road.
3. The defendants had not brought any evidence to show that the subject plot was not created from the road reserve. Nothing stopped the defendants from bringing an expert of their own to controvert the expert evidence of PW-2, 3 and 4, and demonstrate that the suit property was not created from a road reserve or that Tom Mboya Road did not have a reserved width of 30.48 meters. The suit property was created from the Tom Mboya Road reserve. Whichever process was followed, the creation and allotment of the plot was illegal.
  4. If the allocation was by the Municipal Council of Mombasa, then it was improper. The court had not been shown any law which allowed the municipal councils to create plots out of roads, allocate them to the public, and have the Commissioner of Lands issue title to them. The fact that allocation of plots was through confidential minutes was very telling in itself. It simply meant that the persons who sat in that meeting knew that what they were doing was scandalous, embarrassing and uncouth, and they would not have wished for the public to be aware of what they discussed in such a meeting. If allocation of plots was lawful, open and transparent, there would be nothing to hide, and no reason to have confidential minutes. From the confidential minutes, there was intention to secretly allot plots to some carefully chosen connected individuals.
  5. Roads had been under the , Cap 399, Laws of Kenya. That law provided at section 8 for conversion or alteration of public roads. Alteration of public roads was to be done by the Minister through a gazette notice. There was no gazette notice from the then Minister in charge of Roads. The Municipal Council of Mombasa could not usurp the powers of the Minister and purport to affect a public road and create plots out of it. Municipal councils had power to close roads, under section 185 of the repealed , but closure of a road and allocation of land out of a road were not the same thing. The power to close roads was simply that, to close a road.
  6. The power to close a road never entailed creation of a plot. Within the exercise of that power, the local authority needed to publish that intention to close a road in the Kenya Gazette and in one or more newspapers (section 185(2)(b) of the repealed ) and also serve the Minister in charge of town planning (section 185(2)(e) of the repealed ). There was no evidence of publication in the newspapers, or notice to the Minister of Town Planning.
  7. A close look at Gazette Notice No. 1099, that which was said to have closed the Tom Mboya Road so as to create plots out of it, doesn't tell under what law it was placed. You could not tell from that gazette notice what law was being followed. If that was the route taken to create and allocate the subject plot, then the plot was improperly created and allocated and the title that emanated therefrom could not be alleged to be a good title capable of being protected.
  8. The Tom Mboya Road was in use by the public. The Commissioner for Lands could not simply, by a stroke of his pen, declare that a public road was no more and that in place thereof was a private plot. The Commissioner of Lands had no power to do so. The allocation was not done by the President. There was no allotment letter and no lease signed by the President. The lease issued to the 2<sup>nd</sup> defendant claimed that it was issued by the President, but that allegation was untrue, for it was there to see that execution was by the Commissioner of Lands. He had no power to allocate such a plot carved out of a road.
  9. Whether the subject title emanated from the procedure outlined by the plaintiff or the procedure claimed by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, either way, the title was not created nor allotted following the proper legal channels. That was a bad title shamelessly created out of a public road.
  10. Once land had been set aside for public purpose, it could not be alienated further. In any event, the positioning of the plot, *vis-à-vis* the existing road, should have put any diligent person into inquiry, as to how the plot was created and whether it was actually properly carved out of the road reserve.



11. The suit property was carved out of a road. A road was one that was set aside for public use. It could not be inferred that it was the intention of the law that the Commissioner of Lands or the Municipal Council of Mombasa, who were entrusted by the public to hold that land on their behalf, could proceed and deal with it as they wished. They could not proceed to create plots out of it to the detriment of the public.
12. There was no evidence that Tom Mboya Road was obsolete and no longer in use. In fact, it was a matter of public notoriety, and the court took judicial notice, that it was a very busy road. It was a very important road for the benefit of the public. The public could not be deprived of land set aside for their benefit by the whims of the Commissioner of Lands working in cahoots with some gluttonous recipients. The Commissioner of Lands abused his powers to create the suit property out of a road reserve that was being used by the public. He had no power to create such a title and the title.
13. Courts would frown upon titles purportedly created out of road reserves. In the instant case, the title was issued under the regime of the repealed and even the instant suit was filed before the RLA was repealed. The therefore applied to the instant situation. Sanctity of title was addressed in section 143 of the . From section 143(1), the court had power to order the cancellation of title where it had been obtained by fraud or mistake. In the circumstances of the instant case, the Commissioner of Lands and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, were all complicit to the fraudulent creation of title and allocation of the suit property.
14. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were not innocent parties at all. They had not offered any explanation as to how an allotment letter was issued to the 1<sup>st</sup> defendant, or how a lease suddenly fell into the laps of the 2<sup>nd</sup> defendant. In their evidence, the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not demonstrate that they were innocent purchasers. In fact, they came across as parties who had a lot to hide. They were all parties to the fraudulent acquisition of a road reserve. Even assuming that they were not guilty of any fraud, then at the very least, the creation of the suit property out of a public road reserve, was a mistake, and under section 143 of the , title could be nullified if it was created by mistake.
15. The person who held the office of Commissioner of Lands could be sued in his personal capacity. The plaintiff did not seek any specific orders against the 5<sup>th</sup> defendant, and save for costs, there was really no order that the court needed to make against the 5<sup>th</sup> defendant.
16. There was insinuation that the Government would have protected the title, that could not be. There was evidence that the Government itself was appalled by the creation of that plot and proceeded to nullify it through Gazette Notice No. 11533 of October 1, 2010. It was only that the Gazette Notice was quashed as the procedure on revocation of titles was not followed. It could not therefore be said that the Government would have protected that title. There was no issue with the non-joinder of the Government in the instant case.

*Suit allowed.*

#### **Orders**

- i. *The title to the suit property was unlawfully issued and it was thereby declared null and void ab initio.*
- ii. *The Chief Land Registrar and the Land Registrar, Mombasa, were ordered to cancel the title to the suit property.*
- iii. *The Director of Surveys was ordered to amend the RIM so as to remove the suit property from the RIM.*
- iv. *A permanent injunction was issued barring the 1<sup>st</sup> – 4<sup>th</sup> defendants and/or their servants/agents from entering, being upon, developing, dealing, or in any other way interfering with the land covered in the nullified title to the suit property.*
- v. *Costs to be borne jointly and/or severally against all the defendants.*

#### **Citations**

#### **Cases**



1. Ethics and Anti-Corruption Commission vs Judith Marilyn Okungu & another (Civil Appeal 183 of 2014; [2017] KECA 413 (KLR)) — Explained
2. Milankumar Shah & 2 others v City Council of Nairobi & others (Civil Case No. 1024 of 2005 (OS)) — Explained
3. Niaz Mohamed Jan Mohamed v Commissioner of Lands & 4 others (Civil Suit 423 of 1996) — Explained

#### Statutes

1. Anti-Corruption And Economic Crimes Act (No. 3 of 2003) — Section 23 — Interpreted
2. Ethics And Anti-Corruption Commission Act (No. 22 of 2011) — Section 3(1) — Interpreted
3. Government Land Act (Repealed) (Cap 280) — In general — Cited
4. Local Authorities Act (Repealed) (cap 265) — Section 185 — Interpreted
5. Public Roads And Roads of Access Act (CAP. 399) — Section 6 — Interpreted
6. Registered Land Act (Repealed) (cap 300) — Section 143 — Interpreted

#### Advocates

None mentioned

## JUDGMENT

(Suit by plaintiff seeking to nullify a title that was created out of a road reserve; evidence showing that the suit property was indeed carved out of a road reserve; no power vested in the Municipal Council of Mombasa or with the Commissioner of Lands to create a private plot out of a road reserve; title declared null and void and orders made for its cancellation)

### A. Introduction and Pleadings

1. This suit was commenced through a plaint filed on January 21, 2008 by the Kenya Anti-Corruption Authority (KACC), which was a public body established under the Anti-corruption and Economics Act, 2003 (repealed). KACC was succeeded by the Ethics and Anti-Corruption Commission (EACC) a public body established under section 3(1) of the *Ethics and Anti-Corruption Commission Act*, Act No 22 of 2011. The 1<sup>st</sup> -4<sup>th</sup> defendants are limited liability companies whereas the 5<sup>th</sup> defendant was a former Commissioner of Lands.
2. The subject matter of this dispute is the land parcel Mombasa Island/Block XI/934. The plaintiff contends that this plot was illegally carved out of Tom Mboya Road (also described as Tudor Road), a public road located in Mombasa Island. It is the plaintiff's case that the 5<sup>th</sup> defendant illegally alienated this land and issued an allotment letter to the 1st defendant (Bhangra Limited) and subsequently a lease dated August 29, 1997 was issued to the 2<sup>nd</sup> defendant (Castle Dom Properties Limited). This lease was registered on September 18, 1997 and it is for a term of 99 years from December 1, 1996. The lease was later transferred to the 3<sup>rd</sup> defendant (Dim Agencies Limited) on November 14, 1997. Another transfer was effected to the 4<sup>th</sup> defendant (Lillywhites Limited) on March 10, 2006. At the time of filing suit, it was therefore the 4<sup>th</sup> defendant holding a leasehold title to the suit property. The plaintiff contends that all the four companies are related, and share directors and ownership, and that the transfers were effected so as to pretend that there was an innocent purchaser for value without notice and to defeat the course of justice. The plaintiff pleads that the creation of the plot was done fraudulently, *inter alia* because the 5<sup>th</sup> defendant had knowledge that this land was a road reserve. It is pleaded that the requisite council resolutions were not given. The 5<sup>th</sup> defendant is pleaded to be guilty of misfeasance in public office and in breach of his fiduciary duties for inter alia failing to comply with



the provisions of the Government Lands Act (now repealed), the Registered Lands Act (now repealed), the Local Authorities Act (now repealed), and other relevant statutes and regulations in the alienation of the suit property. It is contended that the 1<sup>st</sup> to 4<sup>th</sup> defendants participated in the fraudulent scheme to alienate the land.

3. In the plaint, the plaintiff seeks the following orders :-

- a) A declaration that the Lease dated August 29, 1997 and registered on September 16, 1997 in favour of the 2<sup>nd</sup> defendant over the parcel of land described as Mombasa Island/Block XI/934 was issued ultra vires the 5<sup>th</sup> defendant's statutory powers and is thus illegal, null and void *ab initio*;
- b) An Order directed to the Land Registrar, Mombasa District Registry, to rectify the register by cancellation of the entries relating to the issuance of the Lease dated August 29, 1997 and registered on September 16, 1997 in favour of the 2<sup>nd</sup> defendant over the parcel of land described as Mombasa Island/Block XI/934 and all subsequent entries made therein;
- c) An Order directed to the Land Registrar, Mombasa District Registry, to rectify the register by cancellation of the entries relating to the Transfers made;
- d) As against the defendants, an Order for vacant possession of the parcel of land described as Mombasa Island/Block XI/934;
- e) As against the defendants, an order for a permanent injunction to restrain them, their agents, servants, employees and/or assigns from trespassing upon, transferring, leasing, wasting and/or dealing in any manner whatsoever described with the parcel of land described as Mombasa Island/Block XI/934, other than by way of surrender to the Government of Kenya;
- f) As against the 4<sup>th</sup> defendant, general damages;
- g) In the alternative damages by way of compensation as against all the defendants;
- h) Costs of and incidental to this suit;
- i) Interest at court rates on (f), (g), and (h) above.

4. The 2<sup>nd</sup> defendant did not enter appearance to the suit.

5. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed a joint statement of defence. They averred that the suit is misconceived, fatally flawed, and incompetent on the following grounds:- that the plaintiff had no power under the *Anti-corruption and Economic Crimes Act* to bring these proceedings in its corporate name; that the proprietor of the suit property is the Government of Kenya and the 4<sup>th</sup> defendant is the lessee, hence, the suit property cannot be treated as lost property within the meaning of section 7(h) of the Act; that the suit is seeking to nullify the lease issued by the Government without the Commissioner of Lands or the Attorney General being made a party to the suit; and that the provision of section 7 relied on by the plaintiff in instituting these proceedings is unconstitutional. They pleaded that by a lease dated August 29, 1997 made between the 2<sup>nd</sup> defendant and the Government, for a consideration of Kshs. 150,000/= by way of stand premium, the Government let to the 2<sup>nd</sup> defendant all interest in the suit land. Subsequently, the 2<sup>nd</sup> defendant by a transfer of lease registered on 14th November 1997 transferred the suit property to the 3<sup>rd</sup> defendant at a consideration of Kshs 750,000/=. The 3<sup>rd</sup> defendant then transferred its interest on the suit land to the 4<sup>th</sup> defendant by a transfer of lease dated March 10, 2006 for a consideration of Kshs 1,191,680/=. It is further pleaded that the 3<sup>rd</sup> and 4<sup>th</sup> defendants were issued with Certificates of Lease when the suit property was transferred to



them. It is pleaded that the above transfers were consented to by the Government. They pleaded that the Lease of the 2<sup>nd</sup> defendant indicated that the property was to be used for shops, offices and flats, and that the 3<sup>rd</sup> and 4<sup>th</sup> defendants had no duty to go behind the lease to find out if the premises was set aside for any other use prior to the date that it was let to the 2<sup>nd</sup> defendant. They pleaded that at the time of purchase, there was no indication in the land register that the property was excised from a road. They pleaded that they are innocent purchasers for value and that the Government and the plaintiff are estopped from disputing the title of the 3<sup>rd</sup> and 4<sup>th</sup> defendants. They denied that the property was alienated fraudulently and added that the title of the 4<sup>th</sup> defendant is not liable to be defeated under the [Registered Land Act](#). They asked that the suit be dismissed with costs.

6. The 5<sup>th</sup> defendant also filed a statement of defence. He denied that the suit property is an unclassified road vested in the council for a public purpose. He further claimed that the issuance of the lease was lawfully done within the provisions of the [Government Land Act](#) (GLA) (repealed) and all particulars of fraud were denied. He pleaded that he acted *intra vires* his powers under the GLA. He contended that the suit against him is unconstitutional as he ceased to hold the office of the Commissioner of Lands, and that the suit is also selective, scandalous and vexatious, and discloses no cause of action against him personally. He pleaded that the suit is misconceived and an abuse of the plaintiff's powers under the [Anti-corruption and Economic Crimes Act](#).

## **B. Evidence of the Parties**

7. The plaintiff called 7 witnesses and produced the documentation related to the suit property as exhibits.
8. PW-1 was Ridhwan Mohammed, a law clerk with the County Government of Mombasa. He had an earlier written witness statement which he adopted as his evidence. In it, he inter alia stated that he joined the Municipal Council of Mombasa in the year 1984 and has been working in the Town Clerk's Department since employment. He stated that some plots Numbers 983, 939, 948, 950, 934, 949, 935, 936, 937, and 946, were excised from Tudor Road (also known as Tom Mboya Avenue). He stated that the legal section did not issue any notices for the closure of roads as the law requires, and that if any were issued, they were issued by other departments. In court, he testified that the road reserve was for expansion of Tom Mboya street. He testified that for any closure of the road, a physical planner would give the size of the road to be closed, and then it would be gazetted for any objections to be made. He was referred to Gazette Notice No 1099 of 11th March 1994 (a notice on closure of the road) and he testified that the notice was done by the Acting Town Clerk. He testified that the property was never alienated as the process was not followed. Cross-examined, he stated that he was not aware that there was a Part Development Plan for the plot. A copy of a Part Development Plan (PDP) said to be for the suit property was put to him and he testified that it was not prepared by the Municipal Council but by the Commissioner of Lands. He added that he was unaware of a Certificate of Lease that was issued with respect to the suit property.
9. PW-2 was Chrisantus Mwadime a Planning Assistant at the County Government of Mombasa. He testified that upon receipt of a proposal (presumably a proposal to create a plot in a sketch), they prepare a PDP. He would prepare the PDP as requested by the Chief Planning Officer. The PDP contains the description of the land and what is to be done. Those involved are the Chief Municipal Engineer, the Chief Planning Officer, a draftsman and designer. Once the PDP is drawn, it is taken before the Planning Committee for further deliberations. After deliberation, a minute number is derived, proposing the excision. He referred to minutes No 335/93 of 7 September 1993 of the Municipal Council of Mombasa as that which allowed for the allocation of the plot.



10. PW-3 was Edward Marenye Jotham Kiguru, a licenced land surveyor who has been practicing in Mombasa since the year 1989. He has been a surveyor since the year 1973. He testified that he was instructed to conduct the survey for the suit plot in December 1996 as new grant survey. He did a survey plan FR No 318/167 which was approved by the Director of Surveys. It was for creation of the Plots Nos 934, 935, 936, 937/Block XI/Mombasa Island. He testified that the property was a road reserve at the time of survey. He did the survey on the force of an approved PDP and the letters of allotment. He stated that the Registry Index Map (RIM) was amended in 1997. He was aware that residents of the area protested against the survey as they felt that this was a public utility land reserved for expansion of Tudor Road. Cross-examined, he testified that before the survey, he was given the description of the property, the letters of allotment, payment fees, and PDP approved by the Commissioner of Lands. He was aware when he did the survey that the land was a road reserve. He had knowledge of the width of the road as defined by the physical boundaries and also from the maps, and survey plans marking the road. When he submitted his documents, they were approved by the Director of Surveys and the Registry Index Map was amended. The Certificate of Lease was then prepared. He however stated that the survey he did was subsequently cancelled by the Director of Surveys though he did not have any document to demonstrate this.
11. PW-4 was Philip Osiemo Manwa the engineering surveyor with the County Government of Mombasa, Department of Transport and Infrastructure. This department deals with design of storm water drainage and sewer systems. He had a letter dated 27th March 2007 from the Ministry of Roads and Public Works which explains the status of Tom Mboya Road. That letter states that there is encroachment of the road which has affected usage of the road including interference with the walkways and reduced sight distances. The letter requested the Council to re-survey the road and reclaim it to its original status. He testified that according to the department's records, the road had not been resurveyed because it is still in its original status. He added that his department was not consulted in the allocation of the plots from the road and this is the reason why the department's records show that the road is still in its original status. He testified that there is no provision for excising a road. He reiterated under cross-examination that his department was not consulted on the allocation.
12. PW-5 was Hashim Got Sat, who in 1997 served as Land Registrar, Mombasa. He testified that Castle Dom Properties Limited (the 2<sup>nd</sup> defendant) became registered as lessee of the suit property on September 18, 1997 with the lease being for 99 years from December 1, 1996. Upon registration, a certificate of lease was issued. On November 14, 1997, a transfer was effected to Dim Agencies Limited (the 3<sup>rd</sup> defendant) for a recorded consideration of Kshs 750,000/=, and on the same day a Certificate of Lease was issued to the transferee. On 10 March 2006, the property was transferred to Lillywhites Limited (the 4<sup>th</sup> defendant). This transaction was exempted from Stamp Duty payment as the directors of the two companies were the same. He stated that on 1st October 2010, a Gazette Notice No. 11533 was registered, revoking this leasehold title on the claim that the land was reserved for public use and its allocation was illegal. Cross-examined, he was not aware that this revocation was challenged in court. He confirmed that the directors of Dim Agencies Limited and Lillywhites Limited were the same.
13. DW-6 was Dedan Okwama, an investigator in the employment of the plaintiff. He was part of the team that investigated the suit property. He testified that their investigations revealed that the suit property was excised from a road reserve which was meant for use by the public. He gave the history of allocation of the land; that the first allottee was Bhangra Limited, (1<sup>st</sup> defendant) which was issued with a letter of allotment on December 9, 1996, the plot being one for use as business cum residential. He testified that the PDP that was attached to the allotment letter had no reference number. He could not find a letter where Bhangra Limited expressed interest to be allotted the plot. The person who had expressed interest was one Councillor Ahmed A Muhdhar, through a letter dated December 8, 1992. He added



that Bhangra Limited did not accept the offer in writing or pay the stand premium noted of Kshs 169,560/=. He stated that the lease was issued to Castle Dom Properties Limited (2<sup>nd</sup> defendant) and it was not clear to him how a letter of allotment to Bhangra Limited ended up with a lease to Castle Dom Properties Limited. He established that Bhangra Limited and Castle Dom Limited shared the same postal address. He also collected documents from the Municipal Council of Mombasa including minutes of a meeting held on September 7, 1993 which inter alia discussed plot allocations. He also obtained Gazette Notice No 1099 of February 25, 1994 which made reference to closure of the road and survey of adjacent plots. He collected the Registry Index Map, and to him, the same showed that the suit plot lay on a road reserve. He stated that the Ministry of Roads in her letter dated March 27, 2007 confirmed that the plot is on the road. He testified that even if procedure was followed, the plot was not available, as it was already alienated as a road, and the purpose for which the property was reserved had not ceased.

14. He was cross-examined on his appointment which he said was under section 23 of the *Anti-corruption and Economic Crimes Act*. He affirmed that the investigations undertaken were for the purpose of recovery of public land and not a criminal purpose hence the DPP was not involved. Nobody has been charged with any criminal offence though he thought that the actions herein are also criminal in nature. He reiterated that the suit property was on a road reserve though he was not able to tell the exact dimensions of the property vis-à-vis the road. He stated that the road is tarmacked though interference is not on the tarmacked area. He was taken through the minutes that gave rise to allocation of the suit property and list of allottees and stated that he saw no approval for the allocation. He stated that the land belongs to the Government and the role of the Municipal Council was to maintain it and ensure that there was no interference. He testified that the Gazette Notice by the Council was a notice to close the road. He testified that owing to public outcry the road was actually not closed. He reiterated that allocation of a plot could not be done without a reference number in the PDP.
15. With the above evidence, the plaintiff closed her case.
16. DW-1 was Ashok Doshi, a director of the 1<sup>st</sup> and 3<sup>rd</sup> defendant. He had a witness statement which he adopted as his evidence and he also gave oral evidence in court. In his statement, he stated that the 2<sup>nd</sup> defendant (Castle Dom Properties Limited) was issued with a lease over the property on August 29, 1997 in consideration of Kshs 150,000/= as stand premium. The 2<sup>nd</sup> defendant then sold its interest to the 3<sup>rd</sup> defendant at a consideration of Kshs 750,000/= and the property transferred to the 3<sup>rd</sup> defendant on November 14, 1997. The property was subsequently transferred to the 4<sup>th</sup> defendant on March 10, 2006 at a consideration of Kshs 1, 191,680/=. He stated that the 1<sup>st</sup> defendant (Bhangra Limited) has never owned the suit property and has no interest in it. He denied that the property forms part of a road. He stated that the 1<sup>st</sup> and 3<sup>rd</sup> defendants have no relationship with the 2<sup>nd</sup> defendant and that all transfers were done for valuable consideration. In court, he testified that he was not aware of the allotment letter to Bhangra Limited and that Bhangra Limited did not apply to be allotted the suit land. He added that since Bhangra Limited did not receive any letter of allotment it did not make an acceptance. He reiterated that Bhangra Limited has no interest in this land and has nothing to do with it. He testified that he saw a letter of allotment and Certificate of Lease in the name of Castle Dom Properties Limited before purchasing the land. He stated that Castle Dom Properties Limited was the first allottee of the land. He stated that this land belonged to the Government and the Government allocated it and it is not a road reserve. He testified that the Municipal Council of Mombasa did not have any rights over the land and need not have issued consent for its allocation. He stated that it is the President who leased the property to Castle Dom Properties Limited. He added that he has never been charged with any corruption or even summoned by the plaintiff to record a statement.



17. Cross-examined, he acknowledged that he had not produced a letter of allotment in favour of Castle Dom Properties Limited. He could see that the lease to Castle Dom Properties Limited and the letter of allotment to Bhangra Limited indicated the same postal address. He did not have the sale agreement to support the claim that the property was sold to Dim Agencies Limited (3<sup>rd</sup> defendant) for Kshs 750,000/= in 1997. He also did not have the sale agreement between Dim Agencies Limited and Lillywhites Limited (4<sup>th</sup> defendant). He explained that where a property is transferred between companies sharing 90% of the ownership, stamp duty is not paid. He did not have the deed plan for the property. He reiterated that the property was allotted to Castle Dom Properties Limited. He was of view that the suit property is adjacent to a Plot No 157 in the area and thus not in the Gazette Notice No 1099 which mentions Plots Nos 160, 572 and 573. He denied that his plot is related to any of those mentioned, though he affirmed that the plot abuts the Plot No 572 on the Registry Index Map (RIM). He was not aware of any public outcry after the Gazette Notice. He stated that there was a Gazette Notice which cancelled the title but this was quashed by the High Court. Re-examined, he stated that he had never seen the PDP displayed and reiterated that he is not aware of the letter of allotment to Bhangra Limited. He stated that there was no law prohibiting the transfer of the property between the companies.
18. DW-2 was Anish Doshi, a director of the 4<sup>th</sup> defendant, Lillywhites Limited. He also had a witness statement which he adopted as his evidence. In it, he stated that on March 10, 2006, the 3<sup>rd</sup> defendant (Dim Agencies Limited) transferred the suit property to the 4<sup>th</sup> defendant (Lillywhites Limited) at a consideration of Kshs 1,191,680/= which was paid. He stated that the 4<sup>th</sup> defendant was not bound to inquire under what circumstances the property was leased to the first lessee, Castle Dom Properties Limited, nor how the property was created. He stated that due diligence carried out showed no encumbrance on the title. He refuted the claims of corruption and asserted that the 4<sup>th</sup> defendant is an innocent purchaser for value without notice of the alleged irregularities. He stated that there is no indication that the suit property is excised from a road reserve. He urged that it is the Commissioner of Lands who issued the lease and he found it strange that the Attorney General has not been joined to the suit. In court, he added that the 4<sup>th</sup> defendant did not bother to ask the 3<sup>rd</sup> defendant how she acquired the property and that they followed what was in the register. He was aware that it is claimed that no resolution was passed by the Municipal Council but he stated that this was not trust land and that the property has nothing to do with the Municipal Council. He stated that the lease was given to Castle Dom Properties Limited by the President. On the allegation that the property was to be allotted to Councillor Muhdhar, he stated that there was no evidence that this was the plot to be allotted to the said Councillor. He stated that he has seen no document that the property is a road reserve. He testified that he has never been summoned by the plaintiff's investigators and neither has he been charged with any offence.
19. Cross-examined, he acknowledged not having any proof of payment of the consideration of Kshs 1,191,680/= for the transfer of the property from the 3<sup>rd</sup> to the 4<sup>th</sup> defendant. Neither did he have the sale agreement. He did not take part in the transfer which was done by DW-1 and one Mahesh Doshi (said to be deceased). He himself became director of the 4<sup>th</sup> defendant in the year 2010. He stated that the plot is 6 to 10 meters from the Tom Mboya Road which is tarmacked.
20. With the above evidence, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants closed their case.
21. The 5<sup>th</sup> defendant closed his case without testifying and as I had mentioned earlier, no appearance was entered for the 2<sup>nd</sup> defendant. I invited counsel to file submissions, which they did, and I have taken note of these before arriving at my decision.



### C. Analysis and Disposition

22. I will narrow down the issues herein into three ie :-
- (i) Whether the suit property was carved out of a road reserve;
  - (ii). Whether the suit property was lawfully created and allocated;
  - (iii) Whether the title to the suit property is capable of being protected.

#### **Whether the suit property was carved out of a road reserve**

23. The case of the plaintiff is that the suit property was carved out of the Tom Mboya (Tudor) Road, road reserve. This is of course refuted by the defendants who assert that the suit property was never part of the road reserve, but was unalienated Government land. I observe that in his submissions, Mr Oluga, learned counsel for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, submitted that there was not produced a gazette notice, a letter, map or survey report, to demonstrate that the suit property was initially part of a road reserve. Mrs Abdulrahim, learned counsel for the plaintiff, in submitting on whether or not the plot was a road reserve, referred me to the evidence of PW1, 2, 3 and 4. Having assessed the evidence, I find it inescapable, that the suit property was initially part of the road reserve of Tom Mboya road (Tudor Road).
24. We do not even have to go too far to come to this conclusion. The surveyor who did the survey that created the suit land and three other plots, Mr Kiguru, who testified as PW-3, himself stated he created the suit property from the Tom Mboya road reserve. This is coming from the horse's mouth. The surveyor who created the plots knows from which land the plots were being created from. He himself has said that it was from the road reserve and I have no reason to doubt it. That position is supported by PW-2, the physical planning officer, and PW-4, the engineering surveyor. They are all experts in this field, and their expert opinion has the consensus that the plot was from a road reserve. Mr. Kiguru did state that he created the plots following a PDP that was attached to an allotment letter. Mr Kiguru is an experienced surveyor, having been one since the year 1973, and I have no reason to doubt his evidence. He stated that he is the one who undertook the survey that created the plots Nos 983, 948-950 and 934-937 and 938. The survey of the suit plot (No934) was done under survey plan F/R No 318/167. The survey plan was produced as an exhibit, and it is there to see, that out of the width of the road, some four plots have been created. This creation is apparent when you look at the Registry Index Map (RIM). One will see the width of the road and creation of several plots adjacent to the road, including the plots Nos 934, 935, 936 and 937.
25. Mr. Oluga in his submissions argued that there was nothing that shows the before and after. That is not the position. First, there is the expert evidence of Mr Manwa. He is the engineering surveyor, and roads fall under his docket. His evidence was that Tom Mboya road has a width of 30.48 metres. Where the suit property and others were created, this width narrows to 15.2 metres, and this is because of excision of the road to create the plots. Thereafter, the road resumes its normal width of 30.48 metres. Secondly, apart from the oral evidence, there is also documentary evidence through the RIM, the survey plan of Mr Kiguru, and the PDP used to create the plot. An RIM has an amendment section, which shows the dates of amendment of the map. If you study carefully the RIM in issue, you will see, amendments done on June 17, 1996, that created Plots No 934 – 937. Now, if you want to know what was there before, you simply ignore this amendment, and if you ignore it, in our case, you will see the plots being part of the road reserve. It is also there in the survey plan and in the impugned PDP. These all show how the plots were created. They are not being created from any pre-existing plot, but from the reserve abutting the main Tom Mboya road.



26. The defendants have not brought any evidence to show that the subject plot was not created from the road reserve. Nothing stopped the defendants from bringing an expert of their own to controvert the expert evidence of PW-2, 3 and 4, and demonstrate that the suit property was not created from a road reserve, or that Tom Mboya Road does not have a reserved width of 30.48 metres. Nothing stopped the defendants from bringing any evidence to show what width the road has been, so as to demonstrate that it is not what the plaintiff alleges, and that the road width is completely unaffected by the creation of the suit plot. The defendants only say that the suit plot was not a road reserve but have brought nothing to back up this allegation. Their case is that the land was Government land but not a road reserve. Where is the evidence that this was independent Government land and not land from a road reserve? There is absolutely none. In his submissions, Mr Oluga referred me to the evidence of PW-4 who said inter alia that that the road is intact. The way I understand the evidence of PW-4 is that the road channel, ie what is tarmacked, is intact; what is affected is the road reserve, that is the portion of road adjacent to the main channel, which is put aside to enable future expansion and to take care of services such as storm drain channels.
27. It is therefore my finding that the suit property was created from the Tom Mboya road reserve.

### **Whether the suit property was lawfully created and allocated**

28. I have already found that the subject plot is part of the Tom Mboya Road, road reserve. Could it be alienated from the public into private hands? Now, there are two theories on how the suit property was created and allocated. The first theory is that presented by the plaintiff and the second by the defendant.
29. In the first theory, the plaintiff avers that the creation and allotment of the plot emanated from the Municipal Council of Mombasa, which Council sat in a meeting and decided to create some plots out of the road reserve, and allocate them to individuals. The plaintiff refers to minutes of the Council meeting held on September 7, 1993. There is Minute No 335/93 titled "Plot Allocations." That minute refers to separate "confidential minutes." In the "Confidential Minutes" it is recorded that the Town Clerk reported that approval had been received from the Government to allocate plots to some councillors and civil servants whose names are then listed. There are 37 names in total. It was resolved inter alia that those named should identify suitable plots and notify the same to the Town Clerk for necessary action and "that applications for allocation of road reserves be considered, each case on its own merits." There is another minute pursuant to Minute No 335/93, that "the Town Clerk be directed to submit in the next meeting of the Town Planning & Works Committee, a list of all plot allottees indicating plot numbers against each of them." The plaintiff in addition to the above minutes, refers to the Gazette Notice No 1099 of March 11, 1994. That Gazette Notice is from the Municipal Council of Mombasa and is titled "closure of road." It gives notice that the Municipal Council of Mombasa proposes to close the road reserve described in a schedule and that the plan thereof is deposited with the Town Clerk. Any person wishing to object is given one month to do so. The schedule states that the affected road is "unsurveyed plot adjacent to plot Nos 160, 572, and 573, Section XI, Tom Mboya Avenue, Tudor." The plaintiff in addition refers to the letter of December 8, 1993, written by Councillor Ahmed A Muhdhar. In the letter, the Councillor refers to allocation of a plots A and B which are noted in an attached sketch plan. I can identify the suit property as Plot B in that sketch. The plaintiff avers that somehow, the plot was not allotted to Councillor Muhdhar, but to Bhangra Limited, the 1<sup>st</sup> defendant, who received an allotment letter dated December 9, 1996 with the Plot being identified as Plot A, in an attached PDP. A title was subsequently issued, not to Bhangra Limited, but to Castle Dom Properties Limited, the 2<sup>nd</sup> defendant, and subsequently the downstream transfers took place. The plaintiff impugns this process which I will come to later.



30. The second theory on the creation and allocation of the plot is from the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. They contend that the allocation of this plot has nothing to do with the minutes and the Gazette notices of the Municipal Council of Mombasa, as this was a direct allotment of a plot from the Government. They assert that the allotment was directly to Castle Dom Properties Limited and they are unaware of any allotment to Bhangra Limited.
31. To me, whichever process was followed, I will still come to the conclusion that the creation and allotment of the plot was illegal.
32. If it is true that the allocation was by the Municipal Council of Mombasa, then it was improper. First, this was a road. I have not been shown any law which allowed the Municipal Councils to create plots out of roads, allocate them to the public, and have the Commissioner of Lands issue title to them. The fact that allocation of plots was through “confidential minutes” is very telling in itself. It simply means that the persons who sat in that meeting knew that what they were doing was scandalous, embarrassing and uncouth, and they would not have wished for the public to be aware of what they discussed in such meeting. If allocation of plots was lawful, open and transparent, there would be nothing to hide, and no reason to have “confidential minutes.” What would be confidential if you are properly discharging a mandate of allocating plots? If you are undertaking such a process, openly and transparently, you would in fact be happy to have any such minutes open to the public for scrutiny. Anyway, from the “confidential minutes” I see that there is intention to secretly allot plots to some carefully chosen connected individuals. There is even audacity to resolve to allocate plots from road reserves. Just how low had we sunk? Thereafter the Gazette Notices followed.
33. I mentioned earlier that I have seen no law which allowed Municipal Councils to create plots out of roads. Roads have been under the *Public Roads and Roads of Access Act*, cap 399, Laws of Kenya. That law does provide at section 8 for conversion or alteration of public roads. It states as follows :-
8. Dedication of line of public travel
- (1) Whenever it is made to appear to the Minister that requirements exist for the establishment, alteration or cancellation of a line of public travel or for the conversion of a road of access into a line of public travel, the Minister may, by order published in the Gazette, dedicate, alter or cancel such line of public travel or convert such road of access into a line of public travel.
  - (2) In every order made under this section, the line of public travel to be established, altered or cancelled or the road of access to be converted into a line of public travel shall be clearly described.
  - (3) Where an order under this section dedicates a line of public travel or converts a road of access into a line of public travel, such line of public travel shall be absolutely dedicated to the public as a public road within the meaning of any law now or hereafter in force relating to public roads.
  - (4) Before making and publishing any order under this section dedicating a line of public travel or converting a road of access into a line of public travel, the Minister may, where there is a board, call upon such board to investigate and report upon the necessity for, or desirability of, any such line of public travel and to advise as to the best alignment of such a line of public travel.
34. It will be seen from the above that alteration of public roads was to be done by the Minister through a Gazette Notice. I have no Gazette Notice from the then Minister in charge of Roads. The Municipal



Council could not usurp the powers of the Ministers and purport to affect a public road and create plots out of it. True, the Municipal Councils had power to close roads, under section 185 of the [Local Authorities Act](#) (repealed), but closure of a road and allocation of land out of a road are not the same thing. The power to close roads was simply that, to close a road. Section 185 provided as follows :-

185.

- (1) Subject to this section, a municipal council may permanently close or divert or alter the line of any street or road vested in it under this Act.
- (2) Before any such closing or diversion or alteration is carried out, the municipal council shall—
  - a) prepare a plan showing the nature thereof; and
  - b) not less than one month before the proposed commencement of the work, give notice in the Gazette and in one or more newspapers (if any) circulating in its area, as well as by a sufficient number of placards posted on or near the street or road which it is proposed to close, divert or alter, of the proposed work and of a place where the said plan may be inspected at all reasonable hours; and
- (c) serve a copy of the said notice on the owners or reputed owners, lessees or reputed lessees, and occupiers of all property abutting upon the said street or road or appropriate part thereof and, where it is proposed to divert or alter the line of such street or road, of all property which will abut upon the street or road if diverted or altered as aforesaid, whose address can after reasonable inquiry be ascertained; and
- (d) if the proposed closure, diversion or alteration will affect land not vested in the municipal council, serve a copy of the said notice on the Commissioner of Lands; and
- (e) in the case of a proposal to close a road, serve a copy of such notice upon the Minister for the time being responsible for town planning.
- (3) If the Commissioner of Lands or any person interested as owner, lessee or occupier in any property abutting on the street or road which it is proposed to close, divert or alter under this section, or any other person aggrieved by such proposed closure, diversion or alteration, shall at any time within the period of one month from publication of the notice in the Gazette and in one or more newspapers (if any) as aforesaid, or, where such notice is published on different dates, within the month from the last date of publication, serve written notice on the municipal council of any objection to such closure, diversion or alteration, then, unless such objection is withdrawn, such closure, diversion or alteration shall not be carried out without the sanction of the Minister who may, on the application of the municipal council and after such inquiry (if any) as he may deem necessary, make an order disallowing or allowing the proposed work or allowing it with such modifications as he may deem necessary.
- (4) On completion of any work to which this section applies the municipal council shall give notice thereof to the Minister and shall forward a plan thereof, prepared by a registered land surveyor or by some other person approved in writing by the Commissioner of Lands, to the Commissioner of Lands, showing all details of such closure, diversion or alteration, and the Commissioner of Lands shall cause such amendments as may be necessary to be made in his plan (if any) of the area.



35. I have taken the trouble to reproduce the whole of section 185 above, so that there is no question or doubt as to what the power to close a road entailed. It never entailed creation of a plot. Within the exercise of that power, the local authority needed to publish this intention to close a road in the Kenya Gazette and in one or more newspapers (section 185(2)(b)) and also serve the Minister in charge of Town Planning (section 185(2)(e)). I reiterate that power to close a road and to allocate it are different. Even if I am wrong and they meant the same thing, there is no evidence of publication in the newspapers, or notice to the Minister of Town Planning.
36. If you have a close look at Gazette Notice No 1099, that which is said to have closed the Tom Mboya Road so as to create plots out of it, it doesn't tell you under what law it is placed. You cannot tell from that Gazette Notice what law was being followed. If this was the route taken to create and allocate the subject plot, then the plot was improperly created and allocated, and the title that emanated therefrom cannot be alleged to be a good title capable of being protected.
37. What about the procedure that the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants allege the plot was created? They of course say that this was simply a direct allotment from the Government of Government land. Well this is not so. I have already pointed out that this was a public road reserve. It first needed to be affected by the Minister of Roads, under section 8, as I have demonstrated above. This was not done. Moreover, the road was in use by the public. The Commissioner for Lands could simply not, by a stroke of his pen, now declare that a public road is no more and that in place thereof is a private plot. The Commissioner of Lands had no power to do so. Of course the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants argue that the allocation was done by the President. It was not. I have not seen the President's hand anywhere. There is no allotment letter and no lease signed by the President. Sure, the Lease issued to Castle Dom Properties Limited claims that it is issued by the President, but that allegation is untrue, for it is there to see that execution was by the Commissioner of Lands. He had no power to allocate such a plot carved out of a road. In fact the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have not demonstrated to me any such power that was vested in the Commissioner of Lands.
38. In addition to the above, if it is the case of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, and it is indeed their case, that the origin of their leasehold title is not the allotment letter in the name of Bhangra Limited, then you would expect that there be some sort of documentation leading to the lease in name of Castle Dom Properties Limited. There is no application letter from Castle Dom Properties Limited seeking to be allotted the plot. There is no letter of allotment in her favour. Neither is there any proof of payment of stand premium. So how did Castle Dom Properties Limited get a lease without any of all these? Did a lease, duly executed, accidentally fall from the sky and into the gleeful laps of the directors of Castle Dom Properties Limited who then proceeded to register it? You can see how ridiculous that theory is. If I am to buy it, as the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants wish me to, it will not help them, for it will be apparent that the root of title of Castle Dom Properties Limited is not immersed in any legal ground of allocation of land, but is floating somewhere in the thin air. In fact, probably in the knowledge that it holds a very dubious title, Castle Dom Properties Limited did not bother defending this case. She has not come to court to challenge the allegation that she did not acquire a good title which was capable of being transferred to downstream purchasers. And in the absence of Castle Dom, it fell upon the 3<sup>rd</sup> and 4<sup>th</sup> defendants to demonstrate that whatever they held, and hold, is capable of being considered a good title. I am afraid that the 3<sup>rd</sup> and 4<sup>th</sup> defendants have hopelessly failed in doing so. They have not shown how Castle Dom could have obtained good title to a plot that is actually a road.
39. Thus, whether the subject title emanated from the procedure outlined by the plaintiff, or the procedure claimed by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, either way, the title was not created nor allotted following the proper legal channels. This is a bad title shamelessly created out of a public road.



40. The current title holder, the 4<sup>th</sup> defendant asserts that she is an innocent purchaser for value and should therefore be protected. The 3<sup>rd</sup> defendant, the previous title holder, also floated that argument. I am not persuaded. First, there is significant doubt as to the innocence of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants. At the outset, I find implausible the argument of the 1<sup>st</sup> defendant that it had no interest in the suit land. How come there is an allotment letter in the name of the 1<sup>st</sup> defendant, a company which shares ownership and directorship with the 3<sup>rd</sup> defendant ? Was it sheer coincidence that the 3<sup>rd</sup> defendant happened to buy property that it had no idea that there was an allotment letter in favour of one of her sister companies ? Moreover, Bhangra Limited and Castle Dom Properties Limited appear to share the same postal address. Mmhh... sounds curious. Whether by design or coincidence, throughout this case, Castle Dom Properties Limited has remained masked. Nobody knows who owns Castle Dom or who her directors are. Even the acceptance of lease and the transfers from Castle Dom only bear signatures and no names. The 3<sup>rd</sup> defendant claims to be an innocent purchaser for value without notice of any defect in the title of Castle Dom. I question how true this claim is. There is no sale agreement between Castle Dom and Dim Agencies (3<sup>rd</sup> defendant). It was said that the sale was at a consideration of Kshs 750,000/=. You would expect that to demonstrate that she is indeed a purchaser for value, Dim Agencies would have provided proof of payment of this money. None was given. So we have no sale agreement and we have no proof of movement of money for the alleged transaction between Castle Dom and Dim Agencies. We also have no proof of payment of stamp duty. The transfer form does not have any indication of who attested the signatures thereto. Neither is it dated. All these spaces that are supposed to be filled are blank. All these missing particulars severely dim the cause of Dim Agencies Limited in attempting to demonstrate that she is an innocent purchaser for value. In fact, it appears to me as if Dim Agencies is doing its best to dim every light that can lead to the revelation of who exactly Castle Dom is.
41. The 4<sup>th</sup> defendant, Lillywhites Limited, also alleges to be an innocent purchaser for value from the 3<sup>rd</sup> defendant. It claims to have purchased the property at Kshs 1,191,680/=. Again, there is no sale agreement and no proof of payment of any consideration. You would expect that this be provided by either party because the two share owners and directors. You would also expect, that in demonstrating the innocence of the transaction, an explanation be given as to why the owners of the company thought it fit to transfer land to another company that they own. You cannot be said to be demonstrating innocence by saying that there is no law that bars one company from transferring land that it owns to another sister company when there are surrounding question marks on why the transaction was undertaken. The failure to give reasons, buttressed with the fact that there is no documentary support in form of a sale agreement or payment of consideration, clouds the claims of innocence. My own conclusion, in the transfer to Lillywhites Limited, is that this was nothing but an attempt by the owners and directors of the two companies, to launder the property, so that it can emerge from the other end as white as snow. I am sorry to tell the 3<sup>rd</sup> and 4<sup>th</sup> defendants that the property is as dirty as it was when it was in the hands of Castle Dom Properties Limited. The transfers have not helped in cleaning it up because the title was bad, *ab initio*.
42. A not too dissimilar situation unlocked itself in the case of [Kenya National Highways Authority v Shalien Masood Mughal & 5 others](#) [2017] eKLR. In the suit, the 1<sup>st</sup> respondent held a title to land that abutted the Nairobi/Mombasa Highway. There was need to undertake an expansion of the road and the appellant moved into the property to do so. The 1<sup>st</sup> respondent filed suit claiming that his rights to property have been violated. He succeeded before the High Court, a decision that was reversed on appeal. The evidence showed that the property of the 1<sup>st</sup> appellant was created out of the road reserve



and the Court of Appeal declined to offer protection to his title. *Inter alia*, the Court of Appeal stated as follows :-

“One may ask whether the disputed plot in this matter was lawfully acquired but it is unnecessary to go there. One may even wonder whether, with the exercise of due diligence it was possible to establish the extent of the road reserve for the Nairobi/Mombasa Highway before the disputed plot was created. The fact of the matter is that there was in existence a road reserve before the disputed plot came into being in 2002 and it was not open for any authority to alienate it further for private development. The whole world ought to have been aware, as was ultimately established, that there was a road reserve of 80 meters and a buffer zone of 30 meters which did not in law have to be noted in any land register. It is an overriding interest and not an equitable interest.”

43. The above dictum in fact takes care of a lot of the arguments raised by the 3<sup>rd</sup> and 4<sup>th</sup> defendants. They had argued that there was nothing in the Lands office to show that the subject plot was initially a road reserve. They pleaded that their due diligence did not reveal that the suit property is part of a road reserve, but is a stand-alone plot with title, whose owner was shown in the search certificate. They asserted that the plot was lawfully created and acquired. Well, as said in the above dictum, once land had been set aside for public purpose, it could not be alienated further. In any event, the positioning of the plot, *vis-à-vis* the existing road, should have put any diligent person into inquiry, as to how the plot was created and whether it was actually properly carved out of the road reserve.
44. The case of *Niaz Mohamed Jan Mohamed v Commissioner of Lands & 4 others*, Mombasa HCCC No 423 of 1996, (1996)eKLR, is also instructive. In that case, the land of the plaintiff was acquired for purposes of construction of a public access road. Subsequently, the Commissioner of Lands proceeded to carve out a portion of it, created a plot, and issued title to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. The plaintiff challenged this title. In the course of dealing with an application for injunction, Waki J, stated as follows :-

I am persuaded by the argument that since the acquisition was done for the purpose of making a public road, the road thus made remained a public road or street and vested in the Local Authority, The Municipal Council of Mombasa, to hold in trust for the public in accordance with the law. Needless to say this included the portion usually utilized for the tarmaced road and the remaining portions which form part of the road reserve. Finally I am persuaded by the government that as such trust land, neither the Local Authority nor the Government could alienate the land under the Government lands Act.

45. The scenario here is not much different. The suit property was carved out of a road. A road is one that is set aside for public use. It cannot be inferred that it was the intention of the law that the Commissioner of Lands or the Municipal Council of Mombasa, who were entrusted by the public to hold this land on their behalf, could proceed and deal with it as they wished. They could not proceed to create plots out of it to the detriment of the public. Nowhere have I been shown any evidence that Tom Mboya road is obsolete and no longer in use. In fact, it is a matter of public notoriety, and the court takes judicial notice, that this is a very busy road indeed. It not only serves the huge population living in Tudor area but also public amenities such as the Technical University of Mombasa. It is also a useful bypass if one wishes to progress towards Nyali area while avoiding the city centre. It is a very important road for the benefit of the public. The public cannot be deprived of land set aside for their benefit by the whims of the Commissioner of Lands working in cahoots with some gluttonous recipients. It is patently clear to me that the Commissioner of Lands abused his powers to create the suit property out of a road reserve that was being used by the public. He had no power to create such a title and the title.



46. What I have stated above was also the holding of a three judge bench in the case of *Milan kumar Shab & 2 others v City Council of Nairobi & others*, Nairobi HCCC No 1024 of 2005 (OS) (unreported). In the suit, the plaintiffs were title holders of land which was later amalgamated with a public road reserve. The court declined to protect the purported title. It found that its creation from a road reserve was not legally tenable. The court proceeded to state as follows :-

“... It is in the public interest that road reserves created to serve a zone reserved for establishment of industry, an engine in economic growth, creation of wealth and employment must not be taken for the benefit of a few however mighty, economically or otherwise. Where the law is ignored, the courts will step in and declare what the law is and means.

In this matter the law is and means that the Commissioner of Lands alone, or with the Director of Survey, cannot and will not abuse his powers and has no legal mandate under both the Government Lands Act, and the Local Government Act to close, alter, or divert let alone consolidate a road reserve without due process.

In the premises we find and hold that the purported consolidation of LR No 209/10543 and a road reserve, created no absolute and indefeasible title in the third applicant.”

47. It will be noted from the above that courts will frown upon titles purportedly created out of road reserves. I observe that in our case, the title was issued under the regime of the Registered *Land Act* (RLA) (now repealed) and even this suit was filed before the said statute was repealed. The RLA therefore applies to our situation. Sanctity of title was addressed in section 143 of the Act, which provided as follows :-

143.

- (1) Subject to sub section (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.

48. From section 143(1) above, it will be seen that the court has power to order the cancellation of title where it has been obtained by fraud or mistake. I am persuaded, that in the circumstances of this case, the Commissioner of Lands and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, were all complicit to the fraudulent creation of title and allocation of the suit property. I have mentioned that I have not been provided with any law which empowered the Commissioner of Lands to create a title out of a road. I am not persuaded that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants were innocent parties at all. I have mentioned that they have not offered any explanation as to how an allotment letter was issued to the 1<sup>st</sup> defendant, or how a lease suddenly fell into the laps of the 2<sup>nd</sup> defendant. In their evidence, the 3<sup>rd</sup> and 4<sup>th</sup> defendants did not demonstrate to me that they were innocent purchasers. In fact, they came across as parties who have a lot to hide. I think they were all parties to the fraudulent acquisition of a road reserve. Even assuming that they are not guilty of any fraud, then at the very least, the creation of the suit property out of a public road reserve, was a mistake, and under section 143 above, title can be nullified if it was created



by mistake. I am therefore persuaded to order the cancellation of the title to the suit property which is now in the name of the 4<sup>th</sup> defendant.

49. Before I close, I have taken note of the elaborate submissions of counsel for the 5<sup>th</sup> defendant that the 5<sup>th</sup> defendant cannot be sued in his personal capacity since he was then acting as a Government officer holding the position of Commissioner of Lands. The issue of the Commissioner of Lands being capable of being sued in his/her personal capacity was settled in the case of *Ethics and Anti-Corruption Commission vs Judith Marilyn Okungu & another*, Court of Appeal at Nairobi, Civil Appeal No 183 of 2014 (2017) eKLR. In that matter, the Court of Appeal found that the person who held the office of Commissioner of Lands could be sued in his personal capacity. I am not aware of a contrary decision from the same court or the Supreme Court. However, in this suit, the plaintiff did not seek any specific orders against the 5<sup>th</sup> defendant, and save for costs, there is really no order that I need to make against the 5<sup>th</sup> defendant. There was a loose prayer for general damages against the 4<sup>th</sup> defendant, but I am not persuaded that a case for the award of general damages was made out. There is also a prayer for damages by way of compensation but it is not clear to me who is being compensated and for what loss. I am therefore unable to make any award in respect of damages.
50. I have not forgotten that in the defence of the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants, they raised issue about the capacity of the plaintiff to file this case. I have not seen that followed up in the submissions and I assume that this is abandoned. There was also argument that the Government needed to be joined because it is the Government that issued the lease. There was insinuation that the Government would have protected this title. That cannot be. There is evidence that the Government itself was appalled by the creation of this plot and proceeded to nullify it through Gazette Notice No 11533 of October 1, 2010. It is only that this Gazette Notice was quashed as the procedure on revocation of titles was not followed. It cannot therefore be said that the Government would have protected this title. I see no issue with the non-joinder of the Government in this case.
51. I believe that I have dealt with all issues herein and now make the following final orders :-
- i. That it is hereby declared that the title to the land parcel Mombasa Island/Block XI/934 was unlawfully issued and it is hereby declared null and void *ab initio*.
  - ii. That the Chief Land Registrar and the Land Registrar, Mombasa, is hereby ordered to cancel the title to the land parcel Mombasa Island/Block XI/934.
  - iii. That the Director of Surveys is hereby ordered to amend the Registry Index Map so as to remove this plot Mombasa Island/Block XI/934 from the Registry Index Map.
  - iv. That a permanent injunction is hereby issued barring the 1<sup>st</sup> – 4<sup>th</sup> defendants and/or their servants/agents from entering, being upon, developing, dealing, or in any other way interfering with the land covered in the now nullified title Mombasa Island/Block XI/934.
52. The final issue is costs. Costs shall be borne jointly and/or severally against all the defendants.
53. Judgment accordingly.

**DATED AND DELIVERED THIS 5 DAY OF MAY 2022**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

