



REPUBLIC OF KENYA



Kenya Anti-Corruption Commission v Gemini Properties Limited & 3 others (Environment & Land Case 551 of 2009) [2025] KEELC 4993 (KLR) (30 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 551 OF 2009
EK WABWOTO, J
JUNE 30, 2025**

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

GEMINI PROPERTIES LIMITED 1ST DEFENDANT

JAMES RAYMOND NJENGA 2ND DEFENDANT

ZABLON AGWATA MABEA 3RD DEFENDANT

BARCLAYS BANK OF KENYA 4TH DEFENDANT

JUDGMENT

1. The Predecessor of the Ethics and Anti Corruption Commission brought this suit vide a plaint dated 29th October 2009 seeking the following orders:-
 - a. A declaration that the issuance of a Grant by the 2nd Defendant to the 1st Defendant over L.R No. 209/9295 [original number 209/8000/84] was null and void ab initio and ineffectual to confer any right, interest or title upon the 1st Defendant in the first instance.
 - b. A declaration that the charge which has been registered by the 4th Defendant over L.R No. 209/9295 [original number 209/8000/84] is null and void ab initio and ineffectual to confer any right, interest or title upon the 4th Defendant and the same be cancelled.
 - c. A declaration that the purported revocation of special condition number 5 of the Grant of L.R No. 209/9295 [original number 209/8000/84] by the 3rd Defendant was null and void and ineffectual for all intents and purpose.



- d. An order for restoration of the suit property and rectification of the land register by cancellation of the Grant over L.R No. 209/9295 [original number 209/8000/84] issued to the 1st Defendant and charged to the 4th Defendant so as to restore the suit property to the Public.
 - e. An order for a permanent injunction against the 1st Defendant and the 4th Defendants by themselves, agents, servants or assigns restraining them from constructing, letting, leasing, transferring, charging, entering upon or in any other manner howsoever from dealing with L.R No. 209/9295 [original number 209/8000/84].
 - f. Costs of and incident to the suit.
 - g. Any other or further relief the court may deem fit and just to grant.
2. The suit was contested by the Defendants. The 1st Defendant filed a Statement of Defence dated 22nd August 2011, the 2nd Defendant filed a Statement of Defence dated 29th September 2011 while the 3rd Defendant filed a Statement of Defence dated 20th November 2009. The 4th Defendant was removed from the proceedings pursuant to its application dated 2nd May 2019. The matter then proceeded for hearing only between the Plaintiff and the 1st to 3rd Defendants.

The Plaintiff's Case

3. It was the Plaintiff's case that at all times material to this suit Maiella Limited originally owned parcel of land L.R 209/8000 comprised in Grant No. IR 25232 and measuring approximately 66.18Ha. The Grant was issued to the said company on 18.8.1972 by the Government of Kenya and is what is currently known as "New Muthaiga" Estate within Nairobi.
4. It was averred that sometimes in 1972, Maiella Limited, the original owners of LR No. 209/8000 subdivided the said parcel of land into several portions and advertised the said portions for sale. The said portions were subsequently surveyed and allocated land reference numbers. However, on 23rd August 1972 the Government of Kenya registered a caveat on L.R 209/8000 claiming "a surrendee's interest in portions of the leasehold" which secured and constituted a condition precedent to the subdivision of the whole portion of land by Maiella Limited.
5. It was stated that in satisfaction of the said Government's condition precedent, Maiella Limited after subdivision surrendered to the Government of Kenya one parcel of land known as L.R No. 209/8000/84 [hereafter the suit property].
6. It was further stated that the suit property was surrendered to the Government of Kenya by Maiella Limited as a public utility for the construction of a nursery school and clinic. The surrender instrument of the suit property was subsequently transferred to the Government of Kenya by way of a Memorandum of Registration of Transfer of Land on dated 20th January 1979 and received at the Ministry of Lands on 9th February 1979.
7. The Plaintiff averred that on or about 26th May 1978 a company by the name Njoga Limited applied to the then Minister for Lands asking to be allocated the plot market "A" [the suit property] as the same "is vacant Government land and it is absolutely uncommitted." The then Minister for Lands purported to approve the said application on 2nd June 1978.
8. It was further averred that on or about 20th July 1978 the said Njoga Limited wrote another letter to 2nd Defendant requesting that the letter of allotment of the "unsurveyed plot A" be issued in the name of "our new company M/s Gemini Enterprises Limited".



9. The Plaintiff further averred that as at the time of the purported application by Njoga Limited and or Gemini Enterprises Limited, the suit property had already been surveyed by Maiella Limited and allocated with land reference number 209/8000/84. The same was not an unsurveyed plot.
10. According to the Plaintiff, on or about 5th February 1978, the 1st and 2nd Defendants fraudulently, illegally and in total contravention of the law used the Survey Plan and the Deed Plan prepared by Maiella Limited in 1972 and registered with the Director of Surveys to prepare and register a Grant in the name of the 1st Defendant. The suit property was purportedly and illegally allocated to the 1st Defendant with a new Land Reference number 209/9295 in place of the original Land Reference number 209/8000/84.
11. It was averred that the allocation of the suit property to the 1st Defendant by the 2nd Defendant was fraudulent, corrupt and contrary to the Government Land Act Cap. 280 particulars which were pleaded at paragraph 15 of the plaint.
12. According to the Plaintiff, the fraud and illegality in the process of alienation of the parcel of land and the illegal change of special condition number 5 of the Grant were not discovered until an investigation was undertaken by the Plaintiff sometimes in the year 2009.
13. During trial, five witnesses testified on behalf of the Plaintiff, Josias Mugendi Njagi testified as PW1. He stated that he works with the Business Registration Services as a Senior Clerical Officer. It was his testimony that MAIELLA LIMITED REG. NO C.2389 was registered on 1st October 1951 with Matelda Rosica and Armando Rosica as Directors/Shareholders. With its location and postal address at Plot No. 43, Gloucester House, Tom Mboya Street P. O. Box 45095 Nairobi. GEMINI PROPERTIES LIMITED REG. NO. C.18543 was registered on 6th December 1978 with Zara Madatali Chatur and Rahim Madatali Saburali Chatur as directors/shareholders. With its location and address at LR No. 209/8000/84 New Muthaiga Estate P. O. Box 49434-00100 Nairobi. GEMINI ENTERPRISES REG. NO. 70767 was registered on 26th January 1977 with Eshban Crispus Nduriri Githiaka, Mwangi Githiaka and Joshua Ndeere Ndirangu as Proprietors. With its location and address at Plot No. 209/3885, Nanyuki Road Industrial Area Nairobi P. O. Box 49263 Nairobi. NJOGA LIMITED does not appear in our data base of registered businesses or companies.
14. When cross-examined by Counsel for the 1st Defendant, he stated that even though he prepared the report dated 14th January 2022, the same had not been signed by him. He also stated that as per their policy, the report has to be signed by the Deputy Registrar, Business Registration Services. He also stated that the subsequent details of the company were never updated after their registrations.
15. Eric Munene, a Cartographer at the Ministry of Lands and Physical Planning testified as PW2. He relied on his witness statement dated 24th January 2022 in his evidence in chief. It was his testimony that the first survey in respect to the property was done in 1972 and the land in question was registered as L.R No. 209/800/84. He also stated that another survey was submitted in 2003 for extension of lease and user. The same was registered as Survey Plan, file No. 482/95 dated 10th February 2003 and authenticated on 7th May 2003.
16. On cross-examination by Counsel for 1st Defendant, he stated that the survey was done and registered in two different plans but he did not have the other plan. He also stated that he did not look at the whole parcel. He also stated that the change of L.R Number is normal when a new survey is done and, in this case, the same was regular and within the law.



17. When cross-examined by Counsel for the 3rd Defendant, he stated that the two surveys were done procedurally, there was no contravention of the law and the Department of Survey had approved the same.
18. Robert Simiyu, a former Assistant Director Land Administration testified as PW3. He adopted and relied on his witness statement dated 29th March 2022 in his evidence in chief.
19. It was his testimony that the suit property was a resultant subdivision of LR Number 8445 originally held by Maiella Limited. The same was surrendered to the Government for a specific purpose. Later the same was allocated to Njoga Limited pursuant to the request and vide a letter dated 20th July 1978 addressed to the Commissioner of Lands.
20. On cross-examination by Counsel for the 1st Defendant, he stated that Government Land can be allocated to an individual so long as certain conditions are met. He also stated that there was evidence that the current owners of the land were paying rates. He also stated that the land had already been allocated by 8th January 1979 and that due process was followed in its allocation. He further stated that there was an alteration and a handwritten cancellation of the word “Enterprises” and replaced with the word “properties” and there must have been a reason as to why that was done.
21. On further cross examination, he stated that change of user is a permissible process. There are several offices involved. There was no irregularity in respect to the allotment and change of user herein.
22. When re-examined, he stated that the Commissioner of Lands approved the change of user.
23. Stephen Njoroge Chege, a Chief Land Registration Officer testified as PW4. He adopted and relied on his statements dated 8th March and 2nd December 2022. It was his testimony that the grant herein was registered on 6th February 1979 as L.R No. 33069 in the name of the 1st Defendant.
24. Upon cross-examination, he stated that the 1st Defendant is the holder of the title and as per their records, the same is a good title. He also stated that the property is currently charged.
25. Evans Kipkorir Ronoh, was the last witness to testify on behalf of the Plaintiff. He testified as PW5 and stated that he is an investigator working with the Plaintiff. He adopted and relied on his witness statement dated 29th March 2022.
26. It was his testimony that in the course of carrying out investigations in the matter, they wrote to several government agencies seeking for relevant information. He also stated that they received several responses. It was established that a caveat was registered on 23rd August 1972 which was later withdrawn on 28th August 1972. He also stated that there was a surrender done. He also stated that there were special conditions provided that the land shall be used for clinic and as a day nursery school with two residences for the teacher and doctor. The 1st Defendant charged the property in breach of the special conditions and they had received a complaint from New Muthaiga Estate Residents Association.
27. Upon cross-examination, he stated that his statement had not indicated where the complaint came from. He also stated that the complaint he had referred to in his statement was not about ownership but on developments being made on the property. He further stated that the objective of their investigations was to establish whether the suit property was public land and whether it was available for allocation.



28. On further cross-examination, he stated that the lands office explained the allocation of the property. As at 1979 there was recognition of the property and there was also recognition that someone was paying the rates. The Commissioner of Lands approved the change of user.
29. When cross-examined by Counsel for the 3rd Defendant, he stated that there was a Gazette Notice dated 16th November 1965 which relates to the delegation of powers to the Commissioner of Lands by the President.
30. When re-examined, he stated that there was no specific allocation of the land made to the 1st Defendant. The said land was not available for allocation because it had been surrendered to the Government.

The 1st Defendant's case

31. The 1st Defendant filed a statement of defence dated 22nd April 2011. It was averred that the property known as L.R No. 209/9295, was never registered in the name of the Government of the Republic of Kenya as alleged by the Plaintiff and neither were any changes made to the property as alleged.
32. It was also averred that the property described by the Plaintiff as L.R No. 209/8000/84 has no relation to the parcel of land owned and registered in the names of the 1st Defendant.
33. The 1st Defendant denied ever having been involved in any fraudulent act, corrupt practice and or participation of such in its acquisition of its parcel of land. It was stated that the company mentioned as Njoga limited has no relationship with the 1st Defendant. Equally, all the particulars of fraud that were pleaded by the Plaintiff were denied.
34. It was stated that the 1st Defendant acquired the subject property legally and followed all the due process.
35. It was pleaded that since its acquisition of the suit property it has complied with all the necessary conditions attached to the certificate of lease it applied and obtained all the requisite consents from the Commissioner of Lands prior to undertaking any act governed by the special conditions and the Commissioner of Lands in execution of his statutory mandate issued all the approvals.
36. It was pleaded that at all times, the 1st Defendant has always adhered to the requirements imposed by the various authorities in the development and management of the suit property and no impropriety has ever been pinpointed by the Plaintiff.
37. It was stated that the 1st Defendant has been in occupation of the suit property since 1978, the 1st Defendant has been paying all the utility bills in respect of the property and has been complying with all the necessary conditions.
38. It was further stated that the 1st Defendant is a private company and it is unaware of any public interest or claim of ownership of the property. The allegations to the contrary are therefore disputed.
39. During trial, two witnesses testified on behalf of the 1st Defendant Julius Orwa Kobado testified as DW1 while Rahim Chatur testified as DW2.
40. DW1 stated that he is a licensed surveyor for 41 years. It was his testimony that he was instructed to do a report in respect to the suit property in July 2021. The scope of the said report was three fold, to confirm that the title deed is registered, do a search for legal documents pertaining to the suit property and prepare a comprehensive surveyor's report for L.R 209/9295 originally L.R No. 209/8000/84.
41. He further stated that he did prepare a report which he produced in his evidence in chief as DExhibit 1.



42. It was his testimony that the property was property allocated to the 1st Defendant as relevant statutory approvals were found at the Survey of Kenya Office.
43. In respect to his observations and findings which was stated in his evidence in chief; it was stated that land LR No. 209/8000 as originally registered in the name Maiella Limited as a leasehold land for a term of 99 years with effect from 1st May 1970.
44. After subdivision of land L.R No. 209/8000 into several portions; one of the resulting portions with L.R Number 209/8000/84 having an area of 1.326Hectares approximately was surrendered to the Government of Kenya on 20th January 1979 as indicated in entry No. 142 of the title.
45. Land L.R No. 209/9295 [formerly L.R No. 209/8000/84] was granted to Gemini Properties Limited for 99 years with effect from 1st January 1978 by the Commissioner of Lands for a Clinic and a Nursery School.
46. On 10th May 2003 the user of Land L.R 209/9295 was extended to include educational purposes the accommodation for the Headmaster/Principal, Boarding facilities and ancillary offices [Educational purposes including Nursery School and Clinic, Primary and Secondary School] through Commissioner of Lands letter Reference Number 9855/52.
47. Gemini Properties Limited commissioned a Licensed Surveyor by the name Mr. O. M. Wainaina to carry out an extension of user survey exercise which the Survey completed in April 2003.
48. On 24th April 2003 they commissioned a Surveyor Mr. O. M. Wainaina who submitted the Extension Survey data to Director of Surveys for checking, approval and authentication.
49. Director of Surveys examined the Extension of User Survey Data on 7th May 2003; approved it on 7th May 2003 and authenticated the same on 9th May 2003.
50. A new Deed Plan Number 248902 was issued on 15th May 2003 to enable the registered owner of the Land L.R Number 209/9295, Gemini Properties Limited to process a new Title Deed for Extension of User of the aforementioned Land.
51. The new Deed Plan Number 248902 was used to prepare a New Title Deed in the name of Gemini Properties Limited.
52. It was his testimony that there were no irregularities in the whole process.
53. On cross-examination by Learned Counsel for the Plaintiff, he stated that L.R No. 209/9295 and L.R No. 209/8000/84 is one and the same parcel. The same was surrendered to the Government as surveyed land. The land was available for allocation after surrender to the Government. He did not see the application made by the 1st Defendant though he had seen a letter of allotment dated August 1978 and according to the said letter it seems that the 1st Defendant was allotted the land before it was registered and that he did not know how the allocation was done.
54. When re-examined, he stated that the Commissioner of Lands was responsible for the allocation. The allotment letter was signed by the Commissioner of Land.
55. DW2, a director of the 1st Defendant relied and adopted his witness statement dated 23rd January 2022 in his evidence in chief. It was his testimony that he has been a director of the 1st Defendant for the last 20 years. He also produced the 1st Defendant's bundle of documents dated 3rd January 2022. He further testified the Directors bought shares from the 1st Defendant's company which was owning a



number of properties at that time including the suit parcel. According to him due diligence was done in purchasing the said shares. A change of user of the said property was authorized and approval granted.

56. When cross-examined by Learned Counsel for the Plaintiff he stated that the 1st Defendant was incorporated on 6th December 1978. The Allotment Letter was dated 28th August 1978 and they bought shares of the company in 1986. He also stated that having bought the shares in 1986, he would not know what happened before then. He however reiterated that they did due diligence before purchase. He also stated on further cross-examination, that he is not aware of “Njoga Limited” and he is also not aware of “Gemini Enterprises Limited”.
57. When re-examined, he stated that the property was being used as a private nursery school and later a private primary school was included in the premises. He further stated that the numbers of the students enrolment to the school dropped and they applied for a change of user which approval was granted.

The case of the 2nd Defendant

58. The 2nd Defendant filed a Statement of Defence dated 29th September 2011. It was the second Defendant’s case that he was a Commissioner of Lands up to 1989 and that the proper party to be sued in this case was either the office at the Commissioner of Lands or the Hon. Attorney General and not in his personal capacity.
59. It was pleaded that the suit against him remains defective for failure to join his employer who ought to be vicariously liable for his actions as a civil servant.
60. The second Defendant denied that LR No. 209/9295 was Government land or that it was registered in the name of the Government of the Republic of Kenya as alleged by the Plaintiff and neither were there any charges made to the property as alleged.
61. The second Defendant denied any alienation of the suit property during his tenure as a Commissioner of Lands. It was averred that all land during his tenure was allocated under the directions of the President who solely had the legal authority to alienate Government Land. The particulars of fraud and illegality as was pleaded by the Plaintiff were denied.

The case of the 3rd Defendant

62. The 3rd Defendant filed a Statement of Defence dated 20th November 2009, bundle of documents dated 20th July 2015 and 4th August 2015. It was stated that as a Commissioner for Lands duly appointed by the President he performed his official duties in his capacity as the holder of the said office and he cannot be sued in his personal capacity
63. It was further stated that in respect to this property, the decision to grant the change of user was collective and all the relevant authorities had given their recommendations/approvals in respect to the same.

The Plaintiff’s written submissions

64. The Plaintiff filed written submissions dated 28th April 2025. Counsel submitted on the following issues;-
 - a. Whether the 1st Defendant was allocated the suit property.
 - b. Whether the suit property was available for alienation to the 1st Defendant.



65. It was submitted that from the testimony of Robert Simiyu the application for allocation of the suit property was made by Njoga Limited on 26.5.1978. However according to the testimony of Josisah Mugendi Njagi for Business Registration Services Njoga Limited is not registered. This evidence on the non-existence of njoga Limited was not challenged. It would be legally impossible for a non-existent entity to apply for allocation as it is incapable of holding land.
66. It was also submitted that vide a letter dated 20th July 1978 Njoga Limited wrote to the Commissioner of Lands requesting for the suit property to be allocated to Gemini Enterprises Limited which according to the testimony of Josisah Mugendi Njagi for Business Registration Services was registered on 26th January 1977. It was also submitted that vide a letter dated 28th August 1978 Gemini Enterprises Limited was allocated the suit property and accepted its allocation even though there appears to be a cancellation/crossing of the name “Enterprises” and he replaced with the name “properties” which was hand written.
67. It was further submitted that the 1st Defendant was not in existence when the allotment letter was issued and as such an allocation to an existence entity was illegal. Reliance was placed to the cases of Kenya Anti Corruption Commission v Online Enterprises Limited & 4 Others [2019] eKLR and Athi Highway developers Limited v West End Butchery Limited & 6 Others [2005] eKLR.
68. On whether the suit property was available for alienation, it was submitted that according to the testimony of Robert Simiyu which evidence was restated by the investigating officer, Maiella Limited originally owned land parcel L.R 209/8000 Grant No. IR 25232 measuring approximately 66.18Ha. The Grant in respect of the said property was issued to the said company by the Government of Kenya on 18th August 1972.
69. It was submitted that sometimes in 1972 Maiella Limited, the original owners of L.R 209/8000 subdivided the said parcel of land into several portions and advertised the said portions for sale. The said portions were subsequently surveyed and allocated land reference numbers.
70. It was further submitted that on 23rd August 1972, the Government of Kenya registered a caveat on L.R 209/8000 claiming “a surrendee’s interest in portions of the leasehold” which secured and constituted a condition precedent to the subdivision of the whole portion of land by Meilla Limited.
71. Counsel submitted that in satisfaction of the said Government’s condition precedent, Maiella Limited after subdivision surrendered to the Government of Kenya one parcel of land known as L.R 209/8000/84 [the Suit Property].
72. It was the Plaintiff’s submission that the suit property was surrendered to the Government of Kenya by Maiella Limited as a public utility for the construction of a nursery and clinic.
73. It was contended that the surrender instrument of the suit property was registered against the main Grant on 20th January 1979.
74. The Plaintiff submitted that the suit property was subsequently transferred to the Government of Kenya by way of a Memorandum of Registration of Transfer of land dated 20th January 1979 and received at the Ministry of Lands on 9th February 1979.
75. It was argued that in contravention of the law and the special conditions of the grant, the 2nd Defendant who was the Commissioner of Lands and Gemini Properties Limited, used the Survey Plan and the Deed Plan prepared by Maiella Limited and registered with the Directors of Surveys, to prepare and register a Grant on L.R No. 209/8000/84 in the name of Gemini Properties Limited.



76. According to the Plaintiff's submissions, the purported allocation of the suit property to the 1st Defendant was fraudulent, corrupt and contrary to the provisions of the Government *Land Act*, Cap. 280 and ultra vires. Special condition number 5 provided that the land shall be used for clinic and a day nursery school and two residences for the teacher and doctor while special condition number 7 provided that the grantee shall not sell transfer sublet charge or part with the possession of the land or any part thereof or any building thereon.
77. Citing the cases of Niaz Mohamed Jan Mohamed v Commissioner for Lands & 4 Others [1996] eKLR; Funzi Island Development Ltd & 2 Others v County Council of Kwale [supra]; Republic v Minister for Transport & Communications & 5 Others ex parte Waa Ship Garbage Collectors & 15 Others eKLR [E&L] 1, 563; John Peter Mureithi & 2 Others v Attorney General & 4 Others [2006] eKLR; Kenya National Highway Authority v Shalien Masood Mughal & 5 Others [2017] eKLR; Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR; Munyu Maina v Hiram Gathiha Maina [2013] eKLR and Milan Kumarn Shah & Others v City Council of Nairobi & Others, HCCC No. 1024 of 2005 the Plaintiff urged the court to grant the sought in the plaint.

1st Defendant's written submissions

78. The 1st Defendant filed written submissions dated 11th June 2025. Counsel submitted on the following issues: -
- a. Whether suit property was available for allocation as of the year 1978 when it was allocated to the 1st Defendant.
 - b. Whether the allocation to the suit property was proper abinito and whether the 1st Defendant holds good title to the suit property.
79. It was submitted that the burden placed on the Plaintiff in this matter was to demonstrate by evidence that the suit property was unavailable for allocation to the 1st Defendant or its predecessors to title.
80. It was submitted that the Plaintiff in its plaint especially paragraphs 10, 11 and 15 had pleaded that the 1st Defendant's title to the suit property was bad on account of fraud and that the suit property had been registered in the name of the Government by way of Memorandum of Registration dated 20th January 1979. It emerged in evidence that indeed that was not true. The evidence availed by the Plaintiff through PW5 and the evidence of DW1 agreed that the suit property could and was indeed allocated to a private entity as long as the requisite conditions for allocation are met regardless of whether it was a surrender or not.
81. It was argued that the Plaintiff in an attempt to patch up its case, brought about the question of the original applicant Njoga Ltd and the relationship with the 1st Defendant. By its evidence, the Plaintiff showed actually there was an application for allocation of the suit property and produced correspondence to that effect. There was no demonstration that any step was omitted in the process. It was not shown that by the mere fact that the original applicant choose a nominee to get the title that amounted to fraud. No law was violated by such nomination and the burden was on the Plaintiff to demonstrate, which it did not.
82. It was further submitted that the documents relied upon were sourced from Government offices and PW4 was clear that from what was held in the Chief Land Registrar's office, there was nothing untoward in respect of the title held by the 1st Defendant.



83. It was also submitted that the Plaintiff had availed contradictory evidence before the court with its witnesses disapproving what was pleaded and as such the Plaintiff was unable to discharge the burden placed on it by the law.
84. On whether the allocation of the suit property was proper abinito and whether the 1st defendant holds good title to the suit property, it was submitted that the law relating to the alienation of public land before the enactment of the 2010 Constitution and the subsequent Statutes governing administration of land was Governments Lands Act which position had been stated in the case of Ali Mohamed Dagane [Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane] v Hakar Abshir & 3 Others [2021] KLR] wherein the court analysed the seven steps that were requisite in an allocation of government land under the Governments Lands Act [repealed].
85. Counsel submitted that by its own evidence the Plaintiff had showed that:
- a. An application for allotment of the suit property by Njoga Ltd which nominated the 1st Defendant for allotment.
 - b. That all necessary steps were undertaken and there was communication between various government agencies relating to the application and subsequent allotment of the suit property to the 1st Defendant.
 - c. That indeed a grant was issued to the 1st Defendant by the Commissioner of lands.
 - d. That the 1st Defendant abided by the terms of the grant and has been paying all taxes.
 - e. That all the changes in conditions were done with the permission of the Commissioner of Lands.
86. It was submitted that the evidence of PW3 and PW4 was categorical that there was nothing wrong with the process followed up in the acquisition of the suit property by the 1st Defendant. The Plaintiff was also presented with the evidence of 3rd Defendant which clearly shows that by the Gazette Notice of 1965, the Commissioner of Lands had been granted powers by the President to deal with such lands as the present suit property. The Plaintiff did not dispute or challenge the said Gazette Notice.
87. It was argued that an examination of Section 3 of the Governments Lands Act as read together with the notes thereunder shows that the commissioner of land had authority to grant the suit property to the 1st Defendant because at that point in time it was unalienated to any other person.
88. It was further submitted that while the Plaintiff pleaded fraud and illegality in the process of alienation of the suit property none of the Plaintiff's witnesses pointed out any illegality of fraud and as such the said allegations having not been proved and should not be allowed to stand by this court. The case of Ethics and Anti Corruption Commission v Ongeru & Another [Environment & Land Case 133 of 2010] [2015] KEELC 4103 [KLR] [29 May 2025] [Judgment] was cited in support.
89. The 1st Defendant urged the court to dismiss the Plaintiff's suit with costs.

The 2nd Defendant's submissions

90. The 2nd Defendant filed written submissions dated 9th June 2025 and Counsel submitted on the following issues:
- i. Should the 2nd Defendant be sued in his personal capacity in this matter.



- ii. Did the 2nd Defendant commit any fraud on illegality as claimed by the Plaintiff.
91. On the first issue it was submitted that the 2nd Defendant was the Commissioner of Lands up to 1989. The Commissioner of Lands is an officer within the Public Service in the Republic of Kenya. As a result, the 2nd Defendant being a public officer up to 1989 had a wide scope duties and responsibilities assigned to him by his employer, the Government of the Republic of Kenya.
92. Due to being a public officer, the 2nd Defendant ought not to be held personally liable for the acts committed within the scope of his duties assigned to him by the Government. Instead, the Government should be held vicariously liable.
93. The case of *Ribinu v Ndung'u* [suing on behalf of the Estate of the Late Joram Ndung'u Mwaniki & 2 Others [Civil Appeal 37 of 2023 was cited in support.
94. It was argued that the office of the Commissioner of Lands and/or the Attorney General ought to have been joined to this suit and in their absence of such joinder the case against the 2nd Defendant cannot stand.
95. It was submitted that the Plaintiff has not sought for any specific orders as against the 2nd Defendant and thus the entire case against the 2nd Defendant is spurious and untenable.
96. As to whether the 2nd Defendant did commit any fraud or illegality as claimed by the Plaintiff, it was submitted that L.R No. 209/9295 was never Government land nor was it registered as such and neither were any changes made to the property as alleged.
97. It was further submitted that during the 2nd Defendant's tenure as a Commissioner of Lands all government land alienated was allocated under the direction, orders and sanction of the President who solely had legal authority to alienate government land. It was further submitted that the 2nd Defendant carried out his duties of his office as Commissioner for Lands in a regular routine way by complying with all the regulations and procedure set for alienation of the property. Strict process was followed for alienation of public land in consultation with other offices in Government departments obtaining their consent and no objection confirmation and that was untoward or irregular was done.
98. The second Defendant concluded his submissions by urging the court to dismiss the Plaintiff's suit with costs.

The 3rd Defendant's submissions

99. The 3rd Defendant filed written submissions dated 12th June 2025. Counsel submitted on a singular issue on whether the 3rd Defendant is personally liable herein.
100. It was argued that despite the Plaintiff in this matter having been filed and summons to enter appearance against the Defendants issued, no prayers were sought directly against the 2nd and 3rd Defendants other than invalidating the actions previously undertaken by the said Defendants in the performance of their official duties and hence therefore the specific allegations against the 3rd Defendant are vague.
101. It was argued that the Plaintiff despite filing this suit against the 3rd Defendant, has not field any evidence of any improper use of office by the 3rd Defendant or any benefit obtained/derived by the 3rd Defendant pursuant to the impugned transactions, during the 3rd Defendant's tenure in office or any other time.



102. It was submitted that as the Commissioner for Lands duly appointed by the President he performed his official duties in his capacity as the holder of the said office and cannot be prosecuted in his personal capacity for the discharge of the said duties.
103. It was further submitted that the decision to grant the change of user was collective and all the relevant authorities had given their recommendations and approvals for the same.
104. It was further submitted that the 3rd Defendant further filed a supplementary document dated 18th January 2023 being Gazette Notice No. 4141 published on 16th November 1965. The said document is published that Kenya's then President Jomo Kenyatta, authorized the Commissioner of Lands to make grants or dispositions of any estates, interests or rights in or over lands that are for the time being vested in the Government of Kenya. The effect of the Gazette Notice was to authorize the Commissioner of Lands. Therefore, the 3rd Defendant performed his official duties in his capacity as the holder of the said office with full authority and cannot be prosecuted in his personal capacity for the discharge of the duties.
105. The 3rd Defendant concluded his submission by urging the court to find that the Plaintiff had failed to establish and prove evidence of any improper use of office and any benefit derived or obtained by the 3rd Defendant in the performance of his official duties and therefore the suit should be dismissed.

Issues for Determination

106. With the foregoing outline of the pleadings, oral and documentary evidence adduced and having considered the written submissions filed by the parties, the following issues emerge for determination:-
 - i. Whether the suit property was available for allocation.
 - ii. Whether the 1st Defendant lawfully acquired the suit property.
 - iii. Whether the Plaintiff's case has been proved to the required standard.
 - iv. Whether the Plaintiff is entitled to the reliefs sought.

Analysis and Determination

107. Before I proceed to address the issues outlined for determination, it is important to address an issue that was raised by the 2nd and 3rd defendant in their defences and written submissions.
108. The 2nd and 3rd Defendants who are both former office holders for the Commissioner of Lands in the Ministry of Lands raised an objection to the suit and submitted that they ought not to have been sued in their individual and or personal capacity since they were appointees of the President and they performed their official duties in their capacity as the holders of the office of the Commissioner of Lands and hence therefore they could not be prosecuted in their personal capacity for the discharge of the said duties. It was also their contention in their respective pleadings and submissions that the office of the Commissioner of Lands and the Attorney General ought to have been joined to these proceedings failure of which the entire suit is spurious, untenable and cannot stand.
109. The Plaintiff did not specifically submit on the said issue. However this court upon perusing the reliefs that were sought by the Plaintiff and the pleadings filed by the parties herein, notes that the Plaintiff did not specifically seek any direct orders as against the 2nd and 3rd Defendants herein and as such it is the position of this court that the issue as to whether or not the 2nd and 3rd Defendant's ought not to have been personally sued in their individual capacities or that they are personally liable is not a silent issue for determination herein since issues for determination must always stem from the pleadings of



the parties. Having addressed the aforementioned issues, this court now proceeds to analyze the main issues outlined herein sequentially.

Issue No. i

Whether the suit parcel was available for allocation.

110. It was the Plaintiff's case that the suit property L.R No. 209/8000/84 was not available for allocation to a private entity. According to the Plaintiff, the same had been surrendered by Maiella Limited to be used as a public utility for the construction of a nursery school and a clinic for the benefit of the residents of New Muthaiga Estate and the surrounding areas.
111. The 1st Defendant case on the other hand was that the property known as L.R No. 209/8000/84 has no relation to the parcel of land registered in its names. According to the 1st Defendant, its property is known as L.R No. 209/9295. It was averred that the same was available for allocation and that the same was acquired legally and all the procedures were followed.
112. As to whether or not the said property was not available for allocation to any private entity, the burden of proof is vested upon the Plaintiff as outlined in Section 107 of the Evidence Act Cap 80 of the Laws of Kenya.

“Section 107

Burden of Proof

1. Whoever desires any court to give judgment as to any legal right on liability dependent on the existence of facts which he asserts must prove that those facts exist.
2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

113. Hence therefore, the Plaintiff needs to prove its allegation that the suit parcel was not available for allocation to any entity as it had pleaded.
114. While testifying in court, the Plaintiff's witnesses PW3 Robert Simiyu and PW3 who was working with the Ministry of Lands and Physical Planning as an Assistant Director Land Administration and the Chief Land Registration Officer respectively produced various documents and tendered evidence as to whether or not the said land was available for allocation to any entity.
115. Evidence was adduced by PW3 and PW4 to the effect that property L.R No. 209/8000/4 was a resultant subdivision of LR No. 8445 originally owned by Maiella Limited in New Mutahaiga estate. The plot was surrendered to the Government reserved for special purpose as a condition for approval of the subdivision scheme plan.
116. On 26th May 1978 a company by the name Njoga Limited wrote to the then Minister for Lands and Settlement the late Hon. J. H. Angaine requesting to be allocated the surrendered parcel 209/8000/84 for the reasons that that the plot was vacant and uncommitted. The Minister approved the application and marked the letter to the Commissioner of Lands on 2nd June 1978.
117. On 20th July 1978 Njoga Limited wrote to the Commissioner of Lands requesting to have the parcel LR No. 209/8000/84 allocated to Gemini Enterprises Limited instead of themselves as M/s Gemini Enterprises Limited was there new company.



118. Records indicate that the plot was allocated to Gemini Enterprises Limited vide a letter of allotment ref 98551/3 dated 28th August 1978 with the user being clinic, day nursery school, residence for teacher and doctor incharge.
119. On 17th November 1978, N.P Sheth Advocate acting for Gemini Enterprises Limited forwarded a bankers cheque of Kshs. 110,267.00. The payment was acknowledged on the same day vide a receipt A 151897 dated 17th November 1978.
120. Upon payment the Commissioner of Lands wrote to the Director of Surveys requesting for a deed plan.
121. In a letter dated 23rd November 1978, the Director of Surveys responded to the Commissioner of Lands explaining the unavailability of the deed plan.
122. On 4th December 1978 Hamilton Harrison & Mathews, a law firm acting for Gemini Enterprises Limited wrote to the Director of Surveys in relation to L.R No. 209/8000/84 forwarding a letter dated 26th September 1972.
123. On 8th January 1979, the Commissioner of Lands wrote to the Town Clerk, City Council of Nairobi raising concerns about the execution of surrender of the parcel LR No. 209/8000/84. In the letter it was noted that the surrender was being executed.
124. The Registrar of Titles registered a surrender LR No. 209/8000/84 on 20th January 1979 with the transferor being Maiella Limited and transferee being the Government of Kenya. Consideration of the surrender being approval for sub division of LR No. 209/8000.
125. The Commissioner of Lands responded to the Director of surveys on 25th January 1979 confirming registration of the surrendered parcel.
126. The deed plan for LR No. 209/9295 was forwarded by the Director of Surveys to the Commissioner of Lands on 30th January 1979.
127. Instructions to prepare a new grant in respect of LR No. 209/9295 were issued on the same day the deed plan was forwarded.
128. A grant with LR Number 209/9295 in favour of Gemini Properties Limited was registered as IR No. 33069/I on 6th February 1979. Subsequently change of user was effected on the suit property.
129. An agreement for sale was entered into between Satyavrat Ramrakha and Urmila Satyavrat, the Director of Gemini Properties Limited on one part and Madat Chatur and Naushad Chatur on the other part for the sale of the Company for a consideration of Kshs. 2,850,000.00. This was before N. P. Sheth, an Advocate.
130. It was also evident that the 1st Defendant was issued with a grant for LR No. 209/9295 IR 33069 on 5th February 1979 and the grant contained a leasehold for a period of 99 years with effect from 1st January 1978 and particularly delineated on Land Surveyor Plan Number 105999.
131. While the Plaintiff had pleaded in its plaint that the said land was not available for allocation, the testimony of PW3 and PW4 who were key witness to its case proved otherwise.
132. To begin with PW2, Eric Munene Kihara a Cartographer working at the Ministry of Lands and Physical Planning had confirmed that LR No. 209/8000/84 and LR No. 209/9295 are one



and the same parcel and this was also confirmed by DW1 – Julius Omar Kabando a Surveyor who testified on behalf of the 1st Defendant.

133. PW3 confirmed in his evidence that the said land was available for allocation and the same could have been allocated to any individual as long as the conditions are met. It was his testimony that the land in question had already been allocated as at 8th January 1979 or earlier when the Memorandum was issued on 20th January 1979. It was also his testimony that due process was followed in respect to the allocation of the suit property.
134. The testimony of PW4 Stephen Chege Njoroge, the Chief Land Registration Officer also confirmed that as per the records at the Ministry of Lands a grant was registered on 6th February 1979 in the names of the 1st Defendant who is still the current proprietor of the said property. He reiterated that the land was available for allocation and that is why there was issuance of an allotment letter in respect to the same.
135. In view of the foregoing, the Plaintiff's contention that the said parcel was not available for allocation is misplaced. The 1st Defendant tendered and adduced evidence which was also corroborated by PW4 and PW3 that the said land was available for allocation and as such it is the finding of this court that the Plaintiff has not tendered evidence demonstrating that the land in question was not available for allocation at the time it was acquired by the 1st Defendant.

Issue No. ii

Whether the 1st Defendant lawfully acquired the suit property

136. On this issue, it was the Plaintiff's case that the suit property was acquired by the 1st Defendant contrary to the law and the Plaintiff has come to court seeking cancellation of Grant L.R No. 209/9295. It was contended that the 1st Defendant acquired the interest to the suit property fraudulently and illegally for the reasons that the same was acquired contrary to the special conditions Number 5 and 7 of the Grant.
137. As earlier stated the burden of proof is vested upon the Plaintiff as outlined in Section 107 of the [Evidence Act](#).
138. Section 26 of the [Land Registration Act](#) gives a presumption on title i.e that courts should take it prima facie that the interest is good. Section 26 provides as follows :

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



2 A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

139. Analysis of the evidence tendered shows that the 1st Defendant took occupation of the suit property sometimes in 1978 and continued using it for the intended purposes until sometimes on 26th May 2003 when they initiated the change of user. It was also confirmed that the current shareholders of the 1st Defendant acquired the property in the year 1986 when the 1st Defendant’s shares were transferred by the original shareholders namely Pr. Satyavrat Ramhaka and Urmila Styavrat Ramhaka to the current shareholders.
140. From the trail of the evidence analysed by this court, the suit property was initially used as a Nursery School and a Clinic for the benefit of the public. The said Nursery School and Clinic were to be operated privately and there was no evidence tendered that demonstrated that the said school and clinic was to be operated by the Government.
141. The letter dated 29th June 2009 which was tendered in evidence by DW2 confirmed that the previous directors of the 1st Defendant Dr. Satyavrant Ramhaka and his wife Dr. [Ms.] Urmla Ramhaka who later sold their shares to the current directors of the Plaintiff operated a private nursery school and a private clinic. The same was operated privately and never used as a public facility. The evidence on record also confirmed that the Nursery School and Clinic were operating commercially by a private entity and this did not mean that it was a facility operated by them as a public utility and or government facility. There was also no evidence confirming that the same was on public land.
142. In considering whether or not the said suit parcel was allocated contrary to the condition of the grant and specifically condition 5 therein, it is worth noting that from the trail of the documentary evidence that was tendered herein, it is evident that the 1st Defendant sought approval and consent of the Commissioner of Lands before embarking on any change of user of the suit premises. On 26th March 2003, the Commissioner of Lands substituted the Condition Number 5 in the grant to indicate the land and buildings shall be used for educational purposes, the accommodation for the headmaster/ principal, boarding facilities and ancillary officers [educational purposes shall also include nursery school and clinic, primary and secondary school]. On 14th March 2008, the Commissioner of Lands substituted the Condition Number 5 in the grant to indicate “the land and building shall be used for shops and offices”.
143. As such the 1st Defendant obtained all the relevant and necessary approvals and consents in respect to the suit parcel. Having considered the foregoing, the Plaintiff was not able to demonstrate that the 1st Defendant’s acquisition of the property was illegal, fraudulent and unlawful.

Issue No. iii.

Whether the Plaintiff’s case has been proved to the required standard

144. It is trite law that whoever alleges must proof. Section 107 [1] of the *Evidence Act*, Cap 80 Laws of Kenya provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.”



145. On evidentiary burden of proof, Sections 109 and 112 of the *Evidence Act* provide as follows:
- “ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.”
112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.”
146. The two provisions were dealt with in the case of *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334, in which the Court of Appeal held that:
- “ As a general proposition under Section 107 [1] of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden, that is, placed upon a party..... the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.”
147. The court has stated as much and the trail of documentary evidence adduced by the Plaintiff showed glaring inconsistencies and documents which had been altered and or tampered with.
148. The copy of the title in respect of LR No. 209/8000 which was considered the mother title had entries which contradicted the averments made in the plaint. Entry Number 2 of the title dated 23rd August 1972 refers to a caveat by the Government of Kenya claiming surrenderee’s interest in position of the leaseholds [absolutely] and the suit premises was not part of the caveat. Entry Number 142 dated 20th January 1979 the purported surrender of a portion of the title measuring 1.326Ha to the Government of Kenya as LR No. 209/8000/84 was visibly made by two different hands with different handwritings and fonts. The copy of the allotment letter dated 28th August 1978 which was submitted to the court showed that Gemini Enterprises Limited was allocated the suit property and accepted its allocation even though there appears to be a cancellation/crossing of the name “Enterprises” and replaced with the name “properties” which was hand written and manifestly tempered with.
149. There was also super imposition of writing on the original entry which cast doubt as to the authenticity and credibility of the said documents.
150. In view of those glaring inconsistencies on what would be considered the crucial documents herein, it would have been expected that to address the said anomalies, the makers of the said documents would be called to testify and confirm the authenticity or otherwise of the said documents. In the instant case the said documents having been made in the 1970s being over 45 years ago, it appears that the makers of the said documents were not available to testify. However, the custodian of the said documents whose testimony was tendered by PW3 and PW4 confirmed that the 1st Defendant is the current owner of the suit parcel and there was no anomaly on the acquisition of the said property by the 1st Defendant. In essence the testimony of the said witness was contrary to the averments made by the Plaintiff in its plaint.
151. PW5, the investigator who undertook the investigations on behalf of the Plaintiff testified that he had an opportunity to consider the documents that he was given but could not give a clear explanation on the said discrepancies and anomalies.



152. In the case of Kenya Akiba Microfinance Ltd v Ezekiel Chebii & 14 Others [2012] it was held as follows:

“Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make adverse inference that if such evidence is produced, it would be adverse to such a party”

153. The Plaintiff ought to have availed to this court the proper records considering the nature of the reliefs that were being sought herein. In light of such glaring anomalies and considering the testimony of PW3 and PW4 who were key witnesses to the Plaintiff whose direct testimony contradicted the Plaintiff’s pleadings, it is the finding of this court that this court the Plaintiff’s case has not been proven to the required standard.

Issue No. [iv]

Whether the Plaintiff is entitled to the reliefs sought

154. The Plaintiff sought several reliefs as enumerated in the plaint. However, given earlier findings on the issues raised herein and also considering the fact that the Plaintiff’s case has not been proved to the required standard, this court is unable to grant the reliefs sought.

155. In respect to costs, costs are at the discretion of the court and in the present case, the court directs each party to bear own costs of the suit.

Final orders

156. Consequently, this court is not persuaded that the Plaintiff’s case has been proved to the required standard and the following orders are hereby issued: -

- i. The Plaintiff’s suit vide plaint dated 29th October 2009 be and is hereby dismissed.
- ii. Each party to bear own costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 30TH DAY OF JUNE 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Ms. Cherono holding brief for Mr. Nyoike for Plaintiff.

Mr. Kioko for 1st Defendant.

Ms. Koki for 3rd Defendant.

No appearance for 2nd Defendant.

Court Assistant: Mary Ngoira.

<i>JUDGMENT ELC NO. 551 OF 2009</i>	0
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