



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 166 OF 2009**

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

**VERSUS**

**AERIAL DEVELOPERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**ENOCK TUITOEK.....2<sup>ND</sup> DEFENDANT**

**SAMMY SILAS KOMEN MWAITA.....3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**A. THE PLEADINGS**

1. The Plaintiff instituted this suit by way of a plaint dated 9<sup>th</sup> June 2009. The suit was filed in the High Court at Mombasa but was later transferred to the Environment and Land Court at Mombasa for disposal after the establishment of the Environment and Land Court pursuant to the provisions of Article 162 (2)(b) of the Constitution of Kenya, 2010.
2. In the plaint it is pleaded that the plaintiff is a body corporate established under the provisions of the Anti-Corruption and Economic Crimes Act, No.3 of 2013 and brought the suit pursuant to the provisions of that Act.
3. It is pleaded that at all material times the Government of Kenya through the then East African Community, reserved African community, reserved **LAND REFERENCE NUMBER MN/1/2398** (hereinafter referred to as the suit property) situated in Bamburi/Nyali estate within Mombasa Municipality for the construction of a house for the members of staff of the then Directorate of Civil Aviation by way of a Survey Plan Folio Reference Number 131/31 dated 22/10/1975 on or about 18/08/1976, and upon completion of the survey, the Government of Kenya, through the then East Africa Community caused to be prepared and registered with the Director of Survey a Deed plan for the suit property.
4. It is pleaded that sometimes in 1977, the Government of Kenya through the then East African Community completed the construction of a four bedroom bungalow with a servant quarter on the suit property and allocated the same to the Directorate of Civil Aviation to house its members of staff. The said house was entered into the Government building register as HG 3 and later on changed to HG145. That the suit property and the house thereon formed part of Government land reserved for use by and to be held by the then Directorate of Civil Aviation as a public utility and for a public purpose of housing the members of staff of the then Directorate of Civil Aviation.
5. It is pleaded that by dint of the provisions of the Civil Aviation Act, Chapter 394 Laws of Kenya, the Kenya Civil Aviation Authority was established to provide air navigational services in place of the Directorate of Civil Aviation and took over all assets, liabilities, functions and employees of the Directorate of Civil Aviation. Pursuant to the provisions of the said Cap 394 Laws of Kenya, the Minister for Transport, vide a gazette notice dated 13/10/2006 vested in the Kenya Civil Aviation Authority all movable and immovable property and assets which were by 24/10/2002 held by the Government on behalf of the Directorate of Civil Aviation which included the suit property and the house thereon.
6. It is pleaded that sometimes in the year 2002, the Defendants fraudulently and illegally used the survey plan and the deed plan prepared by the then East Africa Community and registered with the Director of Survey to prepare and registered a Grant in the name of the 1<sup>st</sup> Defendant. That the said Grant was prepared and registered in the favour of the 1<sup>st</sup> Defendant without the consent or approval of the Board of Directors of the Kenya Aviation Authority, the Minister for Transport, Minister for Lands and Minister for Finance, and or without following due process of bonding the house on the suit property as provided for in the Government Lands Act (now repealed), the Government Financial Regulations and Bond of Survey Procedures. That at the time of the allocation, the suit property and the house thereon had already been allocated and reserved for use by members of staff of the Kenya Civil Aviation Authority and who were in actual occupation of the said

house in the provisions of air navigational services to the public, and that the suit property was therefore not available for alienation or allocation to the 1<sup>st</sup> defendant. It is stated that by reason of the matters aforesaid the allocation of the suit property and the house thereon to the 1<sup>st</sup> defendant was done unlawfully, corruptly and contrary to the provisions of the Government Land Act, Cap 280 (repealed) and the Government Financial Regulations and Bond of Survey procedures and the following particulars of irregularity, illegality and fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are pleaded:

- a. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently obtained allocation and registration of the suit property in favour of the 1<sup>st</sup> Defendant when they knew or ought to have known that the suit property and the house thereon was reserved for the members of staff of the Kenya Civil Aviation Authority and was therefore not unalienated Government land.**
- b. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently obtained allocation and registration of the suit property in favour of the 1<sup>st</sup> defendant when they knew or ought to have known that the allocation of the suit property by the 3<sup>rd</sup> Defendant was done in blatant disregard and in excess of the relevant statutory provisions and regulations on alienation of Government land;**
- c. At all material times the 1<sup>st</sup> and 2<sup>nd</sup> Defendants knew that on the suit property rested a four bedroomed bungalow with a servant quarter in actual occupation by a member of staff of the Kenya Civil Aviation Authority.**
- d. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants fraudulently obtained allocation and registration of the suit property in favour of the 1<sup>st</sup> Defendant when they knew or ought to have known that the Board of Directors of the Kenya Civil Aviation have never surrendered or relinquished the suit property as to be available for alienation or allocation to them. Neither did the minister responsible for Lands, Transport or Finance consent to the said allocation as provided for in the Government Lands Act, Cap 280 and the Government Financial Regulations and Procedures.**

7. The Plaintiff contended that the 3<sup>rd</sup> Defendant deliberately acted fraudulently and in excess of his statutory powers and authority and his actions were ultra vires the relevant statutes and amounts to abuse of office. The following particulars of fraud and abuse of office on the part of the 3<sup>rd</sup> Defendant are pleaded:

- a. The 3<sup>rd</sup> Defendant knew or ought to have known that the land was not available for alienation.**
- b. The 3<sup>rd</sup> Defendant allocated to the 1<sup>st</sup> Defendant the suit property when aware that the suit property was already reserved for a public use and thus unavailable for allocation.**
- c. The 3<sup>rd</sup> Defendant knew or ought to have known that the Board of Directors of the Kenya Airports Authority have never surrendered or relinquished the suit property to the government for alienation or allocation to the 1<sup>st</sup> Defendant neither did the Minister responsible for Lands, Transport and Finance given consent to the said or any allocation as required by the provisions of the Government Financial Regulations and Procedures;**
- d. The 3<sup>rd</sup> Defendant knowingly and/or recklessly failed to comply with the relevant statutes and regulations governing the administration and alienation of Government land and/or houses allocated to the Kenya Civil Aviation Authority;**
- e. The 3<sup>rd</sup> Defendant dishonestly and fraudulently dealt with and/or alienated land reserved for the Kenya Aviation Authority.**

8. It is further pleaded that in the premises, the purported issuance of the title over the suit property to the 1<sup>st</sup> Defendant was null and void ab initio and incapable of conferring on the 1<sup>st</sup> Defendant any or at all any estate, interest or right in the suit property. In the alternative and without prejudice to the foregoing, the plaintiff averred that the 3<sup>rd</sup> Defendant, with the knowledge that he had no statutory power and/or was acting in excess of his statutory powers, and that his actions were likely to occasion loss to the public, purported to granted a title over the suit property to the 1<sup>st</sup> Defendant in circumstances constituting misfeasance in public office and listed the following particulars:

- i. With malice and knowledge of want of authority, the 3<sup>rd</sup> Defendant purported to excise and alienate a house reserved for the Kenya Civil Aviation Authority.**
- ii. With malice and knowledge of want of authority, the 3<sup>rd</sup> Defendant purported to act in the name of the president of the Republic of Kenya.**
- iii. With malice and knowledge of illegality of his actions, the 3<sup>rd</sup> Defendant willfully failed to comply with and/or ignored the provisions of the Government Lands Act, the Government Financial Regulations and Procedures and other provisions of the law.**

9. The Plaintiff has sought the following orders:

- a. A declaration that the allocation to the 1<sup>st</sup> Defendant and subsequent issuance of the Lease to the 1<sup>st</sup> Defendant of the land comprised in MN/1/2398 was irregular, fraudulent and illegal and consequently null and void.**
- b. An order for rectification of the register by cancellation of the title and all entries made on the land register in favour of**

the 1<sup>st</sup> defendant in respect of LAND REFERENCE NUMBER MN/1/2398.

c. An order of preservation and a permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their agents, servants, or assigns restraining them from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with MN/1/2398 otherwise than by transfer of surrender to the Kenya Civil Aviation Authority or/and the Government of Kenya.

d. General damages for fraud and breach of fiduciary duty as against the 3<sup>rd</sup> Defendant.

e. Damages as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the demolition of the 4 bedroomed bungalow on the suit property.

f. Costs of and incidental to the suit.

g. Any other or further relief the court may deem fit and just to grant.

10. Only the 3<sup>rd</sup> Defendant filed defence. In his defence dated 10<sup>th</sup> July 2009, the 3<sup>rd</sup> Defendant denied the Plaintiff's claim. The 3<sup>rd</sup> Defendant averred that he performed/executed his duties as commissioner of lands within his statutory powers and not ultra vires as alleged by the Plaintiff. He averred that the Plaintiff's suit is incompetent, incurable and fatally defective.

## **B. THE EVIDENCE**

11. At the hearing, only the Plaintiff attended court even though the hearing date was taken by consent of all the parties. The Plaintiff called two witnesses and produced several documentary exhibits and at the end, the Plaintiff's counsel filed written submissions.

12. PW1 was Dedan Okwama, an investigator with the Ethics & Anti-corruption Commission (EACC), the Plaintiff herein. He stated that the Plaintiff is mandated under Section 11 (j) as read with Section 37 of the EACC Act to institute and conduct proceedings in court for purposes of the recovery or protection of public property, confiscation of proceeds of corruption and payment of compensation. He testified that he was a member of the EACC team which investigated allegations regarding illegal alienation of LAND REFERENCE NUMBER MN/1/2398 (the suit property) that belong to the Government of Kenya with view of recovering the same.

13. He testified that following the investigations that they undertook, they established that on or about 16/12/1974, the government of Kenya, through the then East African Community, agreed to reserve twenty (20) plots, each measuring 0.5 acres situated in Nyali estate (also known as Bamburi) for use by government departments namely, department of customs (now Kenya Revenue Authority), the Directorate of Civil Aviation (now the Kenya Civil Aviation Authority) and the Directorate of Meteorology. That a licensed surveyor appointed by the Government completed the survey of the said plots for the senior staff housing and submitted the survey plan Folio Reference Number 131/31 to the Director of Surveys for approval and registration. The said survey plan was approved on 13/02/1976 and authenticated on 16/2/1976. According to the survey plan, the said 20 plots were allocated LAND REFERENCE NUMBERS MN/1/2396 to MN/1/2415 by the Director of Surveys. After the registration of the said survey plan, the government, through the then East African Community caused to be prepared and registered Deed plans for the 20 parcels of land, to wit LR.NOS.MN/1/2396 TO MN/1/2415.

14. He testified that though the Government surveyed the said 20 parcels of land for the construction of senior staff houses and registered Deed plans for the same, the titles for the respective parcel of land were never processed. He stated that sometime in 1977, the Government through the then East African Community completed the construction of four bed-roomed bungalows with servant quarters on the said 20 parcels of land, including the suit property. That the said houses were entered into Government Building Register as HG 1-2- and the numbering later changed to HG143-HG162. The suit property was referred to as HF3 and later changed to HG145 and that the said house was in possession and occupation by a member of staff of the Directorate of Civil Aviation (now Kenya Civil Aviation Authority). On the establishment of the Kenya Civil Aviation Authority, the then minister for Transport vide Gazette Notice dated 13/10/2006 vested in the Authority all the movable and immovable property and assets which were by 24/10/2002 held by the Government on behalf of the Directorate of Civil Aviation, which included the suit property and the house thereon. PW1 testified that the Directorate of Civil Aviation (now the Kenya Civil Aviation Authority) and the Directorate of Meteorology offer essential services and are on duty for 24 hours and classified as security organs of government as they handle civil and military matters. Consequently, the 20 houses reserved were removed from the pool of Government houses earmarked for sale.

15. He testified that sometime in year 2000, the defendants fraudulently and illegally used the survey plan folio reference number 131/31 dated 22/10/1976 and Deed plan number 99258 dated 18/8/1976 to prepare a Grant in the name of Aerial Developers Limited, the 1<sup>st</sup> Defendant herein. That the said Grant was prepared and registered the 3<sup>rd</sup> Defendant without the consent or approval of the then Directorate of Civil Aviation (now the Kenya Civil Aviation Authority) or the then Ministry of Transport or Ministry of Finance. He added that the said Grant in favour of the 1<sup>st</sup> Defendant was prepared and registered by the 3<sup>rd</sup> Defendant without boarding the house on the suit property as required in the Government Land Act (repealed) and the Government Financial Regulations and Board of Survey procedures. It was his testimony that as at the time of the allocation of the suit property and the house thereon, the said parcel of land had already been reserved, set aside for the use and was being used by then Directorate of Civil Aviation (now the Kenya Civil Authority) to house its members of staff who provide air navigation services to the public. That the suit property was still and remains reflected in the Government Building Registered as an institutional house and has at all material times been used to accommodate staff members of the Directorate of Civil Aviation (now the Kenya Civil Aviation Authority), and was not available for allocation to the 1<sup>st</sup> Defendant, adding that such purported allocation was void and incapable of conferring any estate, title, interest or right in the suit property. According to PW1, the suit property is one of the properties mentioned in the Report by the Ndungu Commission of Inquiry into illegal allocation of public land in which cancellation of the title issued in favour of the 1<sup>st</sup> Defendant was recommended.

16. PW1 testified that the suit property, being public land, was not available for alienation by the 3<sup>rd</sup> Defendant in any manner whatsoever to

the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other person, and that the issuance of a lease by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was fraudulent, illegal and null and void. It was his testimony that the purported alienation or allocation of the suit property in favour of the 1<sup>st</sup> Defendant in the first instance and subsequently to the 2<sup>nd</sup> defendant was unlawful, corrupt, dishonest and fraudulent. He stated that the defendants through a joint enterprise unlawfully and fraudulently facilitated the corrupt allocation of the suit property contrary to the law, thereby causing loss of public property to the undue prejudice of the Government of Kenya. He reiterated the particulars of irregularity, illegality, fraud, abuse of office and misfeasance in public office as set out in the plaint. PW1 produced as exhibits the documents filed by the plaintiff in the List of Documents as P.exhibits 1-16. It was his testimony that the purpose and intend of the initial reservation of the property has never ceased.

17. PW2 was Cyril Wangong'o, the manager legal services and acting corporation secretary of the Kenya Civil Aviation Authority who reiterated the evidence given by PW1 and added that the suit property is located within an area that is communal to the government agencies, and that the same had never been given away by the Authority and therefore the defendants acquired title to it illegally.

18. With the above evidence, the plaintiff closed its case. The defendants' case was also ordered closed on 18/12/2018 when they failed to attend court and give evidence.

### **C SUBMISSIONS OF COUNSEL**

19. Mr. F. O. Makori learned counsel for the plaintiff in his submissions, inter alia submitted that the alienation of the suit property and the house thereon to the 1<sup>st</sup> defendant in the first instance was done unlawfully, corruptly and contrary to provisions of Section 3 and 7 of the Government Land Act (repealed) and the Government Financial Regulations and Board of Survey Procedures. He submitted that there is no evidence on record to indicate that the president executed the Grant in favour of the 1<sup>st</sup> Defendant and that the 3<sup>rd</sup> Defendant who purportedly allocated the suit property to the 1<sup>st</sup> Defendant has failed to proffer any such evidence either. He was also of the view that the allocation was unlawful because the suit property was land that had already been allocated, surveyed, alienated and reserved for a specific public use by the Kenya Civil Aviation Authority and therefore was not an unalienated government land in terms of the provisions of Section 3(a) of the Government Lands Act (repealed). He further submitted that the 3<sup>rd</sup> Defendant could not have issued the Grant to the 1<sup>st</sup> Defendant under Section 7 of the same Act since the proviso to that section expressly provided that nothing contained in that section could be deemed to authorize the usurpation of the president's power under section 3 among others. He also submitted that the purported Grant in favour of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was prepared and issued by the 3<sup>rd</sup> defendants without the consent or approval of the Director of surveys and the Director of Physical Planning and without boarding the house on the suit property for sale at a market value as provided for in Section 12 of the Government Lands Act (repealed), the Government Financial Regulations and the Board of Survey Procedures. That there was no evidence to prove that a part Development Plan (PDP), Letter of Allotment or a Survey Plan was ever prepared, recorded and lawfully issued to the 1<sup>st</sup> Defendant before the Grant was registered in his favour, arguing that this was because the suit property had already been allocated or alienated. It was his submission that the alienation of the suit property by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant in the first instance and subsequently to the 2<sup>nd</sup> defendant was illegal and a nullity *ab initio*, and that the same was ineffectual to confer any title to the 1<sup>st</sup> defendant in the first instance and subsequently to the 2<sup>nd</sup> defendant or any other person thereafter. He submitted that the defendants engaged in paper transactions without a parcel of land as its substratum was already alienated to Kenya Civil Aviation Authority and as such was never available for alienation. He further submitted that the defendants have failed to discharge their respective evidentiary burden of proof in showing that the suit property was lawfully allocated to them in accordance with the law. It was his submission that the Plaintiff's evidence on record stands tall and uncontroverted in any way. The Plaintiff's counsel relied on the cases of **Benja Properties Limited –v- Syedna Mohammed Burhannudin Sahed & 4 Others (2015)eKLR**; **Kenya Industrial Estates Limited –v- Anne Chepsiror & 5 Others (2015)eKLR** and **Henry Muthee Kathurima –v- Commissioner of Lands & Another (2015) eKLR**.

20. The Plaintiff's counsel submitted that the remedies sought by the plaintiff should be granted as the same are supported by the evidence on record, adding that Sections 23 and 56 of the Registration of Titles Act (repealed) empowered the court to order cancellation of an illegally acquired title and to restore the suit property to its rightful owner. He submitted that a title to land such as the Grant to the suit property is only infeasible and sacrosanct if the process of allocation and alienation is done in accordance with the law, arguing that in the present case, the alienation of the suit property by the 3<sup>rd</sup> defendant to the 1<sup>st</sup> defendant in the first instance and subsequently to the 2<sup>nd</sup> defendant was fraught with fraudulent flaws. He relied on the case of **Kenya National Highway Authority –v- Shalien Masood Mughal & 5 Others (2017)eKLR** where the Court of Appeal referred to **Dr. Joseph Arap Ngok –v- Justice Moiwo Ole Keiuwa & 5 Others, Civil Appeal No. Nai 6 of 1997** on sanctity of title. It was further submitted that the court should apply the doctrine of public interest in administering substantive justice and revoke the Grant over the suit property that was issued to the 1<sup>st</sup> Defendant in the first instance and subsequently to the 2<sup>nd</sup> defendant and allow the Plaintiff's suit with costs.

### **D. DETERMINATION**

21. I have considered the pleadings, evidence and submissions. In my view, the following issues present themselves for determination.

**i. Whether the suit property was lawfully alienated.**

**ii. Should the titles of the 1<sup>st</sup> defendant and subsequently of the 2<sup>nd</sup> Defendant be protected or are they liable to be cancelled.**

**iii. Whether the Plaintiff is entitled to the remedies sought.**

22. The procedure for issuance of Government land and Government leases was governed by the provisions of the Government Land Act, Cap 280 Laws of Kenya (now repealed). Section 4 of the repealed Act provided as follows: -

**“4. All conveyances, leases and licenses of or for the occupation of Government lands, and all proceedings, notices and**

**documents under this Act, made, taken, issued or drawn shall, save as thereon otherwise provided, be deemed to be made, taken, issued or drawn under and subject to the provisions of this Act.”**

Under the Government Lands Act (repealed), two entities had power to issue Government land and leases. These were the president and the Commissioner of Lands. Section 3 of the repealed Act provided inter alia that: -

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

-

**a. Subject to any other written law, make grants or disposition of any estates, interests or rights in or over unalienated government land.....”**

23. Section 7 of the repealed Act provided as follows:

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

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

24. The suit property herein was granted to the 1<sup>st</sup> defendant by a Grant executed by the 3<sup>rd</sup> defendant in the name of the president of the Republic of Kenya. There is no evidence on record to indicate that the president executed the Grant in favour of the 1<sup>st</sup> Defendant in the first instance. And even assuming the president did allocate the suit property to the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant executed the Grant on instructions of the president, the same in my view, would still have been unlawful because the suit property was land that had already been allocated, surveyed, alienated and reserved for a specific public use by the Directorate of Civil Aviation (now the Kenya Civil Aviation Authority) and therefore the same was not an unalienated government land in terms of Section 3 (a) of the Government Lands Act (repealed). In my view, the Grant Number CR.33869 comprising LR NO.MN/1/2398 issued to the 1<sup>st</sup> Defendant was issued fraudulently and is void to the extent that the right of the president to make grants under the above provisions of the law was not followed. In the case of **Banja Properties Limited –v- Syedna Mohammed Burhannudin Sahed & 4 Others (2015) eKLR**, the Court of Appeal held:

**“25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the commissioner of lands to the original allottee did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5<sup>th</sup> Respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and rest- it was paper transactions without any parcel of land as its substratum.....**

**26..... It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seized prevails against all who can show no better right to seisin. ”**

25. In this case, the plaintiff has given convincing evidence to prove that at all material times, the suit property was alienated public land which was reserved for public use by Kenya Civil Aviation Authority, hence the same was not available for sale neither was it offered for sale. The property was not available for alienation by the 3<sup>rd</sup> Defendant to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other person. The evidence on record satisfactorily proved the particulars of irregularity, illegality, fraud, abuse of office and misfeasance in public office as set out in paragraphs 14 and 16 of the plaint. The plaintiff has also proved that the 3<sup>rd</sup> defendant abused his office in issuing the Grant over the suit property to the 1<sup>st</sup> defendant. It was incumbent upon the defendants to discharge the evidentiary burden of showing that the procedure they used to acquire the suit property which is public land, was lawful pursuant to the provisions of the Government Lands Act (repealed). The plaintiff’s evidence on record remains uncontroverted.

26. In this matter, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not file any defence. And apart from filing his defence, the 3<sup>rd</sup> defendant did not adduce any evidence in support of assertions made therein. It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleading. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against the defendants is uncontroverted and therefore unchallenged.

27. Having considered the evidence on record and the submissions as well as the law, I am satisfied and I find that at all material times the suit piece of land was vested in the Kenya Civil Aviation Authority for its use to construct staff houses. At no time did it surrender the suit land to the government. It was therefore, by virtue of the provisions of the Government Lands Act (repealed) not available for allocation by the 3<sup>rd</sup> defendant. Its allocation to the 1<sup>st</sup> defendant and subsequently to the 2<sup>nd</sup> defendant was therefore null and void. I find that the plaintiff has proved its case on a balance of probabilities.

28. In the result, I find that the plaintiff’s claim succeeds and I accordingly enter judgment for the plaintiff against the defendants in terms of prayers (a), (b) and (c) of the plaint.

29. I award costs to the plaintiff jointly and/or severally against the defendants.

30. It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 10<sup>th</sup> day of July 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Makori for plaintiff

No appearance for defendants

Yumna Court Assistant

**C.K. YANO**

**JUDGE**