



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 113 OF 2008

(FORMERLY HCCC NO. 113 OF 2008)

ETHICS AND ANTI-CORRUPTION COMMISSION....PLAINTIFF

VERSUS

JOSEPH OROKO ONGERA.....1ST DEFENDANT

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

CORRIGENDA JUDGMENT

In the Judgment delivered on 9th December, 2021 in the final orders, Order (1) erroneously states that the lease to the suit property KISII MUNICIPALITY/BLOCK 3/429 was issued on 20th September, 2002 instead of 3rd July, 2002 as indicated in the pleadings and submissions.

The correct position is that the lease was issued on 3rd July, 2002. Accordingly and pursuant to section 99 of the Civil Procedure Act, the clerical error in the Judgment is hereby corrected to read as follows:

i . A declaration is hereby issued that the lease to the 1st Defendant on 3rd July, 2002 in respect of the parcel of land described as KISII MUNICIPLAITY/BLOCK 3/429 was made in excess of the statutory powers of the 2nd Defendant and is thus null and void *ab initio*.

The rest of the Judgment remains the same.

DATED, SIGNED AND DELIVERED AT KISII THIS 18TH DAY OF FEBRUARY, 2022.

J.M ONYANGO

JUDGE

REPUBLIC OF KENYA

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JOSEPH OROKO ONGERA.....1ST DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff instituted this suit against the Defendants vide a Plaint dated 23rd September 2008 which was later amended on 13th September 2019 seeking the following reliefs:

- a) A declaration that the transfer and Certificate of Lease registered and issued on 3/7/2002 respectively in favour of the 1st Defendant over the parcel of land described as KISIIMUNICIPALITY BLOCK 3/429 was issued *ultra vires* and fraudulently and is thus illegal, null and *void ab initio*.
- b) An order directed to the Land Registrar, Kisii District Registry to rectify the register by cancellation of the entries relating to the transfer of Lease in favour of the 1st Defendant over the parcel of land described as KISIIMUNICIPALITY BLOCK 3/429.
- c) An order for vacant possession of the parcel of land described as KISII MUNICIPALITY BLOCK 3/429.
- d) An order of permanent injunction to restrain the 1st Defendant whether by himself, servants or agents from alienating, transferring, charging, leasing taking possession or in any manner howsoever described from dealing with the parcel of land described as KISIIMUNICIPALITY BLOCK 3/429 other than by way of surrender to County Council of Gusii.
- e) General Damages against the 2nd Defendant for misfeasance in office
- f) Costs of and incidental to this suit together with interest.

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

3. On 31/1/1995, the Council was registered as the proprietor of a parcel known as KISII MUNICIPLAITY/BLOCK 3/332 measuring approximately 5.868 hectares (14.4 acres) out of the said land which was set apart for purposes of establishing a Community Development Centre.

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

5. On 4/6/2002, the Council was registered as the proprietor of one of the subdivisions KISII MUNICIPLAITY/BLOCK 3/429 measuring 0.1 Hectares (hereinafter referred to as the suit property). The suit property was subsequently transferred to the Defendant and he was issued with a Certificate of Lease on 3/7/2000.

6. It is the Plaintiff's case that the subdivision, change of user and transfer of parcel number KISII MUNICIPLAITY/BLOCK 3/429 to the Defendant was fraudulent and unlawful as it did not comply with the requisite statutes governing the alienation of public land and it is therefore null and void and it did not confer a proper title to the Defendant. In the plaint the Plaintiff has provided the particulars of fraud and breach of trust committed by the 1st and 2nd Defendants.

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

8. Despite being served with Summons to enter appearance, the Defendants neither entered appearance nor filed any defence and the case proceeded by way of formal proof. The case was set down for hearing on diverse dates between 2.3.2020 and 20.9.2021 when the Plaintiff called three witnesses.

PLAINTIFF'S EVIDENCE

9. The Plaintiff called 3 witnesses in support of its case.

PW1 Wenslaus Wekesa Wanyama testified that he works as a Physical Planner in the Ministry of Lands in Nairobi. He told the court that he was previously stationed in the Physical Planning Office at Kisii for a period of 7 years between 2010 and 2017. He relied on his witness statement filed in court on 8th June 2016. He explained the procedure for allocation of land belonging to the County Government as follows:

10. The Town Planning Committee meets and comes up with a Part Development Plan (PDP). The said PDP is then shared with the different committees for their approval. A notice is then placed in two dailies for anyone with a comment to submit their comments within 60 days. Once the 60-day period expires, the Director of Physical Planning forwards the PDP to the National Physical Planning Director attaching the comments from the various departments.

11. The National Director of Physical Planning then subjects the Plan to a vetting process after which the plan is sent to the Minister for Lands for approval. Once the Minister signs the Plan, it is sent back to the Director of Physical Planning to be used as a planning document. Previously the plans were approved by the Commissioner of Lands. Once the plans have been approved they can be used by the National Land Commission for purposes of issuing allotment letters. In cases where there is an existing title, a sub-division scheme is prepared by a Physical Planner.

12. Mr Wanyama testified that in respect of the suit property, there is a Part Development Plan which was prepared by Gusii County Council in order to enable the Council obtain a title deed for the Community Development Centre which has been in existence since 1957. Since the land was earmarked for Gusii Community Centre, a letter of allotment was issued to Gusii County Council and the Council was subsequently issued with a Certificate of Lease. It was his testimony that the sub-division that was done was not proper as there was no application for sub-division and no approval was given for the sub-division of the suit property into 48 plots.

13. PW2 James Cheruiyot testified that he is a Surveyor with the Uasin Gishu County Government. He stated that he previously worked with the Ministry of Lands as a County Surveyor in Kisii County between 2005 and 2017. He relied on his witness statement filed in court on 8th June 2016.

14. He told the court that while in Kisii he conducted a site visit on land parcel number KISII MUNICIPALILTY/BOCK/111/332. The land had a school, community hall, staff houses and part of it was under cultivation. He stated that some of the staff members of the County Government were staying in the staff houses.

15. He testified that the said parcel of land was surveyed between 1991-1992 and it was approved as parcel number KISII MUNICIPALILTY/BOCK/111/332 measuring approximately 14.5 acres. The Certificate of Lease was then issued to Gusii County Council on 6.2.1995 for a term of 99 years from 1.2.1986.

16. He stated that during his tenure as a Surveyor in Kisii he did not come across any application for sub-division of the suit property. He explained that during this period, they had no authority to carry out sub-divisions and they had to get the authority of the Director of Survey. He told the court that he visited the site in 2016 before he left Kisii and there were no new developments on the suit property. He said he was not aware if anyone was claiming the suit property.

17. The Plaintiff's third and last witness was Dedan Ochieng Okwama who testified as PW3. He told the court that he was an Investigator with the Ethics and Anti-Corruption Commission based in Nairobi.

He testified that in the course of his investigations he collected various documents contained in the Plaintiff's List of Documents which he produced as Plaintiff's exhibits 1 to 11. They include the Part Development Plan No. KSI/37/85/10, internal Memo to the Commissioner for Lands, Certified copy of the Lease for KISII MUNICIPALILTY/BOCK/111/332, correspondence between the County Council of Gusii and the Commissioner of Lands, Minutes of a Special Full Council meeting held on 24.5.1990 together with the list of allottees, a certified copy of the Survey Plan of KISII MUNICIPALILTY/BOCK/111/332, a certified copy for the green card confirming that the transfer of lease was purportedly registered on 3.7.2002 and a certified copy of the white card for KISII MUNICIPALILTY/BOCK/111/332.

18. He told the court that when he commenced investigations with regard to the suit property he established that the entire area was reserved for use as a Community Development Centre and it had several facilities. These include a Nursery School, Community Hall, Home craft Training Centre and staff houses. All these properties were meant for public use and not private use.

19. He stated that his investigations established that there were encroachments on the suit property which were done unprocedurally without any Council resolutions and several plots were created on the parcel that was reserved for public use. He stated that the intent and purpose for which the plot was reserved has never changed. He also established that the original title of the property which was reserved for public use was never surrendered to facilitate the sub-division so the whole process was irregular.

20. After the Plaintiff closed its case, the Plaintiff was granted time to file its written submissions.

PLAINTIFF'S SUBMISSIONS

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

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

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

24. On or about 31st January, 1995, the Land Registrar, Kisii, opened a register in respect of the aforesaid reserved land and gave it title number Kisii Municipality Block 3/332 measuring approximately 5.868 Hectares (14.4 acres). A certificate of lease was subsequently issued to the County Council on 6th February, 1995 for a term of 99 years from 1.2.1986. One of the terms in the special conditions in the Certificate of Lease was that "the land and buildings shall only be used for community development centre purposes".

25. Kisii Municipality Block 3/332 was developed as a community centre and had the following facilities; a nursery school, community hall, a home craft training centre and staff housing for council staff.

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

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

28. It is counsel's submission that the suit land which was excised from Kisii Municipality/Block 332 was at all material times public land as it had been reserved in the approved Development Plan No. KSI/37/85/10 of 18.10.1985 and as such could not be re-allocated to private individuals. She cited that the case of **James Joram Nyaga & Another v A.G & Another (2007 eKLR)** where the court referred to Section 3 of the Government Lands Act and observed as follows:

"The above section clearly limits the power of the Commissioner to executing conveyances on behalf of the President and the provision to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter dated 18th December 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registrable title under the Registration of Titles Act Cap 281 of the Laws of Kenya."

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

30. It is counsel's contention that the scheme to sub-divide parcel Kisii Municipality/Block 3/332 and reallocate portions thereof to the 1st Defendant among other people was marred by fraud by persons holding office in the then Gusii County Council. Counsel referred to exhibit 4 which is a letter dated 18.9.1995 from the Chairman of the Council, Mr. Joseph Rasugu Ntabo to the Commissioner of Lands objecting to the proposed subdivision on account of fraudulent dealings with the land. She also referred to Plaintiff's Exhibit 5 which is a letter dated 21.9.1995 from the Commissioner of Lands to the Gusii County Council stopping further processing of the request for subdivision due to the issues raised by Mr. Ntabo.

31. It was counsel's contention that even though the Council obtained approval to sell more identified properties including 4.5 acres out of the land reserved for the Community Development Centre, Gusii County Council purported to hold a meeting in which they approved the subdivision of Kisii Municipality/Block 3/332 into 44 parcels which were given new numbers and allocated to individual beneficiaries including the 1st Defendant, leaving the Council with only 2.755 acres. The said subdivision was contrary to the Ministerial approval and the applicable statutes such as the Trust Land Act, Land Planning Act, Physical Planning Act and Local Government Act. Counsel submitted that the said alienation was conducted in a manner that constitutes corrupt conduct as envisaged under the Anti- Corruption and Economic Crimes Act, 2003.

ISSUES FOR DETERMINATION

1. Whether the parcel of land known as KISII MUNICIPALITY /BLOCK/3/429 constitutes land that was set apart as trust land and vested in the County Council of Gusii under the provisions of the Trust Land Act.
2. Whether the Defendants acted fraudulently in alienation of the suit property as particularized in paragraph 10 of the Amended Plaint.
3. Whether the 1st Defendant holds a good title in respect of the suit property.
4. Whether the 2nd Defendant is liable for misfeasance in public office.
5. Whether the Plaintiff is entitled to the reliefs sought.

ANALYSIS AND DETERMINATION

32. The Plaintiff's case is that through a Gazette Notice No. 1937 of 31st May 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County Council within whose jurisdiction it was situated as provided for under section 115 of the repealed Constitution of Kenya. Through an approved Part Department Plan No. KSI/37/85/10, a portion of the land vested in trust in the County Council of Gusii was reserved for a Community Development Centre, Gusii Training Institute. This assertion was supported by both oral and documentary evidence.

33. PW3 testified that when he commenced investigations with regard to the suit property he established that the entire area was reserved for use as a Community Development Centre and it had several facilities. These include a Nursery School, Community Hall, Homecraft Training Centre and staff houses. All these properties were meant for public use and not private use. He produced documents to show that through a Gazette Notice No. 1937 of 31st May 1966, 215.65 acres of land within Kisii Township was set apart as Trust Land and vested in the Gusii County. The Community Development Centre was established pursuant to an approved Part Department Plan No. KSI/37/85/10.

34. PW2 told the court that when he visited the suit property it had a school, community hall, staff houses and part of it was under cultivation. He stated that some of the staff members of the County Government were staying in the staff houses. He stated that the intent and purpose for which the plot was reserved has never changed.

35. It is therefore clear that parcel No. KISII MUNICIPALITY/BLOCK 3/429 which is a sub-division of parcel No. KISII MUNICIPALITY BLOCK 3/332 constitutes land that was set apart as trust land and vested in the County Council of Gusii under the provisions of the Trust Land Act.

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

PW1 gave an elaborate explanation of the procedure governing the alienation of public land. This procedure was aptly captured by Cherono J in the case of **Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR** where he stated as follows:

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

.....

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

.....

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

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

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

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

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

.....

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

.....

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

37. In the instant case it is clear that the above-mentioned procedure was not followed. In particular, PW1 pointed out that the sub-division that was done was not proper as there was no application for sub-division and no approval was given for the sub-division of the suit property into 48 plots.

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

39. Furthermore, there is no evidence that an allotment letter was issued to the 1st Defendant nor is there any evidence that the 1st Defendant

made payment of the price that was expected to have been set out in the Allotment letter.

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

41. PW3 produced exhibit 4 which is a letter dated 18.9.1995 from the Chairman of the Council, Mr. Joseph Rasugu Ntabo to the Commissioner of Lands objecting to the proposed subdivision on account of fraudulent dealings with the land. He also produced Plaintiff's Exhibit 5 which is a letter dated 21.9.1995 from the Commissioner of Lands to the Gusii County Council stopping further processing of the request for subdivision due to the issues raised by Mr. Ntabo. He told the court that he established that the original title for KISII MUNICIPALITY/ BLOCK 3/332 which was reserved for public use was never surrendered to facilitate the sub-division so the whole process was irregular.

42. As correctly submitted by counsel for the Plaintiff, even though the Council obtained approval to sell more identified properties including 4.5 acres out of the land reserved for the Community Development Centre, Gusii County Council purported to hold a meeting in which they approved the sub-division of Kisii Municipality/Block 332 into 44 parcels which were given new numbers and allocated to individual beneficiaries including the 1st Defendant, leaving the Council with only 2.755 acres. It was her contention that the said sub-division was contrary to the Ministerial approval and the applicable statutes such as the Trust Land Act, Land Planning Act, Physical Planning Act and Local Government Act. Counsel submitted that the said alienation was constructed in a manner that constitutes corrupt conduct as envisaged under the Anti-Corruption and Economic Crimes Act, 2003.

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

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

Having held that the alienation of KISII MUNICIPALITY BLOCK 3/332 was fraudulent, it follows that the resultant titles including land parcel no. KISII MUNICIPALITY /BLOCK 3/429 tainted with fraud and it is therefore *ultra vires*, illegal, null and void. In saying so, I am guided by the case of **Daudi Kiptugen v Commissioner of Lands & 4 Others [2015] eKLR** the court stated that:

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

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

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

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

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

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

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

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

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

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

(i) A declaration is hereby issued that the lease made to the 1st Defendant on 20th September, 2002 in respect of parcel of land described as KISII MUNICIPALITY BLOCK 3/429 was made in excess of statutory powers of the 2nd Defendant and is thus null and void *ab initio*.

(ii) An order of permanent injunction is hereby issued restraining the 1st Defendant, his servants, employees, agents or assigns from trespassing upon, transferring, leasing, wasting and or dealing with the suit property that is KISII MUNICIPALITY BLOCK 3/429 other than by way of transferring the said title to Kisii County Government as the successor to County Council of Gusii.

(iii) The Land Registrar Kisii County is hereby directed to rectify the Register by cancelling the lease and Certificate of Lease issued on 20th September, 2002 in respect of KISII MUNICIPALITY BLOCK 3/429 in favor of the 1st Defendant.

(iv) The 2nd Defendant shall pay General Damages in the sum of Kshs. 1,000,000/= for misfeasance in public office.

(v) The costs of this suit shall be borne by the Defendants jointly and severally.

DATED, SIGNED AND DELIVERED AT KISII THIS 9TH DAY OF DECEMBER, 2021.

J.M ONYANGO

JUDGE