



REPUBLIC OF KENYA



Ethics & Anti-Corruption Commission v Njoroge & 3 others (Environment and Land Case 360 of 2017) [2025] KEELC 4516 (KLR) (16 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4516 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 360 OF 2017**

OA ANGOTE, J

JUNE 16, 2025

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

JULIUS KERU NJOROGE 1ST DEFENDANT

GRACE WAMITI KERU 2ND DEFENDANT

RAYSON PHARMACEUTICAL LIMITED 3RD DEFENDANT

SAMMY SILAS KOMEN MWAITA 4TH DEFENDANT

JUDGMENT

1. Through a Complaint dated 31st May 2017, the Plaintiff asserted that the suit property, L.R. No. X7/2X2/5 I.R. No. 8XX04 situate in Nairobi County, was granted to the defunct Kenya Posts and Telecommunication Corporation (KPTC) through an allotment letter reference no. 54XX9/X1 dated 18th July 1991 for a lease term of 99 years from 1st August 1991 at an annual rent of Kshs. 30,000/- and is duly alienated government land, and that the suit property is specifically reserved for public purpose, being the construction of a post office and office blocks belonging to KPTC and was not available for allocation.
2. Despite the unavailability of the suit property, the Plaintiff averred that the 4th Defendant caused to be issued to the 3rd Defendant a letter of allotment referenced 93103/11/132 and dated 31st January 1990 for a term of 99 years from 1st February 1990. The Plaintiff asserted that the 3rd Defendant was incorporated on 6th October 1998, several years after the purported allocation of the suit property.
3. It is pleaded that on 29th November 1999, an agreement for sale was entered into between the 3rd Defendant and the 1st and 2nd Defendants, purporting to transfer the suit property to them and that the 4th Defendant then executed and caused to be registered a 99-year lease in favour of the 1st and 2nd



Defendants in respect of the suit property dated 31st May 2000 and registered as I.R. 8XX04/1 on 20th June 2000.

4. The Plaintiff averred that the lease to the 3rd Defendant is fraudulent, illegal, null and void ab initio and incapable of creating good title over the suit property. Furthermore, that the purported transfer by the 3rd Defendant to the 1st and 2nd Defendants is incapable of passing any interest in the suit property to the 1st and 2nd Defendants.
5. The Plaintiff argued that the record of the suit property is publicly available and the 1st and 2nd Defendants had actual or constructive knowledge of the fraudulent process of allocation and/or the defect in title. The Plaintiff contended that the conduct of the 4th Defendant is against public interest and illegal.
6. The Plaintiff iterated the particulars of fraud, illegality and unlawfulness on the part of the 4th Defendant, which include allocating the suit property in favour of the 3rd Defendant in total disregard of the subsisting alienation of the suit property by the government for public use and that the 4th Defendant alienated the suit property to the 3rd Defendant with notice that it was public land that had not been altered or its use changed in accordance with the applicable legal requirements.
7. The particulars of fraud on the part of the 1st, 2nd and 3rd Defendants, their servants and agents, as indicated in the Plaint, are knowingly alienating already alienated government land; knowingly contriving to alienate alienated government land; acquiring the suit properties with knowledge, express or implied, that it was reserved for use for construction of a post office and office blocks belonging to KPTC and knowingly falsifying or causing to be falsified records to show that the allocation of the suit property was done earlier than the actual date.
8. Without prejudice, the Plaintiff argued that the 4th Defendant held an office in public service, hence, he stood in a fiduciary position vis-a-vis all government land and the public. The Plaintiff urged that the 4th Defendant breached his fiduciary duty.
9. Further and in the alternative, the Plaintiff averred that the 4th Defendant acted with knowledge that he had no statutory power and that/or he was acting in excess of his statutory power and his actions were likely to occasion loss to the public.
10. The Plaintiff prayed for judgment against the Defendants jointly and severally for:-
 - a. A declaration that the purported issuance of lease and registration of the suit property to the 1st and 2nd Defendants is invalid, null and void for all intents and purposes for illegality and thus conferred no estate, interest or right on them.
 - b. A declaration that the issuance of lease and registration herein in respect of the suit property in favour of the 1st and 2nd Defendants is illegal.
 - c. An order directing the Registrar to cancel and expunge from the register the entry relating to the transfer of the suit property in favour of the 1st and 2nd Defendants and any subsequent entries.
 - d. An order of permanent injunction restraining the 1st and 2nd Defendants by themselves, their servants or agents or otherwise howsoever dealing with the suit property.
 - e. Mesne profits for loss of use.
 - f. General damages.



- g. Costs of this suit.
 - h. Interest on f) and g) above at court rates.
11. In the 1st and 2nd Defendants' Statement of Defence, they argued that the Plaintiff has no locus to bring this suit; that the Plaintiff is acting ultra vires its mandate; that the suit premises is not public property; that the suit is statute barred; that the suit is res judicata and that the suit is instituted mala fides and is an abuse of due process.
 12. It was their position that they acquired the suit premises for valuable consideration and their title is unimpeachable. They asserted that their title to the suit premises precedes the alleged title of KPTC and that they are not complicit or party to the fraud as alleged or at all. The 1st and 2nd Defendants further stated that the relief of mesne profits as sought by the Plaintiff is misplaced and incompatible with general damages as they are mutually exclusive.
 13. The 4th Defendant, in its Statement of Defence dated 8th August 2019, averred that the suit property was unalienated government land available for allocation and that the same was allotted to Rayson Pharmaceutical Limited, the 3rd Defendant, vide an allotment letter dated 31st January 1990.
 14. The 4th Defendant denied the allegation of abuse of powers and stated that the use of any government documents in preparation of a grant in favour of the 3rd Defendant was in accordance with the established government procedures and the law. He further asserted that he acted within the powers donated to him by the applicable law, as the then Commissioner of Lands.
 15. The 4th Defendant denied the particulars of fraud, illegality and/or unlawfulness. He argued that any prior or internal arrangements over the suit property did not alter its status as an unalienated government land and that it is hypocritical for the Plaintiff to state that the 4th Defendant had prior notice of alienation yet the purported allotment to the Kenya Posts and Telecommunications Corporation was allegedly done vide a letter dated 18th July 1991, way after the allotment to the 3rd Defendant on 31st January 1990.
 16. The 4th Defendant further asserted that the suit is tainted with malice and discrimination and not maintainable against him because of non-joinder of the Office of the Commissioner of Lands or its successor, the National Land Commission.
 17. Despite service of the Plaint and Summons to Enter appearance, the 3rd Defendant neither entered appearance nor filed a Defence.

Hearing and Evidence.

18. The Plaintiff adduced the testimony of three witnesses. PW1 was Rose Kavinye Musyimi, the Manager in Charge of Facilities Management at the Postal Corporation of Kenya. She relied on her statement dated 4th October 2016. She also relied on the documents in the Plaintiff's bundle which she produced as PEXB1.
19. PW1 stated that on 18th July 1991, the Postal Corporation of Kenya was allocated the Nairobi West Post Office Plot as LR No. X7/2X2/5 via a Letter of Allotment Ref. No. 54XX9/X1 and the plot measured 0.1148 acres and that the lease term was ninety-nine years with effect from 1st August 1991 at an annual rent of Kshs 30,000 subject to adjustment on survey.
20. She stated that a survey plan, office copy number 59450-53, Folio No. 71, Register No. 57 dated 31st March 1955 shows that the Nairobi West Shopping Centre Plot was allocated reference number LR



- No. X7/2X2/5; that a survey plan office copy number 70815-23, Folio No. 83, Register No. 112 obtained from the Survey of Kenya dated 30th July 1958 shows that the re-numbering of plots was done and Numbers X7/2X2/1-9 were cancelled and new LR numbers issued, and that LR No. X7/2X2/5 changed to LR No. 209/2X2/10 measuring 0.0465 Ha.
21. PW1 stated that on 5th September 1977, the Commissioner of Lands wrote to the Regional Director/ Kenya requesting for site availability for construction of Wilson Airport Branch Post Office and that on 30th September 1977, the Managing Director, East Africa Posts & Telecommunication wrote to the Commissioner of Lands and copied to the Director of Physical Planning, responding that the Director of Aerodromes had confirmed that there was no vacant premises or space at Wilson Airport for lease.
 22. It was the evidence of PW1 that on 4th February 1980, the Managing Director, East Africa Posts & Telecommunication wrote to the Commissioner of Lands for an alternative plot near Uhuru Stadium or after Prison Training School and that vide a letter dated 8th February 1980, the Commissioner of Lands wrote to the Managing Director East African Posts and Telecommunications Corporation informing him of a site earmarked for a post office at Nairobi West Shopping Centre.
 23. PW1 stated that on 20th February 1980, the Managing Director, East African Posts and Telecommunications Corporation accepted the proposed site and requested for a plan of the site from the Commissioner of Lands and vide the letter dated 3rd March 1980 and that the Commissioner of Lands wrote to the Managing Director East African Posts and Telecommunications Corporation informing him of the details of Nairobi West Shopping Centre Plot as LR No. X7/2X2/5.
 24. She attested that on 8th April 1980, the Managing Director wrote to the Commissioner of Lands about the size of the plot and enclosed a print of the Post Office building as a sample of their proposed post office building and that on 18th July 1991, Kenya Posts & Telecommunication were issued with a Letter of Allotment for Nairobi West Shopping Centre Plot Ref. No. 54XX9/X1.
 25. It was her testimony that on 17th February 1994, the Commissioner of Lands acknowledged receipt of Kshs. 15,990/= as payment for fees stipulated in the Letter of Allotment Ref. No. 54529/15 and Kshs. 60,000/= for payment of land rent and that receipt No. 785802 was issued by the Commissioner of Lands as proof of payment.
 26. PW1 stated that on 9th October 1996, the Managing Director of East African Posts and Telecommunications Corporation wrote to the Commissioner of Lands confirming receipt of payment of rent and the letter of allotment and requested for a grant before commencement of developments on the plot.
 27. PW1 stated that a Survey Records Office Map dated 8th August 1999 shows that Nairobi West Shopping Centre Plot LR. No. 209/2X2/10 was surveyed and authenticated by the Director of Surveys as Nairobi West Post Office on 2nd August 2000.
 28. She testified that in 2001, private developers, Julius Keru Njoroge and Grace W. Keru, claimed ownership of the plot and produced a title to the plot dated from 1st February 1990 for a term of 99 years. PW1 further averred that on 29th January 2002, the Postal Corporation of Kenya registered a caveat forbidding any transactions on the plot and instituted a suit, being Nairobi High Court Civil Suit No. 1549 of 2002, which was later withdrawn on an external legal consultant's advice.
 29. It was the evidence of PW1 that Postal Corporation of Kenya later engaged the services of advocates to pursue the recovery of the plot and on 18th March 2011, it wrote to the defunct Kenya Anti-Corruption Commission and the Commissioner of Lands for further investigation into the matter.



30. PW2 was Silas Kiogora Mburugu, the Principal Land Administration Officer at the National Land Commission. He adopted his statement dated 4th December 2016 as his evidence in chief. He averred that from the correspondence file no. 132640 in respect of Land Reference Number X7/2X2/5, the land was allocated to Rayson Pharmaceutical Limited vide a Letter of Allotment dated 31st January 1990 marked as Folio 1 as an unsurveyed Commercial Plot measuring approximately 0.046 of a hectare.
31. It was the evidence of PW2 that the allottee accepted the offer letter by way of payment vide receipt No. E350426 of 7th February 2000 and that upon payment, the allottee applied for authority to transfer the land to Julius Njoroge Keru and Grace Wamiti Keru.
32. PW2 testified that on 8th February 2000, authority was given and communicated to the applicant through a letter referenced 159434/5 and dated 8th February 2000 and that the authority to transfer the land was subject to payment of 2% of the consideration being consent fees and 4% of the same being stamp duty.
33. The demand for the payment of the legal fees, it was averred, was forwarded and accepted and the Plans Record was asked to confirm the status of the land; that the Plans Record Office stated at Folio 7 of the file, that there was a reservation for KPTC on file no. 54529 and that the land was undeveloped and vacant and that the authority for payment was given by an Assistant Commissioner of Land, Amiani, on 24th March 2000 and a receipt no. E518626 was issued for the payment.
34. PW1 stated that a form of informal transfer from Rayson Pharmaceutical Limited to Julius Njoroge Keru and Grace Wamiti Keru was executed on 22nd May 2000; that the lease in the name of the transferees was processed and executed by the Commissioner of Lands on 31st May 2000 and that the grant for L.R X7/2X2/5 was registered as IR No. 8XX04 in Nairobi Central Registry.
35. PW1 averred that File No. 54529 reflected in Folio 7 of File No. 132640, which contained a reservation for KP&T was not availed to him by the officer in charge of records, Mr. Osano, who brought him File No. 132640. He further averred that with respect to allocation of land that is already reserved for a particular user and is allocated to a different user, a re-planning has to be carried out.
36. PW2 produced the documents at Pages 14, 18-21, 22-23, 24,25 and 26-28 of the Plaintiff's bundle as PEXB2. There was a note at page 14 by the records office which shows the reservation of the land for KPTC, which was a comment by the Records Office. He referenced the Letter of Allotment to Rayson Pharmaceutical Ltd at Page 18 dated 13th January 1990 and stated that if the company was not registered, it would not have been eligible.
- X7. In the course of examination, PW2 stated that he found the documents at the Lands Office. He stated that File No. 54529 and File No. 132640 were connected though they are two separate files; that File No. 54529 was however not available and that the Allotment Letter was used to open the file number 132640 and the Commissioner of Lands then issued the title.
38. In re-examination, he maintained that in the file, he did not come across any re-planning or change of user of the land. He stated that the Director of Planning should have prepared a PDP re-designating the user of the land from the current one to the new one and that the Letter of Allotment shows the user as commercial.
39. The Plaintiff's third witness, PW3, was Pius Nyange Maithya, a registered valuer and a full member of the Institution of Surveyors of Kenya working as a Forensic Investigator with the Ethics and Anti-Corruption Commission, the Plaintiff herein.



40. It was his evidence that on 13th August 2013, he was allocated a case involving allegations that Mr. and Mrs. Julius Keru Njoroge had been allocated Land Reference Number X7/2X2/5 belonging to the Postal Corporation of Kenya and that he sought for relevant documents from the Postal Corporation of Kenya, the Ministry of Lands and the Registrar of Lands.
41. PW3 testified that after perusing documents and recording statements with regard to the subject parcel, he established that Land Reference Number X7/2X2/5 Nairobi West had two files in the Inland Registry, File No. 132640 and File No. 54529 and that the suit property, being LR No. X7/2X2/5 IR No. 8XX04 was granted to the defunct Kenya Post and Telecommunications Corporation (KPTC) vide an allotment letter referenced 54XX9/X1 and dated 18th June 1991 for a term of 99 years from 1st August 1991.
42. It was the evidence of PW3 that the officials of the Ministry of Lands went ahead to allocate the land to a private company called Rayson Pharmaceutical Limited, who despite having been allegedly allocated the land in 1990, made the requisite payments in 2000, at which time they transferred the land to Julius Keru Njoroge and Grace Wamiti Keru.
43. According to PW3, an allotment letter was then purportedly issued to Rayson Pharmaceutical Limited in respect of the suit property measuring 0.046 hectares marked as a commercial property; that he established that the said Rayson Pharmaceuticals was incorporated on 6th October 1998, eight years after the purported allocation of the suit property.
44. It was the evidence of PW3 that his investigations revealed that the public property vested in a public body was illegally vested by the then Commissioner of Lands, Sammy Silas Komen Mwaita, to Rayson Pharmaceutical, in total disregard of the subsisting alienation and that the purported grant to Rayson Pharmaceutical Limited was fraudulent, illegal, null and void ab initio and could not pass good title to Julius Keru Njoroge and Grace Wamiti Keru or any other person.
45. PW3 produced documents at pages 29-71 of the Plaintiff's Bundle as PEXB3. In cross-examination, he stated that although he had the records of Rayson Pharmaceuticals Ltd and although the company was still active when he undertook his investigation, he did not pursue the directors of the company as the company transferred the land and the title. He maintained that the EACC has the mandate of recovering property belonging to the public.
46. It was evidence PW3 that while he recognized that through a Gazette Notice dated 16th November 1965, the Commissioner of Lands was authorized to make grants on behalf of the President, he averred that Sammy Silas Komen Mwaita, who signed the grant on behalf of the President, did not perform his functions in good faith.
47. The 1st Defendant, DW1, Julius Keru Njoroge, adopted his statement dated 21st September 2017 as his evidence in chief. In his statement, he averred that on 31st January 1990, him, together with his wife, the 2nd Defendant, entered into a transfer agreement with Rayson Pharmaceutical Limited for the property known as L.R. No. X7/2X2/5. He stated that on 31st May 2000, they received a lease from the Ministry of Lands for the property LR No. X7/2X2/5 IR 8XX04 signed by the Commissioner of Lands.
48. DW1 avowed that since they were issued the lease, he has been paying land rents to the City Council and since then, he has enjoyed quiet possession of the property. He stated that he did not personally know the directors of the 3rd Defendant company, nor met them, as the transaction was being dealt with by their advocates.
49. He produced a bundle of documents dated 26th September 2019 as 1DEXB1 and the Supplementary List dated 22nd April 2022 as 1DEXB2.



50. In cross-examination, DW1 averred that people have built kiosks on the land; that they used an agent, Niko Enterprises Agency, when they acquired the land and that he never called for the registration documents of the seller because it is the advocate who did the due diligence. He testified that he paid for the land and he has never demanded for his money.
51. By consent, the 4th Defendant, Mr. Sammy Mwaita's witness statement was adopted, as he was unable to attend court for cross-examination. In his statement, he averred that he was employed as a civil servant in 1985 and rose through the ranks and that in 1999, he was appointed as a Commissioner of Lands vide a Gazette Notice dated 4th December 1999.
52. He stated that the process of issuance of titles involves about 20 steps which span a number of government departments including provincial administrators, survey department, local authorities, clerks of councils and CEOs of parastatals. According to the 4th Defendant, these steps are initiated by an application by an interested party.
53. He averred that during the period he was in office, the government resolved to dispose of non-strategic government houses and land to private individuals, as one of the requirements by the World Bank and IMF that various houses and land were disposed of to private citizens or civil servants at a cost.
54. It was his evidence that after due process has been followed of land allocation, through a letter of allotment, payment of requisite fees, survey and land registration, titles/leases or grants are issued. According to the 4th Defendant, upon approvals and requisite payments, his duty as a Commissioner of Lands was only to sign at the tail end after various steps and approval by the respective officers.
55. He asserted that he has been wrongly sued in his personal capacity for matters which were purely official in nature, and that it is the current office holder who should have been sued to verify or confirm the authenticity of the grants that were issued herein.

Submissions.

56. The Plaintiff's Counsel submitted that from the certificate of incorporation provided for the 3rd Defendant, it is evident that the 3rd Defendant company was not in existence at the time it was allocated the suit property. Counsel contended that none of the Defendants sought to explain this anomaly and that this is the clearest indicator of fraud perpetrated by the purported allocation of the suit land to the non-existent 3rd Defendant.
57. It was submitted that any registration and transfer following this fraudulent allocation equally stands tainted by the said fraud and is incurable. Counsel relied on the Court of Appeal case of Arthi Highway Developers Limited vs West End Butchery Limited & 6 Others [2015] eKLR.
58. The Plaintiff's Counsel also submitted that the suit property was already alienated government land and the purported allocation and lease of the suit property to the 3rd Defendant was a nullity, incapable of creating good title and similarly, the purported transfer by the 3rd Defendant to the 1st and 2nd Defendants is a nullity, as the 3rd Defendant was incapable of passing a good title.
59. It was submitted that none of the Defendants adduced evidence to show that a new Part Development Plan had been developed and approved to allow the allocation to the 3rd Defendant and that the allocation was fraudulent and could not vest a valid title to the 3rd Defendant, capable of being transferred to the 1st and 2nd Defendants.
60. Counsel for the Plaintiff relied on the case of James Joram Nyaga & another vs The Hon. Attorney General & Another [2007] eKLR as well as on Section 3 and 7 of the Government Lands Act which



limit the power of the Commissioner of Lands to execute leases or conveyances on behalf of the President.

61. The Plaintiff has also relied on the cases of Kenya Anti-Corruption Commission vs Peter Oloo Aringo & 3 Others [2020] eKLR; Kenya Anti-Corruption Commission vs Online Enterprises Limited & 4 Others [2019] eKLR; Chemey Investment Limited vs Attorney General & 2 Others [2018] eKLR and Munyu Maina vs Hiram Gathiha Maina [2013] eKLR.
62. Further, it was submitted that the 1st and 2nd Defendants are not bona fide purchasers as they failed to conduct due diligence on the status of the 3rd Defendant who were the alleged vendors. Counsel quoted the Court of Appeal's decision in Flemish Investments Limited vs Town Council of Mariakani [2016] eKLR.
63. The 1st and 2nd Defendants' Counsel submitted that the Plaintiff has not adduced any evidence to show that the defunct Kenya Post and Telecommunications Corporation or the Postal Corporation of Kenya has or had title to the property and that only a reservation and a letter of allotment was adduced as evidence by the Plaintiff.
64. They argue that the government cannot grant a title on one part then come sue for ownership and recovery after granting the title. Counsel relied on the following cases: Torino Enterprises Limited vs Attorney General [2023] KESC 79 (KLR) where it was held that a letter of allotment does not confer title or ownership in the land and Wilson Masila Muema vs County Government of Machakos [2020] eKLR.
65. The Defendants' counsel submitted that the State has been charging and collecting land rates for the property from the 1st and 2nd Defendants and that in the absence of title attributable to the State, the Plaintiff is barred from the prosecution of this suit because it lacks the locus as per Section 11 of the *Ethics and Anti-Corruption Commission Act*.
66. Counsel submitted that *Legal Notice No. 155 of 2006*, outlines the assets, liabilities and contentious issues of the defunct Kenya Posts and Telecommunications Corporation, to the exclusion of the suit property and that the EACC has feigned ignorance to the provisions of this gazette notice.
67. It is their argument that that KPTC did not fulfill the conditions of the letter of allotment beyond 1st July 1999 and the suit property was not registered in its name. In this respect, counsel on Section 69 of the *Interpretation and General Provisions Act* and Nderitu Gachagua vs Thuo Mathenge & 2 Others [2013] KECA 281 (KLR).
68. It was submitted that the 1st and 2nd Defendants were issued with a certificate of title by the registrar upon purchasing the suit property from the 3rd Defendant who had acquired a letter of allocation and fulfilled the conditions thereof; that the Certificate of Lease granted gives an absolute and indefeasible title to the owner unless fraud or misrepresentation, to which the owner is proved to be a party. Counsel quoted Section 23 of the Registration of Titles Act and the cases of Joseph Ng'ok vs Moijo Ole Keiwua & Others Civil Appeal No. 60 of 1997 (27/97 Nrb) and Hannah Wangui Ithebu & another vs Joel Ngugi Magu & 2 others [2005] eKLR.
69. The 1st and 2nd Defendants' counsel submitted that they are bona fide purchasers for value and without notice of defect in title; that the presented facts leave many gaps as to the accuracy of the documents brought forth by the Plaintiff and that the Plaintiff has not dispelled its onus of proving that the 1st and 2nd Defendants had knowledge of the existence of an unregistered interest on the part of the defunct KPTC and whose interest they unknowingly and wrongfully defeated.



70. According to counsel, the context in this suit is distinct from that in the case of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR), by dint of the land regime governing the title and that in the *Dina Management Case*, the title was issued under the Government Lands Act which was subject to the doctrines of common law and equity.
71. It was submitted that under the Registration of Titles Act, the government grants indemnity and insurance to a registered owner and the only recourse is compensation by the state for an error in the register and that the remedy available to the Plaintiff can only be granted by the Executive and not the Judiciary. Counsel relied on the case of *David Peterson Kiengo & 2 others vs Kariuki Thuo* [2012] eKLR.
72. As to the claim for mesne profits and general damages, the Defendants' Counsel submitted that these remedies cannot be sought simultaneously and that the claimed loss cannot be alleged by a non-owner of the property. Counsel relied on the Court of Appeal case of *Attorney General vs Halal Meat Products Limited* [2016] eKLR and *Maina Kabuchwa vs Gachuma Gacheru* [2018] eKLR.
73. The 4th Defendant's Counsel submitted that all actions conducted during the period in question were executed in his official capacity and his involvement in a comprehensive titles issuance process which comprises over 20 procedural steps demonstrated that his actions were confined to his statutory responsibilities. It is additionally submitted that the 4th Defendant's power as Commissioner for Lands to divide townships into plots was conferred by the law, as provided under Section 9 of the Government *Land Act* (now repealed).
74. Further, the 4th Defendant's counsel submitted that during his tenure, the government's decision to dispose of non-strategic government houses and land to private citizens was made under the Government Lands Act, and that this was implemented in accordance with recommendations from the World Bank and IMF and evidenced by circulars dated 18th August 2004 and 24th January 2007.
75. It was the 4th Defendant's advocate's submission that the 4th Defendant was erroneously sued in his personal capacity for acts that were purely official in nature, and all liability should be confined to his official functions and not to extend to his personal capacity in the absence of any proof of bad faith.

Analysis and Determination.

76. The Plaintiff has challenged the validity of the title to the suit property, L.R. No. X7/2X2/5, held by the 1st and 2nd Defendants, which property they acquired from the 3rd Defendant. The Plaintiff contends that the 3rd Defendant obtained title to the suit property fraudulently because the suit property was already alienated to a public entity, the Kenya Posts and Telecommunications Corporation, and was not available to be allocated to the 3rd Defendant.
77. It argues that the 1st and 2nd Defendants could not have acquired good title to the suit property and seeks that the issuance of the lease to the 1st and 2nd Defendants be declared illegal, null and void. The Plaintiff also seeks that the impugned entries in the register of the suit property be cancelled and expunged.
78. The 1st and 2nd Defendants, however, assert that they lawfully acquired title to the suit property from the 3rd Defendant and that they are bona fide purchasers whose title is indefeasible. They also maintain that there is only one certificate of title issued to them and no title was ever issued to the KPTC.
79. The Defendants have contended that the Plaintiff lacks locus to bring this suit and is acting outside its mandate in this matter. Section 11(j) of the *Ethics and Anti-Corruption Commission Act* however stipulates that the EACC has the mandate to institute and conduct proceedings in court for purposes of recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption



- or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.
80. As this matter concerns the recovery of L.R. No. X7/2X2/5, which the Plaintiff asserts was reserved for a State Corporation, Kenya Posts and Telecommunications Corporation, the Plaintiff is acting well within its mandate.
 81. The Defendants have additionally claimed that this suit is res judicata. They assert that Postal Corporation of Kenya, which succeeded the Kenya Posts and Telecommunications Corporation, had previously filed a High Court Civil Suit No. 1549 of 2002, Postal Corporation of Kenya vs Julius Keru Njoroge, the Attorney General. The suit was however withdrawn by the Plaintiff on 16th December 2009. In their bundle of documents, the Defendants adduced a copy of the Plaintiff's Complaint, the Defence filed by Julius Keru as well as the Notice of Withdrawal of Suit.
 82. The doctrine of res judicata, as set out under Section 7 of the *Civil Procedure Act*, prevents a court from trying a suit which has been in issue in a former suit between the same parties, in a court competent to try such subsequent suit which has been heard and finally decided by such court.
 83. It then behooved the Defendants to adduce a final judgement of the earlier suit to show that that suit had been determined on its merits, which they failed to do. There is therefore no evidence to show that High Court Civil Suit No. 1549 of 2002 was heard and determined on its merits. This suit can therefore not be said to be res judicata. This court has the requisite jurisdiction to consider the merits of this matter.
 84. Upon consideration of the pleadings filed by the parties, the issues for this court's consideration are as follows:
 - a. Whether the suit property was reserved for the Kenya Posts and Telecommunications Corporation.
 - b. Whether the 1st and 2nd Defendants are bona fide purchasers.
 - c. Whether the Plaintiff is entitled to the orders sought in its Plaintiff.
 85. Article 62(1) (b) of *the Constitution* of Kenya defines public land as including land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease.
 86. The Kenya Posts and Telecommunications Corporation (KPTC) was established under the Kenya Posts and Telecommunications Act (now repealed) which commenced on 31st December 1977. KPTC succeeded and took over the functions of the East African Posts and Telecommunication Corporation in Kenya. Under Section 3(2) of the Act, the Corporation was a body corporate with the power to hold and dispose of movable and immovable property for the purposes of the corporation.
 87. Section 14 of the KPTC Act (repealed) prescribed the procedure for acquisition of land for purposes of the Corporation, distinguishing between the process of acquiring public land and private land. Where the land is public land, it is indicated that the Corporation shall notify the Minister responsible for public lands that the land specified in the notice is required for the purposes of the Corporation. Where such notice is given, the Minister may, in his discretion and upon such terms and conditions as he may think fit, place such land at the disposal of the Corporation for the purposes of the Corporation.
 88. In support of its case, the Plaintiff has adduced multiple correspondences between the Commissioner of Lands and Managing Director/Kenya of the East African Posts and Telecommunications



- Corporation (EAPTC) spanning the period between 5th September 1977 and 3rd March 1980. From these letters, it is clear that the EAPTC had reached out to the Commissioner of Lands seeking a site to lease for the purposes of establishing a post office.
89. Through a letter dated 8th February 1980, the Commissioner of Lands informed the Managing Director, EAPTC, that there was a site earmarked for a Post Office at Nairobi West Shopping Centre and inquired whether they would be interested in acquiring this plot. The said Managing Director gave a conditional acceptance, through his letter dated 20th February 1980, subject to receipt of the site plan. He also sought to be informed the plan number to facilitate purchase of the survey plan from the Director of Surveys.
 90. On 3rd March 1980, the Commissioner of Lands indicated that the plot at Nairobi West Shopping Center had been given L.R. X7/2X2/5. The EAPTC Managing Director wrote back on 8th April 1980 confirming that he had gotten a plan of the site and he had found the plot to be too small.
 91. Despite the apparent dissatisfaction with the size of the plot, on 18th July 1991, a letter of allotment was issued with respect to LR No. X7/2X2/5 Nairobi to the Kenya Posts and Telecommunications Corporation subject to payment of annual rent of Kshs. 30,000. The Allotment Letter indicates that the land is to be used for a post office and offices. It is additionally noted on the Letter of Allotment that the suit property refers to the Nairobi West Post Office Plot.
 92. The Plaintiff has additionally adduced an extract from the File Records Section of the National Land Commission which indicates that the suit property L.R. No. X7/2X2/5 has a reservation reflected in favour of Kenya Posts and Telecommunications Company in File No. 54529.
 93. The Plaintiff's witness, PW1, referenced the amalgamation of LR No. X7/2X2/1-9 into LR No. 209/2X2/10 through Survey Folio Number 83 Register No. 112 obtained from the Survey of Kenya dated 30th July 1958. PW1 stated that the Director of Surveys re-surveyed the said LR N0. 209/2X2/10 as Nairobi West Post Office on 2nd August 2000. The said witness did not however produce these documents before court.
 94. These assertions would in effect have meant that the suit property known as LR No. X7/2X2/5 ceased to exist in 1958, and would be detrimental to both the Plaintiff's and the Defendants' suit. With no evidence to support the said amalgamation, the court will disregard these claims all together.
 95. On the basis of the evidence adduced by the Plaintiff, this court is satisfied that it has been established that the suit property was surveyed and reserved as a public utility, and for the specific purpose of a post office even before the same was allocated to KPTC in 1991.
 96. The Letter of Allotment issued to KPTC duly satisfied Section 14 of the KPTC Act, as it was the instrument through which the suit property was placed at the disposal of the Corporation by the Commissioner of Lands. This process is distinct from the allocation of land to a private person through a letter of allotment.
 97. The 1st and 2nd Defendants have maintained that they are bona fide purchasers of the suit property, which they lawfully purchased from the 3rd Defendant. They contend that the Certificate of Lease issued in their names is an absolute and indefeasible title.



98. The repealed Section 23 (1) of the Registration of Titles Act (repealed) under which the Defendants' title was issued, embodied the doctrine of indefeasibility of title as envisaged under the Torrens System of registration. Section 23 (1) of the Registration of Titles Act provides as follows:

“ 23 (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive of evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

99. In *Joseph Arap Ng'ok vs Justice Moiwo Ole Keiwua*, Nairobi Civil Application No. 60 of 1997, (unreported) the Court of Appeal in considering the effect of Section 23 held that;

“Section 23(1) of the Act [the RTA] gives an absolute and indefeasible title to the owner of the property. The title of such owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya will be placed in jeopardy.”

100. Article 40(6) of *the Constitution* of Kenya however does not extend the application of the right to property to property that has been found to have been unlawfully acquired.

101. With respect to the doctrine of bona fide purchaser, the Supreme Court in the case of *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR) has upheld the position that to establish whether a claimant is a bona fide purchaser for value, the court must first evaluate the root of the title, right from the first allotment.

102. The Supreme Court in this decision quoted with approval the Court of Appeal's determination in *Munyu Maina vs Hiram Gathiha Maina Civil Appeal No 239 of 2009* [2013] eKLR, where it was held that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is being challenged and therefore the registered proprietor must go beyond the instrument and prove the legality of the title, and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register.

103. Similarly, in the case of *Funzi Development Ltd & Others vs County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal stated that:

“...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title.”



104. Further, in *Chemei Investments Limited vs The Attorney General & Others* Nairobi Petition No. 94 of 2005 (Unreported), the court quoted the case of *Isaac Gathungu Wanjohi & another v Attorney General & 6 others* [2012] KEHC 5200 (KLR) where it was held as follows:

“*The Constitution* protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of *Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another* (supra) where the Court stated as follows,

“We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

105. This court is duly guided by the above authorities. That being the case, it was upon the Defendants to satisfy this court as to the legitimacy of the root of their title.

106. The Defendants contend that by dint of the land regime the title presented is registered under, the circumstances in this matter are distinct from those in *Dina Management Limited vs County Government of Mombasa & 5 Others* [2023] KESC 30 (KLR). That is not true. The principles articulated by the Supreme Court in the *Dina Management* case are applicable across all the land registration regimes in Kenya.

107. The Defendants assert that they purchased the suit from the 3rd Defendant, through agents of the 3rd Defendant. The 1st Defendant testified in court that he had never met the directors of the 3rd Defendant as the transaction was undertaken between the parties’ advocates. He also stated that he never called for the registration documents of the seller.

108. The evidence adduced by the 1st and 2nd Defendants is with respect to their purchase of the suit property, and does not give much of the history of their title. It is within the Plaintiffs’ bundle that this court found the Letter of Allotment issued to the 3rd Defendant, Rayson Pharmaceutical Limited on 31st January 1990.

109. The Letter of Allotment is indicated to be with respect to an un surveyed commercial plot in Nairobi West as indicated in Part Development Plan Number 93013/11/125A, which was annexed to the allotment letter.

110. There are several irregularities that arise with respect to the 3rd Defendant’s Letter of Allotment. Firstly, is its reference to the suit property as an ‘un surveyed commercial plot’ yet in the attached PDP, it is indicated to be Land Reference Number X7/2X2/5. That Land Reference number is an indication that the land was surveyed, albeit without a title.

111. Secondly, from the records of the Registrar of Companies, Rayson Pharmaceutical Limited was registered on 6th October 1998, eight years after the Letter of Allotment was purportedly issued to them.

112. The Court of Appeal in the case of *Charles Karaithe Kiarie & 2 Others vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others* [2013] eKLR [2013] KECA 335 (KLR) held that a non-existent company could not hold title. The court upheld the proposition as stated



in *Haiderali Bhimji Motani vs N. K. Thobani & Another* [1945] 12 EACA X7 that a transaction preceding incorporation of a company cannot bind the company.

113. Thirdly, the Director of Physical Planning, through a letter dated 24th February 2014, stated that the records at the National Land Commission indicate that LR No. X7/2X2/5 was reserved for Kenya Posts and Telecommunications Corporation and that no Part Development Plan was prepared by that department to facilitate its allocation to a private individual. This casts aspersions as to the validity of the PDP annexed to the allotment issued in favour of the 3rd Defendant.
114. Lastly, the existence of two correspondence files at the Inland Registry with respect to the suit property is an indication of a scheme that was used to allocate land that had already been reserved for public purpose. PW2, the Principal Land Administration Officer at the National Land Commission, testified that the allotment letter dated 31st January 1990 to the 3rd Defendant, Rayson Pharmaceutical Limited, was used to open the file number 132640 and the Commissioner of Lands thereafter issued the title to the 1st and 2nd Defendants.
115. Although PW2 stated that File no. 54529 was not availed to him, he was able to obtain an extract which indicated that the suit property was reserved for the Kenya Posts and Telecommunications Company. The Letter of allotment issued to KPTC was reference number 54XX9/X1 and the subsequent acknowledgement of payment of Kshs. 60,000/- by KPTC to the Commissioner of Lands on 17th February 1994 has a reference number 54529/15.
116. The existence of two files with respect to the same property was un procedural and undoubtedly a means to perpetuate a fraudulent scheme. In fact, file number 132640 which was opened to facilitate the issuance of a letter of allotment to the 3rd Defendant came way after file reference number 54529 had been opened.
117. These irregularities lead to the conclusion that the letter of allotment that was issued to the 3rd Defendant was unlawful, the land having already been reserved for public purpose, and more specifically for use as a post office. Due to the illegality of the 3rd Defendant's letter of allotment, the 3rd Defendant could not have passed a valid or better title to the 1st and 2nd Defendants.
118. The 1st and 2nd Defendants are therefore not bona fide purchasers as the root of their title is tainted with illegalities. Indeed, the 4th Defendant in issuing the title to the 1st and 2nd Defendants over public land which was unavailable for alienation, acted beyond the scope of the powers bestowed on him.
119. The Plaintiff has sought the reliefs of general damages as well as mesne profits. It is however trite law that where a party claims for both mesne profits and damages, the Court can only grant one and not both. The Court of Appeal in the case of *Kenya Hotel Properties Limited vs Willesden Investments Limited* [2009] eKLR held that:

“...Once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass”, since both mean one and the same thing.”

120. Further mesne profits must be pleaded and proved. In the case of *Peter Mwangi Mbutia & Another vs Samow Edin Osman* [2014] eKLR, the Court of Appeal held as follows:

“We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established...No specific sum was claimed in the Plaint as mesne



profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

121. In this suit, the Plaintiff has neither sought a specific sum as mesne profit nor has it presented any evidence to support the award of mesne profits. This also applies to the claim of general damages. This court therefore has no basis to award these reliefs as sought by the Plaintiff.
122. In conclusion, the Plaintiff’s suit is merited and the following orders do hereby issue:
- a. A declaration be and is hereby issued that the purported issuance of the letter of allotment in respect of the suit property in favour of the 3rd Defendant and the registration of the suit property in the names of the 1st and 2nd Defendants is illegal, null and void ab initio.
 - b. An order does hereby issue directing the Chief Land Registrar to cancel and expunge from the register the entry relating to the transfer of the suit property in favour of the 1st and 2nd Defendants and any subsequent entries.
 - c. The suit property to revert to Kenya Post and Telecommunication Corporation or its successor to be used for public purpose.
 - d. An order of permanent injunction be and is hereby issued restraining the 1st and 2nd Defendants by themselves, their servants or agents or otherwise howsoever from dealing with the suit property.
 - e. That costs of this suit be borne by the Defendants jointly and severally.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 16TH DAY OF JUNE, 2025.

O. A. ANGOTE

JUDGE

In the presence of;

Mrs Cheronu for Mr. Nyoike for Plaintiff

Mr. Muturi for 1st and 2nd Defendants

Court Assistant: Tracy

