



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC PETITION CASE NO.29 OF 2017

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 22, 23, 35, 40
47, 50, 159, 258, 259, & 260 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTIONS 7, 9, 10, 14, 25 AND 26 THE
LAND REGISTRATION ACT NO.3 OF 2012**

AND

IN THE MATTER OF THE LAND ACT NO.6 OF 2012

AND

**IN THE MATTER OF SECTIONS 3, 4, 5 AND 8 OF THE ACCESS
TO INFORMATION ACT NO.31 OF 2016**

AND

**IN THE MATTER OF SECTION 2, 3, 4, 5, 6, 7, 8, 9, AND 11
OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO.4 OF 2015**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL
RIGHTS UNDER THE CONSTITUTION OF KENYA ARTICLES 10, 19, 20,
21, 22, 23, 35, 40, 47 AND 50**

BETWEEN

THOMAS KHAMALA BIFWOLI.....PETITIONER

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE CHIEF LAND REGISTRAR.....2ND RESPONDENT

WILLIAM NDINYA OMOLLO.....3RD RESPONDENT

JUDGMENT

1. **Thomas Khamala Bifwoli**, the Petitioner, filed the petition dated 7th august 2017 against **The Hon. Attorney General, The Chief Land Registrar, and William Ndinya Omollo**, the 1st to 3rd Respondents respectively, seeking for the following prayers;

” a) A declaration that the survey map indicating acreage for Kisumu Municipality Block 5/898 as 0.0216 hectares is a nullity the same based on a non-existent subdivision scheme and fraudulent certificate of lease in the names of Joseph Mungai Kariuki.

b) A declaration that the transfer of lease from Reuben Mwithiga Thuo to Onesmas Odari is a nullity as the said transfer of lease:

(i) Was not signed by both parties,

(ii) Stamp duty and rates were not paid,

(iii) PINS, IDs, passport size photographs were not certified as required by law,

(iv) Was not registered in the presentation Book,

(v) has no date of presentation for registration etc.

c) A declaration that the certificate of Lease in the names of Onesmas Odari is a nullity since it was fraudulently issued pursuant to a fraudulent, unlawful and unregistered transfer of lease which is incapable of transferring any interest in the said land from Reuben Mwithiga Thuo to Onesmas Odari.

d) A declaration that the transfer from Odari to Omollo be is a nullity as the transfer is not signed by the Land Registrar and that Onesmas Odari did not have a valid certificate of lease to transfer to anyone since **Kisumu Municipality Block 5/899** was never transferred to Onesmas Odari by Reuben Mwithiga Thuo in the first place.

e) A declaration that the certificate of lease for Kisumu Municipality Block 5/899 in the names of William Ndinya Omollo is a nullity as it was issued pursuant to fraudulent, unlawful and unregistered documentation without inter alia, a valid and duly executed transfer of lease on record and that Onesmas Odari did not have a valid certificate of lease to transfer to anyone.

f) A declaration that pursuant to **Article 35** of the Constitution, the petitioner is entitled of certified copies of all requested documents since all the requested documents constitute a public record which is disclosable.

g) A declaration that the Decision of state counsel Ms. Essendi purporting to set aside the decision of Senior State Council Janet Langat is a nullity since it's violation of **Article 47** of the Constitution and **Section 2, 4 and 6** of the Fair Administrative Actions Act which inter alia requires Ms Essendi to give notice, reasons, evidence etc to the Petitioner prior to making her decision which overruling that of Ms. Janet Langat.

h) A declaration that the decision of Ms. Essendi setting aside the decision of Janet Langat declaring the 3rd Defendant's certificate of lease as not genuine is a nullity since it was taken after 6 months from the date the decision was made without leave of court and in violation of the law which was the applicable law at the time.

i) Orders compelling the Respondents to issue reasons and full supporting documentation for the contradictory averment in relation to the said **KISUMU MUNICIPALITY BLOCK 5/899**.

j) Orders compelling the Respondents to pay damages to the Petitioner for violating the Petitioner's constitutional rights to property.

k) Orders that the Respondent's bear the costs of this petition.

l) Such further orders and such directions as to the court deem just and appropriate in the circumstances of this case.”

2. The Petitioner has listed several grounds marked 72 to 121 under the heading of “The facts” and the following are the highlights;

“72. The Petitioner is the undisputed and registered owner of **Kisumu Municipality block 5/898** measuring 0.0493 hectares, a fact confirmed by the documents issued by the 1st and 2nd Respondents.

73. The Petitioner purchased the said land from Michael Ogola Agot vide an agreement dated 16th August 2010, the fact is not denied by any of the Respondents.

74. The Petitioner was issued with a certificate of lease dated 25th August 2010 duly issued by the 2nd Respondent with the Kisumu Municipality Block 5.899 measuring 0.0493 hectares.

75. In the month of December 2011, the Petitioner commenced development or construction of the said land having obtained relevant approvals from the County Government.

76. On or about the 18th December 2011, the 3rd Respondent claimed that 0.0216 hectares of the petitioner's land were his. At that time he did not even have a certificate of lease in his names. The 3rd Respondent thereafter proceeded to demolish the Petitioner's development in spite of the Petitioner having stopped the construction pending the determination of ownership of the disputed land.

77. On the 17th December 2012 the petitioner filed a suit against the 1st and 2nd Respondents the same being Kisumu **ELC No.144 OF 2012**; the pleadings are in the bundle marked TKB attached to the petitioners affidavit.

78. The Petitioner is the Plaintiff in Kisumu **ELC 144 of 2012** whereas the 1st, 2nd and 3rd Respondents are the 1st, 2nd and 3rd Defendants respectively; the pleadings and documents are produced and exhibited in the bundle marked TKB attached hereto.

79. The 1st and 2nd Respondents filed their statement of defence on 25th April 2014. At paragraph 5 of the 1st and 2nd Respondents statement of defence, they unequivocally admit on the basis of documents in their custody and control that the certificate of lease for Kisumu Municipality Block 5/899 held by one William Ndinya Omollo (3rd Defendant) "is not genuine".

80. In April/May 2016, the 3rd Respondent unlawfully and using raw force, fenced the Petitioner's entire 0.0493 hectares and commenced development of the same in spite of his approval having been nullified by the Kisumu County Government and in spite of acreage in his fraudulent certificate of lease being 0.0216 hectares and not 0.0493 hectares. 3rd Respondent only stopped further development of Petitioner's aforesaid property when this court issued an injunction restraining him. (See Petitioners application dated 26th may 2016).

81. On the 29th September 2016, the Counsel for the 1st and 2nd Respondents orally sought leave to amend the statement of defence dated 25th April 2014 in the above mentioned case.(see court proceedings dated 29th September 2016).

82. Mr. Maruti objected to the amendment sought pursuant to an oral application since neither I nor my advocate on record were served with; a copy of a proposed amendment, reasons or grounds for amendments, and evidence or information relied upon. Without this basic information, we could not respond to the said application. Despite Mr. Maruti's objection, the respondents were granted 30 days to formally lodge their amended statement of defence which period lapsed on 30th October 2016.(see court proceedings dated 29th September 2016).

83. On the morning of the 5th December 2016, long after the lapse of the period granted, when the matter came up next, Mr. Muruti was served with a purported amended statement of defence but without; reasons or grounds for amendments and evidence or information relied upon to make the amendments. Failure to furnish this information contravenes **Articles 35, 40 and 47 of the Constitution, Section 4, 6 and 7(2) of the fair Administration Actions Act and Section 4 of the Access to Information Act**. In addition the Respondents said application violates **Orders 51 Rules 1 and 4 of the Civil procedure Rules** which require that "*all applications to the court shall be by motion*" and that "*Every notice of motion shall state in general terms the grounds of the application and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served*".

84. Interestingly, in the proposed amended statement of defence, the 1st and 2nd Respondents purported to withdraw an admission that the certificate of lease for **Kisumu Municipality Block 5/899** held by one William Ndinya Omollo is not genuine by deleting paragraph 5 of the statement of defence dated 25th April 2014 without giving any explanation, reason or evidence. (See paragraph 5 of amended statement of defence for the 1st and 2nd Defendants Amended on 3rd November 2016).

85. It's settled law that where a "withdrawal of a prior admission is sought the party seeking the withdrawal should made a substantive application in regard thereto, explaining under oath, that the admission was an error, the circumstances under which the error was made and satisfying the court that the withdraw of the admission will not prejudice the other party (normally the Plaintiff)". These minimum legal requirements are not met to-date.

86. That Courts have repeatedly held that "Amendments to pleadings can be of a wide variety. Some are simple and purely formal in nature, i.e. to amend arithmetical and clerical errors in pleading. Other amendments may be more substantial, for example amendments seeking to withdraw an admission made on the pleadings. It is trite law that amendments constituting the withdraw of an admission have to be done on affidavit. Affidavits would only be necessary in more substantial amendments, such as the withdrawal of admissions".

87. The petitioner is persuaded that an amendment seeking to withdraw an admission that the certificate of lease for Kisumu Municipality Block 5/899 is not genuine is a substantial amendment and therefore can only be done through a formal application, complete with a supporting affidavit setting out clear cogent reasons and evidence relied upon.

88. In spite of numerous requests for the aforesaid documents and information, the Respondents, without any reason or justification, are unwilling or unable to provide the same to this court. (See letter dated 13th December 2016, the application date 17th December 2016, application/letter dated 26th January 2017, letter dated 3rd April 2017 amongst other all in the buddle marked TKB attached to the Petitioner's affidavit).

89. Moreover, the 1st and 2nd respondents decision to withdraw the aforesaid admissions is an administrative action in terms of **Section 2** of the FAAA. That being the case, pursuant to **Section 4** of the FAAA, I am entitled as of right to the following prior to the aforesaid admission being withdrawn;

- a) “prior and adequate notice of the nature and reasons for the proposed administrative action;
- b) an opportunity to be heard to make representation in that regard;
- c) notice of a right to review or internal appeal against an administrative decision, where applicable;
- d) a statement of reasons pursuant to section 6 of the FAAA;
- e) notice of the right to cross-examine where applicable; or
- g) information, materials and evidence to be relied upon in making the decision or taking the administrative action”.

89. in view of the foregoing, the Petitioner was compelled to file in court an application dated 16th December 2016 under inter alia the Access to Information Act and the Fair Administrative Action Act contesting the decision and administrative actions of the Respondents and demanding to be supplied with public “information, materials and evidence relied upon in making the decision or taking the administrative action” pursuant to Articles 35, 40 and 47 of the constitution, Section 4 and the FAAA, Section 4 of the Access to Information; etc.

90. On 29TH March 2017, when Kisumu ELC 144 of 2012 came up for the hearing of the petitioner’s motion application dated the 16th December 2016, the petitioner’s Advocate was served with documents and a list of documents by the counsel for the respondents. (a copy of the list of bundle of documents are produced and exhibited in the bundle marked TKB attached hereto duly paginated).

91. The list of documents filed was in partial compliance and conceding to prayer 4 of the Petitioner’s motion application aforementioned. In that prayer, I request for disclosure and certification of all documents relating to the history, ownership and acreage of disputed and related parcels of land. (A copy of the motion application dated the 16th December 2016 is hereby produced marked TKB).

92. Thereafter, the Petitioner’s counsel requested the Honourable court for leave to be allowed to file a supplementary affidavit in answer to the documents lodged by the Respondents aforementioned, which application was allowed.

93. The supplementary affidavit in answer to the documents lodged by the Respondents was filed and served on the 29th March 2017. (A copy of the supplementary affidavit is produced and exhibited in the bundle marked TKB duly paginated).

94. The list and bundle of documents served upon petitioner’s counsel on the 29th March 2017 are a scanty attempt to furnish the documents sought vide prayer 4 of his motion application of the 16th December 2016; only 4 documents are indicated on the list of documents, but a perusal of my bundle reveals that most of the documents enumerated are not in the bundle.

95. The petitioner is not aware of any reasons or particulars difficulty on the part of the Respondents in availing all the documents relating to the two parcels of land and in particular any reasons and/or or documents that would justify an amendment that attempts to sanitize the 3rd Defendant’s fraudulent certificate of lease.

96. The petitioner’s counsel on record has written to the respondents seeking the documents under inter alia the Access to Information Act but for inexplicable reason, there has never been a response and/or any explanation for the delay and scant furnishing of the information.(see letter dated 13th December 2016; application dated 17th December 2016; application/letter dated 26th January 2017; letter dated 3rd April 2017 amongst others).

100. The Petitioner is persuaded that when a State Agency takes a position, it is on the basis of some information and when it takes exactly opposite view, when another party has relied on that earlier views, the State Agency as a supposed neutral player must furnish all the information forming the basis of the view or assertion prior to taking the opposite view.

101. Having considered the conduct of the 1st and 2nd Respondents herein well as being alive to the history of this matter, the Petitioner has formed the persuasion that the said Respondents have conducted themselves in a manner consistent with an inclination to hide, suppress and falsify information regarding the two parcels of land that form the dispute of these proceedings.

102. The Petitioner is persuaded that Respondents and more particularly the District Land Registrar ha deliberately and intentionally failed to disclose all documents regarding the history, ownership and acreage of Kisumu Municipality Block 5/465, Kisumu Municipality Block 5/898 and Kisumu Municipality Block 5/899 from the origin to the current owners. These documents are relevant for determination of the truth. The missing documents include; survey map; green cards; all certificates of lease on record; all transfers of leases; subdivision scheme approvals etc.

103. Some of the documents made available on the public record by 2nd Respondent such as Survey Map for Kisumu Municipality Block 5/898 which indicate acreage of 0.0216 hectares instead of the current acreage of 0.0493 hectares are fraudulent and not genuine. The said survey map has been denied by Respondents, is neither supported by sub-division scheme approval, certificate of lease etc.

104. The petitioner is persuaded that according to the law, disclosure means full disclosure of the entire requested record; in addition, all requested documents must be duly and properly certified by Land Registrar. These facts were clearly and explicitly communicated to the Respondents in on above mentioned correspondence to them, yet most of the requested documents remain undisclosed, and the few that were disclosed, they remain uncertified.

105. It follows without any contestation that the District Land Registrar as an officer with the office of the Chief Land Registrar has failed to discharge his disclosure obligations pursuant to **Articles 3 and 47 of the Constitution; Section 7 (2) and 10 of the Land Registration Act; Section 4 of the Access to Information Act, Section 4 to 6 of the FAAA and other Laws of Kenya.**

106. The petitioner is persuaded that the failure by the District Registrar is intentional, intended to punish me as the Petitioner and facilitate a 3rd party admittedly fraudulent claim on my parcel of land.

107. All the requested documents are in possession and control of the 1st and/or 2nd Respondents pursuant to **Section 7 and 9** of the Land Registration Act. **Section 9(1)** of the Land registration Act states "The Registrar shall maintain the register and any document required to be kept under this Act in a secure, accessible and reliable format" As such the Registrar has a statutory duty to keep all land records including requested documents.

109. The Petitioner is persuaded that the Chief land Registrar through District Land Registrar Kisumu is in violation of the above mentioned provisions amongst others for refusing or ignoring to avail all the information, public records and explanations.

119. The Petitioner seeks relief against actual and continuous violation of his fundamental right to property and to fair administrative justice and this Honourable court has jurisdiction under **Article 22, 23, 40, 47, 163 (3) (b) and 165 (6).**

120. The Petitioner is further entitled to access to public information held by the Respondents as an right conferred upon him under the constitution of Kenya subject to constitutional limitations; right to property; and right to Fair Administrative Action.

121. By dint of **Article 20 and 259** of the constitution this Honourable court further enjoined by the constitution to interpret the fundamental rights."

3. The petition is supported by the affidavits of the Petitioner sworn on the 27th July 2017 and 1st November 2017 in which he among others depones to the following;

a) "That I am also the Plaintiff in Kisumu ELC 144 of 2012 whereas the 1st, 2nd and 3rd Respondents are the 1st, 2nd and 3rd Defendants respectively; the pleadings and documents are produced and exhibited in the bundle marked TKB attached hereto.

b) That at paragraph 5 of the 1st and 2nd Respondents statement of defence, they unequivocally admit on the basis of documents in their custody and control that the certificate of lease for Kisumu Municipality Block 5/899 held by one William Ndinya Omollo (3rd Defendant) is not genuine. (See paragraph 5 of the statement of defence dated 25th April 2014).

c) That I am informed by Mr. Maruti of Samba & Simba advocates who have conduct of my instruction in Kisumu ELC No.144 of 2012 and whose information I believe to be true, that on the 29th September 2016, the counsel for the 1st and 2nd Respondents orally sought leave to amend the statement of defence dated 25th April 2014 in above mention case.(see court proceedings dated 29th September 2016).

d) That I am informed that Mr. Maruti objected to the amendment sought pursuant to an oral application since neither I nor my advocates on record were served with a copy of proposed amendments, reasons or grounds for amendments, and evidence or information relied upon. Without this basic information, we could not respond to the said application. Despite Mr. Maruti's objection, the Respondents were granted 30 days to formally lodge their amended statement of defence which period lapsed on 30th October 2016. (See court proceedings dated 29th September 2016).

e) That I am informed that on the morning of the 5th December 2016, long after the lapse of the period granted, when the matter came up next, Mr. Maruti was served with purported amended statement of defence but without reasons or grounds for amendments and evidence or information relied upon to make the amendments. Failure to furnish this information contravenes **Articles 35, 40 and 47** of the Constitution, **Section 4, 6 and 7(2)** of the Fair Administrative Actions Act, and **Section 4** of the Access to Information Act. In addition the Respondent said application violates **Orders 51 rules 1 and 4** of the Civil Procedure Rules which require that "all applications to the court shall be by motion "and that "Every notice shall state in general terms the grounds of the application, and where any motion is grounded on evidence by affidavit, a copy of any affidavit intended to be used shall be served".

f) that interestingly, in the proposed amended statement of defence, the 1st and 2nd Respondents purported to withdraw an admission that the certificate of lease for Kisumu Municipality Block 5/899 held by one William Ndinya Omollo is not genuine by deleting paragraph 5 of the statement of defence dated 25th April 2014 without giving any explanation, reason or evidence.(See paragraph 5 of Amended statement of defence for the 1st and 2nd Defendants amended on 3rd November 2016).

g) That its settled law in this country and in civilized legal systems that where a "withdrawal of a prior admission is sought the party seeking the withdrawal should make a substantive application in regard thereto explaining under oath, that the admission was an error, the circumstances under which the error was made and satisfying the court that the withdraw of the admission will not prejudice the other party (normally the Plaintiff) these minimum legal requirement are not met to-date.

h) That moreover, the 1st and 2nd Respondents decision to withdraw the aforesaid admission is an administrative action in terms of section 2 of the FAAA. That being the case, pursuant to Section 4 of the FAAA, I am entitled as of right to the following prior to the aforesaid admission being withdrawn;

- a. “prior and adequate notice of the nature and reasons for the proposed administrative action;
- b. an opportunity to be heard to make representations in that regard;
- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
- d. a statement of reasons pursuant to section 6 of the FAAA;
- e. notice of a right to legal representation applicable;
- f. Notice of the right to cross-examine where applicable; or
- g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.”

i) That in view of the foregoing, I was compelled to file in court an application dated 16th December 2016 under inter alia access to Information and Fair Administrative Action Act contesting the decisions and administrative actions of the Respondents and demanding to be supplied with public “information, materials and evidence, relied upon in making the decision or taking the administrative action” pursuant to **Articles 35, 40 and 47** of the Constitution, **Section 4** of FAAA, **Section 4** of the Access to Information Act; etc.

j) That I was informed by my counsel, Mr. Maruti, which information I believe to be true and correct that on the 29th March 2017, when Kisumu ELC No.144 of 2012 came up for hearing of my motion application dated the 16th December 2016, he was served with documents and a list of documents by the counsel for the Respondents. A copy of the list and bundle of documents are produced and exhibited in the bundle marked TKB attached hereto duly paginated.

k) That as it can be readily discerned, if the documents filed by the Respondents were the ones that necessitated the amendments in Kisumu ELC No.144 2012, then the proposed amendments in the amended statement of defence should be rejected as the said documents actually confirm that the 3rd Defendant’s certificate of lease is not genuine since the “Transfer of lease” from Reuben Mwithiga Thuo to Onesmas Odari is a null and void for the following reasons;

- a) The said transfer of lease is not signed by either Reuben Mwithiga Thuo (transferor) or Onesmas Odari (transferee).
- b) The said transfer of lease is not registered in the presentation book register meaning it was never entered in the register at all;
- c) The said transfer of lease is not stamped in accordance with Stamp Duty Act meaning the mandatory stamp duty was never paid in respect of the said transfer of lease;
- d) The rates were never paid in respect of the said transfer or lease;
- e) Reuben Mwithiga Thuo and Onesmas Odari do not acknowledge their signatures, content of alleged Transfer of lease nor do they acknowledge that they freely and voluntarily executed the alleged transfer of Lease pursuant to **Section 45(2)** of the Land Registration Act and the Transfer of Lease instrument itself;
- f) The Land Registrar or certifying Advocate did not establish identities of the parties since the passport size photograph, National ID numbers and Tax PIN numbers for Reuben Mwithiga Thuo and Onesmas Odari are not authenticated by the Land Registrar or certifying Advocate as required by **Section 45 (1) and (2)** of the Land Registration Act and the Transfer of Lease instrument itself;
- g) For the foregoing reasons, there is no valid or legal Transfer of lease on record that can be registered and that can transfer any interest in the land to anyone;
- h) The said Transfer of lease is null and void as Reuben Mwithiga Thuo never validly transferred any land to Onesmas Odari;
- i) A certificate of lease that was issued to Onesmas Odari without a valid transfer of lease on record is irregular and outrightly a nullity. (see the transfer of lease from Reuben Mwithiga Thuo to Onesmas Odari in the bundle marked TKB)
- j) That having considered the conduct of the 1st and 2nd Respondents herein as well as being alive to the history of this matter, I have formed the persuasion that the said Respondents have conducted themselves in manner consistent with an inclination to hide, suppress and falsify information regarding the two parcels of land that form the dispute of these proceedings.

k) That it is important to note that the original “lease” for Kisumu Municipality Block 5/898 measuring 0.0493 hectare was signed by;

a) Commissioner of Lands who approved the acreage of Kisumu Municipality/Block 5/898 as 0.0493 hectares.

b) Two Land Registrars,

c) Two Directors of First Permanent East African Limited.

d) All the above people in addition to other staff at the Ministry of Lands, survey office, lawyers, buyers etc., could not have failed to detect an error in acreage if there was any. This error is not fraudulent as neither P. Opiyo nor can 2nd Defendant explain it.

l) That it is plain and obvious that my certificate of lease which is Kisumu Municipality Block 5/898 was registered first as compared to that of William Ndinye Omollo which is Kisumu Municipality Block 5/899. It is my view that 3rd Defendant’s certificate of lease is not genuine, or else, we have two certificates of lease over the same parcel of land. This leads to the following observations:

a) In that case, the Petitioner’s certificate of lease should be given priority over the 3rd Defendant’s certificate of lease since it was registered first in time than that of the 3rd Defendant.

b) Pursuant to Section (3) of the Land Registration Act, “the parcels in each registration Section or block shall be numbered consecutively and the name of the registration section and number and letter of the block, if any, and the number of the parcel shall together be a sufficient reference to any parcel.”

c) The Petitioner’s certificate of lease in Kisumu Municipality Block.5/898 while that of the 3rd Defendant is Kisumu Municipality Block 5/899.

d) It’s undisputed fact that 898 comes before 899 in the land Registration Register. This is prima facie evidence that my land was registered first.

e) Moreover, the Petitioner’s land was surveyed first before that of the 3rd Defendant (see registration numbers, 898 which belongs to our client comes first before 899 which belongs to 3rd Defendant, see survey map/plan etc.)

f) Pursuant to section 36 (5) of the Land Registration Act “interests appearing in the register shall have priority according to the order in which the instruments which led to their registration were presented to the registry”.

g) Note that apart from the said Plaintiff’s land measuring 0.0493 hectares, no other vacant land exists at the location of the disputed land. The rest of the land around is developed by their respective owners.

m) That I am aware that Respondents intend to resurvey and remeasure Kisumu Municipality Block 5/898 but disguised as a boundary dispute on 29 August 2017. (See copy of boundary dispute summons from Land Registrar – Kisumu dated 17th May 2017).

n) That **Section 21 of the Registered Land Act** relied upon by G.O. Nyangweso, Land Registrar – Kisumu in the Boundary dispute summons to convene a hearing and determine the boundaries was repealed in May 2012 and therefore is no longer part of the Laws of Kenya.

o) That moreover, Mr. G.O. Nyagweso states in the said summons that the petitioner “has applied to me under **Section 21 (2)** of the Registered Land Act to determine the disputed boundary between his/her land and your lands which is registered under title No. **Kisumu Municipality Block 5/898 – Vs- Kisumu Municipality Block5/899.....”**

p) That contrary to what is stated by the Land Registrar – Kisumu in the boundary disputes summons dated 17 May 2017, I have never made such an application since there is no boundary dispute in this case. Court proceedings confirm that indeed that application was made by the Respondents. This is a clear example of how mischievous a dishonest Mr.G.O. Nyagweso can be. (See court proceedings dated 29th March 2017).

q) That I am on record as opposing the said resurveying of my land as being mischievous, unlawful, unnecessary and intended to divert the attention of this court from fraudulent documents being held by the 3rd Respondent. (see supplementary affidavit filed on 29TH March 2017; see also letter to 3rd Respondent advocates).

r) That determination of boundaries can only come after determination of ownership and not the other way round. The procedure adopted by Respondents in this case is unconstitutional, illegal, strange and suspect. The boundary determination is being rushed to avoid 3rd Respondent documents or ownership from being scrutinized. I reiterate that his documents are forgeries.

s) That production of the said documents during the hearing will delay this case in the sense that in accordance with the

constitutional principles of fairness, sufficient and adequate notice, transparency, accountability and efficient conduct of proceedings, the court will most likely adjourn the case to allow any party contesting the said documents time to investigate and scrutinize the same. All this can be overcome by timely disclosure now.

t) That regarding paragraph 3 and 4 of Respondents Replying Affidavit, the 3rd Respondent mischaracterizes my petition by stating that the same was triggered by the orders issued by this court on 29th September 2016 and the 29th March 2017; that is not true as the said orders relate to amendments and boundary determination respectively. The central issue in my petition amongst others are that;

(i) the 1st and 2nd Respondents are in violation of the national values and principles of governance such as rule of law, integrity, transparency and accountability contrary to **Article 10** of the Constitution.

(ii) the 1st and 2nd Respondents have and continue to violate the right my right to information, property, and administrative action.

(iii) the said violations are intended to facilitate the perpetration of a fraud on my land and

(iv) fraud vitiates everything. Any “affair tainted with fraud cannot be perpetuated saved by the application of any equitable doctrine including an attempt to raise the pleas of res judicata”. None of the said constitutional issues arise from the said orders.

u) That at paragraph 6 and 8 of his replying affidavit, the 3rd Respondent state that orders were made in the presence of my counsel who did not indicate his dissatisfaction. The argument has no relevance either to enforcement of my constitutional rights or hearing and determination of this petition. A party who is dissatisfied with an order of the court for instance goes to appeal, which we did. But more importantly showing dissatisfaction or lack of it is not one of the considerations that exempt the Respondents from provisions of **Article 35 and 47** of the constitution amongst other laws. In addition, an application for extension of time does not relieve the Respondents of their obligations under Article 35 and 47 amongst other laws.

v) That with respect to paragraph 13 of the affidavit, the power of the court to “hear and determine an oral application” under order 8 Rule 8 does not relieve the Respondents of their disclosure obligations under Article 35 and 47 of the constitution, the Land Registration Act, the Access to Information Act, the Fair Administrative Actions Act etc. As such the provisions of Order 8 Rule 8 are irrelevant to the hearing and determination of the petition.

w) That in response to paragraph 22 of the replying affidavit, I state that my petition was inter alia triggered by my discovery of documents in the possession of the 2nd Respondent indicating that there is collusion between the Respondents to perpetrate a fraud on me by inter alia altering, substituting concealing and backdating documents in order to misrepresent the 3rd Respondent certificate of lease as genuine when they know its fraudulent so as to justify the hiving off 0.0216 hectares of my land. As such my petition was triggered by prima facie fraud on the part of the Respondents, confirmed by their unwillingness to disclose reasons for their administrative action and documents that go to determine of the truth amongst others. I reiterate that Respondents cannot withdraw a substantive admission as in this case without a formal application explaining the reasons; this issue will be address exhaustively elsewhere.

x) That the non-prosecution of my application dated 21st December 2016 was majorly occasioned by the Respondents in this case. First, the application was not listed on the cause list of the 8th March 2017 when it was supposed to come up for hearing. I cannot be blamed for that. When it came up on the 29th March 2017, the Respondents in their scheme to prevent the same from being heard;

a) Served my Advocate with a scanty list of bundle of documents in the morning of the 29th March 2017 in order to delay the hearing of that application. They further misrepresented to the court that they have disclosed all the documents when they haven't.

b) They raised frivolous preliminary objections in the morning of 29th March 2017 whose purpose was to eat into the time allocated for arguing my aforesaid application.

c) They further made an oral application to the court for the disputed land to be re-surveyed which application ate into the time allocated for the hearing of my application. That application was not scheduled for that day.

aa) That nothing in the application dated the 21st December 2016 precludes this court from hearing and determining the current petition as the issue are different and that application has not been decided by this court.

bb) That paragraphs 24 and 27 of the replying affidavit demonstrate how dishonest the 3rd Respondent can be. Notices of appeal were disclosed to all parties in this case including the court and on time; the reason why this Appeal has not been prosecuted is because certified proceedings are not ready in spite of my repeated requests for the same.

cc) That in answer to paragraph 25 of the 3rd Respondent's affidavit, I state that pursuant to Section 8 of the Fair Administrative Actions Act, the most fair and expeditious way to enforce my constitutional rights is by way of this petition. The Notice of appeal dated the 19th December 2016 and the application dated the 21st December 2016 have no impact on the hearing and determination of the current petition by this court. As usual, the Respondents are on a fishing expedition to try and delay the hearing of this petition

since their case is built on fraud and mine on solid evidence.

dd) That in response to paragraph 28 of the 3rd Respondent's replying affidavit, I state that todate the 2nd Respondent has not disclosed the following documents amongst others in spite of numerous requests;

- a) The lease in the names of the First Permanent East Africa Limited for Kisumu Municipality Bock 5/899.
- b) Transfer of lease from Fist Permanent East African Limited to Reuben Mwithiga Thuo and all accompanying documents,
- c) Certificate of lease in the names of Reuben Mwithiga Thuo
- d) Relevant sub-division scheme approvals
- e) The genuine survey map etc.

ee) That interestingly, when I first encountered the 3rd Respondent in December 2011, even before he obtained a certificate of lease in his names, he was inter alia already armed with the fraudulent survey map which he heavily relied on to claim ownership of the disputed land. It's now clear why he did that.

ff) That I am also aware that another Land Registrar W. Odhiambo , in collusion with Mr. P. Opiyo and others attempted to fraudulently and secretly cancel the genuine certificate of lease in the names of James Mungai Kariuki indicating acreage of 0.0493 hectares and purported to secretly substitute it with a fraudulent certificate of lease in the names of Joseph Mungai Kariuki but indicating lesser acreage of 0.0216 hectares. A Land Registrar has no powers to unilaterally cancel a certificate of lease without a court order. Whereas Mr. G.O. Nyangweso is aware of this fraudulent certificate of lease and activities of this Land Registrar, he has knowingly and actively elected to conceal this information from the court. This is abetting a crime.

gg) That at Paragraph 36 of the affidavit, the 3rd Respondent claims that he is the "bona fide and registered proprietor of Kisumu Municipality Bloc 5/899". The Court of Appeal has held that a bona fide purchaser "must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title." The evidence on record shows that none of those legal requirements is met since his certificate of lease is fraudulent and therefore not valid and secondly, the person from he allegedly acquired the certificate of lease did not have a valid and legal title to transfer to the 3rd Respondent. At such 3rd Respondent never carried out necessary due diligence.

hh) That at paragraph 40, the 3rd Respondent states that there is no dispute that both Kisumu Municipality Block 5/898 and Kisumu Municipality Block 5/899 both exist in the records of the 2nd Respondent and on the ground. This is not true as;

- a) The evidence on record demonstrates that all the documents relating to Kisumu Municipality Block5/899 are either prima facie fraudulent or derived from fraudulent or no-existent documents and as such no genuine record of the same exists in law.
- b) On ground, alleged Kisumu Municipality Block 5/899 is allegedly derived from a prima facie fraudulent survey map which is unsupported by the requisite approval of the Commissioner of Land and all certificates of lease on record. **Pursuant to Section 30(3) of the Land Registration Act**, a certificate of lease is conclusive prove of acreage and not a survey map.

ii) That in paragraph 62, the 3rd Respondent believe that his certificate of lease is genuine. Whether his certificate of lease is genuine or not is a question of evidence and not what he believes or does not believe in. His believes that his lease is genuine are based on nothing as they are unsupported by any evidence. To the contrary the evidence in record shows beyond reasonable doubt that his lease is a fraud."

4. The Petition is opposed by the 3rd Respondent through the replying affidavit sworn by him on 6th September 2017 in which he deponed to the following among others;

- a) "That Petitioner's complaints in this petition arise from two orders made by the trial Judge in Kisumu E.L.C. No.144 of 2012; the first one was made on 29th September 2016, following an oral application by the 1st and 2nd Respondents for leave to amend their statement of defense, which application was granted.
- b) The second order was made on 29th March, 2017, directing that "the County land Registrar and surveyor to visit land parcel No. Kisumu Municipality/Block 5/898 and 899 and determine the acreage, demarcate their boundaries, and determine whether there has been any encroachment by one party into the other's plot and if so by what acreage."
- c) That the 1st and 2nd Respondents did not comply within 14 days as directed, instead, they drew their amended statement of defense on 3rd November, 2016, and only filed the same on 24th November, 2016, out of time, and the same was thereafter served on 5th December, 2016.
- d) That on 5th December, 2016, on the oral application of the 1st and 2nd Respondents, the time for filing and serving the amended

statement of defence was extended to the time it was filed served, again this order was made in the presence of the Petitioner's advocates, who did not oppose that extension of time.

e) That I know of my own knowledge that pursuant to **Order 8 Rule 3 (1) of the Civil Procedure Rules, 2010**, "the court may at any stage of proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings," and further that in terms of **Order 8 Rule 5** thereof, "the court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and in such terms as to costs or otherwise as are just," if the amendment is "for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any pleadings."

f) That since the leave granted to the 1st and 2nd Respondents to amend the statement of defence was not conditional on the 1st and 2nd Respondents first furnishing the reasons or grounds for the amendments and evidence or information relied upon to make the amendments, there was no contravention of **Articles 35, 40 and 47 of the Constitution or Section 4, 6, and 7 (2) of the Fair Administrative Actions Act or Section 4 of the Access to Information Act**.

g) That one of the issues for determination in Kisumu E.L.C. No.144 of 2012 is whether the Petitioner's title L.R. No Kisumu Municipality Block 5/898 and my (the 3rd Respondent's) L.R. No. Kisumu Municipality/Block 5/899 are distinct and exist separate on the ground.

h) That the statement of defense dated 25th April 2014 was filed by the Attorney General before the plaint was amended on 28th May 2016 to join the Chief Land Registrar as the 2nd Defendant, and it must be known to the Petitioner that it is only the Chief Land Registrar who is required under **Sections 7 and 9 of The Land Registration Act** to "maintain the register and any document required to be kept" and that he is therefore the only one who can tell whether any title document is genuine or not.

i) That in the amendment filed on 24th November, 2016, the said paragraph 5 of the statement of defence dated 25th April, 2014, was deleted, and it was because of this amendment that the Petitioner was aggrieved.

j) That I verily believe that the Petitioner herein has already sought the remedy available to him in law as follows;

a) On 19th December 2016, the Petitioner lodged a Notice of Appeal in Kisumu ELC NO.144 of 2012 against the ruling dated 5th December 2016; that Notice of Appeal, a photostat copy of which is attached hereto, is yet to be prosecuted.

b) On 21st December 2016, the Petitioner filed an application in Kisumu E.L.C. No.144 of 2012, in which he seeks to strike out the amendment dated 3rd November 2016 and filed in court on 24th November 2016 and served on 5th December 2016; that application has not been prosecuted and is still pending.

k) That the Petitioner has failed to disclose the fact that he has already filed a Notice of Appeal which has not been prosecuted, and he is therefore guilty of material nondisclosure.

l) That the Petitioner cannot allege that his constitutional rights have been violated and proceed to prosecute petition while both the Notice of appeal as well as the application dated 21st December 2016; are still pending.

m) That in his letter to the District Land Registrar dated 26th January 2017, the Petitioner had applied for copies of all documents relating to his L.R. No. Kisumu Municipality/Block 5/898 and my L.R. No. Kisumu Municipality Block 5/899.

n) That even before that, in his application dated 21st December 2016, filed in Kisumu E.L.C. No.144 of 2012, one of the prayers sought by the Petitioner was an order that he should be furnished with certified copies of all documents including but not limited to certificates of lease, Transfer, Consents, sub-division scheme approvals and survey maps for both L.R.No. Kisumu Municipality/Block 5/898 and L.R. No. Kisumu Municipality/Block 5/899.

o) That in response to this limb of the application dated 21st December 2016 the 1st and 2nd Respondents filed certified copies of the requested documents in Kisumu E.L.C. No.144 of 2012 on 23rd March 2017 and copies thereof have already been served upon the Petitioner's advocates.

p) That the said Odari Onesmas acquired his title to the said L.R. No.Kisumu Municipality/Block 5/899 on 7th December 2009 after he had bought the same from one Reuben Mwithiga Thuo who had in turn obtained the title from the original owner on 13th February 2008; the original owner was m/s First Permanent (East Africa) Ltd. who was first registered on 5th July 2007.

q) That it is very instructive to note that both L.R. Kisumu Municipality/Block 5/898 as well as of L.R. Kisumu Municipality/Block 5/899 have the same root of title which even the Petitioner has acknowledged, and that is that both were first registered in the name of M/S First Permanent (East Arica) Ltd on 5th July 2007, and:

a) It is also not disputed that L.R. No. Kisumu Municipality Block 5/898 was transferred from M/S First Permanent (Eat Africa) Ltd to one Joseph Munga Kariuki who sold the same to Michael Ogola Agot (the 4th Defendant in Kisumu ELC No.144 of 2012) who in turn sold the same to the Petitioner;

b) On the other hand, of L.R. Kisumu Municipality/Block 5/899 was transferred from M/S First Permanent (East Africa) Ltd to one Reuben Mwithiga Thuo who sold the same to Onesmus Odari who in turn sold the same to me.

r) That the map clearly shows that all the plots in the area are roughly or more or less the same acreage, and the proceedings in Kisumu E.L.C. No.144 of 2012 confirm that even before that suit was filed in December, 2012, the petitioner had already instructed a surveyor to verify the size of his plot and “it was discovered that our client’s plot was in fact nearly 50% or half of what is indicated in the document of title” (see the letter dated 13th February 2012 filed on 10th October 2013).

s) That in the Petitioner’s further amended plaint dated and filed on 26th May 2016 in Kisumu E.L.C. No.144 of 2012, at paragraph 17, he now states that a “cross check with the survey office confirmed a possibility that the assertions of the 3rd Defendant that the acreage of Kisumu Municipality/Block 5/898 and Kisumu Municipality Block 5/899 were 0.0216 hectares each, were apparently correct as of the later date.”

t) That the Valuation Report by ADD PROPERTY CONSULTANTS dated 24th May 2013, which was commissioned by the Petitioner himself, also confirmed that the acreage of the petitioner’s L.R. No. Kisumu Municipality/Block 5/898 “as given by the relevant survey map and ground measurements” was only 0.0216; the valuer’s relevant recommendation was that “there is need to rectify the registered area of the plot to match the surveyed area.”

u) That indeed the court in Kisumu E.L.C. No.144 of 2012 had no jurisdiction to determine this dispute because **Section 18 (2) of the Land Registration Act 2012 (Act No.3 of 2012)** expressly states that “the court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

v) That in all the circumstances of the case, therefore the order made by the Court in Kisumu E.L.C. No.144 of 2012 on 29th March 2017 directing that “the County Land Registrar and Surveyor to visit the land parcel No. Kisumu Municipality Block 5/898 and 899 and determine the acreage, demarcate their boundaries, and determine whether there has been any encroachment by one party into the other’s plot and if so by what acreage,” was the only proper order, taking all factors into account.

w) That the said Onesmas Odari as well as the said Reuben Mwithiga Thuo are not parties to this petition and in the premises the declarations sought against both of them by the petitioner have no legal foundation and cannot be entertained.”

5. The directions on filing and exchanging written submission were given on the 4th October 2017. That consequently the counsel for the Petitioner and 3rd Respondent filed their written submissions dated 17th January 2018 and 31st January 2018 respectively.

6. The following are the issues for the court’s determinations;

a) Whether the declaratory orders sought under paragraph 121 (a) to (c) can issue without enjoining those named, and to be directly affected with the orders, in the petition and according them a hearing.

b) Whether the court’s order allowing the amending of a defence after an oral application in Kisumu ELC NO.144 of 2012 can be challenged through this petition.

c) Whether the petitioner has proved/established his claim that the 1st and 2nd Respondents have failed to provide him with any of the documents sought and in their custody within reasonable time, and if so whether his constitutional rights have been infringed.

d) Whether the Petitioner has suffered loss and damages, and if so whether he is entitled to compensation

e) Who pays the costs.

7. The court has carefully considered the grounds on the petition, the affidavit evidence by both parties, the written submission by both parties counsel, the decided cases cited thereof and come to the following determinations;

a) That the Petitioner is the Plaintiff in Kisumu ELC NO.144 of 2012 which was initially filed against one defendant, the Hon. Attorney General, who is the 1st Respondent herein vide the plaint dated 17th December 2012. That at paragraphs 13 and 14 of the plaint, the Petitioner avers how he learnt of the existence of Kisumu Municipality Block 5/899 from Wilson Ndinya Omollo on the 18th December 2011, and among the orders sought is prayer (c) for damages for the value of the property he has been deprived of.

b) That the 1st Respondent (Defendant) filed their statement of defence dated 25th April 2014 in which they among others averred at paragraph 5 that the certificate of lease presented by one Wilson Omollo was not genuine.

c) That the Petitioner (Plaintiff) then filed an amended plaint dated 25th March 2015 among others, deleting the name “Wilson” and replacing it with “William” at paragraph 12. That a further amended plaint dated 26th May 2016 was filed among others enjoining the Chief Land Registrar, William Ndinya Omollo and Michael Ogola Agot as the 2nd to 4th Defendants respectively. That the 2nd and 3rd Defendants are appearing as the 2nd and 3rd Respondents respectively in this petition.

d) That at paragraph 26 and 28 of the further amended plaint, the Petitioner (Plaintiff) averred that the 2nd Defendant (2nd Respondent herein) had failed to process his request for a certificate of official search in respect of Kisumu municipality/Block 5/898 without offering any reasonable explanation.

e) The 3rd Respondent (3rd Defendant) filed his statement of defence dated 7th June 2016 among others averring that he bought Kisumu Municipality/Block 5/898 from Onesmas Odari and that the parcels is distinct from Kisumu Municipality/Block5/898. That the 1st and 2nd Respondents then filed amended statement of defence dated 3rd November 2016 among other deleting the averment in paragraph 5 of the defence dated 25th April 2014 after applying for leave to amend orally and the court granting it.

f) The Petitioner filed the notice of motion dated 16th December 2016 to among others strike out the amendments in the 1st and 2nd Respondents Amended defence dated 3rd November 2016. The Petitioner also seeks for an order for the 1st and 2nd Respondents to furnish him with copies of “all documents including but not limited to certificate of lease, Transfers, Consents, Subdivision scheme approval and survey pas for **Kisumu Municipality/Block 5/898 and Kisumu Municipality/Block 5/899** from their origin to date”. That among the replies filed is the grounds of opposition by 1st and 2nd Respondents counsel dated 10th March 2017 and list of documents of even date with certified copies of certificate of lease, transfer, consent and white card in respect of Kisumu **Municipality Block 5/898 and 899** attached. That application is reportedly pending before the court and the less the court says about it the better,

g) That the legal standing of the court order allowing the 1st and 2nd Defendants [Respondents] to amend their defence, and the fate of the Amended statement of defence filed thereafter cannot be decided in this petition. That can only be dealt with through an appropriate application made in the suit where the orders were made or through an appeal to the Court of Appeal. That further and related to the foregoing, prayers (g) to (i) cannot be dealt with in this petition as they relate to matter pending for determination in the motion dated 26th December 2016 in Kisumu ELC 144 of 2012, and the appeal commenced by the Plaintiff (Petitioner) through the Notice of Appeal dated 16th December 2016.

h) That the legality or otherwise of the documents filed and maintained at the Land Registry relating to land parcels **Kisumu Municipality Block 5/898 and 899** is among the matters or issues for determination in Kisumu ELC 144 of 2012 which is between more or less the same parties. That as that suit was filed before this petition, and both are before the same court, and revolve around more or less the same subject matter, the court finds this petition to be filed in contravention of Section **6 of the Civil Procedure Act Chapter 21 of Laws of Kenya**. That after Kisumu ELC 144 of 2012 is decided, the Petitioner herein will be in a better position to decide whether the Respondents had made full disclosure of the public documents/information that he has requested for and in their custody, and thereafter be at liberty to seek legal advice on how to seek for appropriate or desired orders or redress. That for the foregoing reasons prayers (a) to (f) and (j) in the petition, being on matters pending and related to Kisumu ELC 144 of 2012 are best dealt with in that suit.

i) That the filing of the petition was unnecessary as it raises issues that are on all fours for determination in Kisumu ELC 144 of 2012. That the court finds no merit in the petition. That as the 3rd Respondents filed his replying papers and participated in the hearing of the petition, he is entitled to costs.

8. That the Petition having been found to be without merit is hereby dismissed with costs to the 3rd Respondent.

Orders accordingly

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 2nd DAY OF May 2018

In presence of;

Petitioner Absent

Respondents Absent

Counsel Mr. Amule for Maruti for the Petitioner

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE