



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 215, 216, 217, 218, 219, 220, 221, 222, 223, AND 224 OF 2009

(CONSOLIDATED)

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

FRANN INVESTMENTS LIMITED.....1ST DEFENDANT

FRANCIS GITHUI WAHOME.....2ND DEFENDANT

ANN GATHONI.....3RD DEFENDANT

VICTOR WAHOME.....4TH DEFENDANT

EDWARD KAGUME.....5TH DEFENDANT

DAVID MWANGLI.....6TH DEFENDANT

WILSON GACANJA.....7TH DEFENDANT

JUDGMENT

(Suit by the plaintiff seeking recovery of land that it claims to have been public land wrongfully acquired by the 1st – 6th defendants; suit land having been used as a customs house by the Customs & Excise Department and later by the Kenya Revenue Authority; said land allotted to a third party who later transferred it to the 2nd defendant; the 2nd defendant having been an employee of the Customs Department and later the Kenya Revenue Authority; 2nd defendant subsequently subdividing the land into 10 plots and transferring the same to the 1st defendant, a company whose shareholding comprised of himself and his family who are the 3rd – 6th defendants; 7th defendant sued for breach of fiduciary duty having been the Commissioner of Lands at the time of the allotment of the land; assertion by the plaintiff that the allotment and transfer of the land were fraudulent and illegal; argument of the 1st – 6th defendants that they are innocent purchasers for value; 7th defendant contending that he cannot be held personally responsible; responsibility of 7th defendant already determined by the Court of Appeal; evidence showing that the land was set apart as a customs house; argument by 1st – 6th defendants that the land was unalienated and that they are innocent purchasers; what would constitute unalienated Government land under the Government Land Act (repealed); holding of the court that the definition must include land set aside for use by the Government for a public purpose; allocation of it could not be done by the 7th defendant; 7th defendant liable in damages; 1st – 6th defendants cannot plead that they are innocent purchasers for value as the 2nd defendant worked for the Customs department; held that the land needs to revert back to the Government and the titles of 1st defendant nullified)

A. INTRODUCTION AND PLEADINGS

1. These suits were commenced through complaints filed on 30 June 2009 later amended on 27 August 2009. The suits were filed by the Kenya Anti-Corruption Commission, the predecessor to the present Ethics and Anti-Corruption Commission (EACC). The Kenya Anti-Corruption Commission (KACC) is a body that was formed under the Anti-Corruption and Economic Crimes Act, No. 3 of 2003. It has filed these suits in respect of the land parcel MN/III/293 situated in Kijipwa area North of Mtwapa Creek within Kilifi District (the original property). It is principally the contention of the plaintiff that this title MN/III/293 was illegally converted into a title LR No. MN/III/2974 which was subsequently subdivided into 10 plots being LR Nos. MN/III/3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, and 3659. These subdivisions are the subject of the consolidated suits herein as follows :- LR No. MN/III/3652 CR No. 35037 (Mombasa ELC No.215/2009);

LR No. 3655 CR No. 35040 (Mombasa ELC No. 216/2019); LR No. MN/III/3657 CR No. 35042; (Mombasa ELC 217/2009) ; LR No. MN/III/3659 CR No. 35044 (Mombasa ELC No. 218/2009); LR No. MN/III/3654 CR No. 35039 (Mombasa ELC No. 219 of 2009); LR No. MN/III/3658 CR No. 35043 (Mombasa ELC No. 220/2009); MN/III/3650 CR No. 35035 (Mombasa ELC No. 221 of 2009); MN/III/3651 CR No. 35036 (Mombasa ELC No. 222/2009); LR No. MN/III/3653 CR No. 35038 (Mombasa ELC No. 223/2209) and LR No. MN/III/3656 CR No. 35041 (Mombasa ELC 224/2009). It was agreed that all the suits raise similar issues of law and fact and were consolidated with proceedings being recorded substantially in the suit Mombasa ELC No. 215 of 2009. The judgment herein is thus in respect of all these mentioned cases.

2. The 1st defendant is a limited liability company whose subscribers are the 2nd – 6th defendants. It is pleaded by the plaintiff that the 2nd – 6th defendants are the “controlling mind” of the 1st defendant and they have been sued as such. The plaintiff has pleaded that the original property was reserved, planned and used, as a customs outpost/watchtower and guard house, of the then Department of Customs, and was not available for alienation as it was not “unalienated Government land.” It is pleaded that on 8 February 1995, the original property was purportedly offered to one Kenny Mohamed Sheikh Ali (Mr. Ali), but that there is no record of a formal acceptance or compliance with any of the conditions on the letter of allotment, and no indication that the said Mr. Ali ever got registered as owner of the original property. It is further pleaded that the letter of allotment bore a land reference and Plan No. 35664/II/42A which the plaintiff avers is inconsistent and peculiar to grabbed properties the country over. The interest of Kenny Mohamed Sheikh Ali was subsequently taken over by the 2nd defendant.

3. The plaintiff has pleaded that the 2nd and 7th defendants (7th defendant being the Commissioner of Lands at the time), caused resurvey and change of the original property, from LR No. MN/III/293 to LR No. MN/III/2974, without any legal or valid basis, and that the process was unprocedural and illegal, since only a subdivision of the original property would result in a new parcel number. It is pleaded that on 4 October 1996, the 7th defendant purportedly made a grant for LR No. MN/III/2974 to the 2nd defendant. The 2nd defendant then caused LR No. MN/III/2974 to be subdivided into the 10 plots that I earlier mentioned and which are the subject of these suits. The 10 subdivisions were then transferred to the 1st defendant company on 19 April 2007. It is pleaded that the 1st defendant was not a purchaser for value and that there was no consent from the Commissioner of Lands, and further, that this transfer was aimed at concealing the fraud involved in the alienation of the original property.

4. It is contended that the whole process of alienation of the original property, the renumbering of the property, and the grant to the 2nd defendant were tainted with fraud and against the express provisions of the law, and could not confer, upon any of the defendants, an interest in the land. The following particulars of fraud are pleaded :-

(a) The 7th defendant knew or ought to have known that the original property being alienated government land was not available for the making of a grant to the 2nd defendant;

(b) The 2nd defendant being an employee of the Customs Department and later Kenya Revenue Authority knew or ought to have known that the original property had been used as a customs outpost/watchtower and was not available for alienation;

(c) The 2nd and 7th defendants knew that the original property and suit property had belonged to the Department of Customs which had erected thereon a customs outpost/watchtower.

(d) The 2nd and 7th defendants knew or ought to have known that the original property had been surveyed and given a parcel number;

(e) The 2nd defendant never applied for allocation of the original property/suit property;

(f) The 2nd defendant knew or ought to have known that the Letter of Allotment is valid for only 30 days;

(g) The 2nd defendant knew or ought to have known that the 7th defendant had no authority to transact on the original/suit property either by allocating or registering the original property in favour of the 1st defendant or at all;

(h) The 7th defendant knew or ought to have known that the 2nd defendant had not accepted nor complied with the conditions in the letter of allotment (if any was given to him);

(i) The 2nd defendant purported to transfer the suit property to the 1st defendant fully aware that he had no (or any) valid title to the original or suit property;

(j) The 1st and 2nd defendants knowingly and willingly obtained a material advantage by unfair or wrongful means;

(k) The 1st and 2nd defendants transferred property without any or a valid consent from the Commissioner of Lands.

5. It is further pleaded that the 7th defendant deliberately acted fraudulently and in excess of his statutory powers and authority and his actions were ultra vires the relevant statutes and amounted to abuse of office, and further, that he could not grant any valid title over the original or the subdivided plots to the 2nd or any other defendant. It is also pleaded that his conduct constituted a misfeasance in public office. It is thus contended that purported grant over the original and the subdivided plots are null and void.

6. In these suits, the plaintiff seeks the following orders :-

(a) A declaration that the conversion of and renumbering of LR No. MN/III/293 to LR No. MN/III/2974 and creation of subdivisions thereof were ultra vires, irregular, fraudulent, and illegal and consequently null and void.

(b) A declaration that the making of a grant in respect of LR No. MN/III/2974 to the 2nd defendant was ultra vires the 7th defendant's statutory powers, irregular, fraudulent, and illegal and consequently null and void.

(c) An order for rectification of the register by cancellation of the Grant made to the 2nd defendant in respect of LR No. MN/III/2974 dated 29 July 1996 and registered on 4 October 1996.

(d) An order for rectification of the register by cancellation of the Transfer dated 11 April 2007 and registered on 19 April 2007 in respect of LR Nos. MN/III/3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, and 3659.

(e) An order for rectification of the register by cancellation of the Certificate of Titles in respect of LR Nos. MN/III/3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658 and 3659.

(f) An order of permanent injunction against the 1st to 6th defendants, their agents, servants or assigns restraining them from leasing, transferring, charging, taking possession, or in any other manner howsoever from dealing with properties LR Nos. MN/III/3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, and 3659 otherwise than by transfer or surrender to the Kenya Revenue Authority and/or the Government of Kenya.

(g) General Damages for fraud and breach of fiduciary duty as against the 7th defendant.

(h) Costs of and incidental to the suit.

7. The 1st – 6th defendants entered appearance and filed a joint statement of defence in all the cases. It is inter alia pleaded that the cases are non-suited against them as the original allottee of the land has not been enjoined. It is also pleaded that the case is non-suited against the 3rd, 4th, 5th and 6th defendants as they are merely original subscribers of the 1st defendant company. It is pleaded that the 1st – 6th defendants are honest purchasers for value without notice of defect in title (which defect in any event is denied). It is further pleaded that the plaintiff is estopped from asserting the alleged title in light of the decision in the case *Mombasa HCCC No. 254 of 2000 Macro Insurance Brokers Limited vs Francis Githui Wahome*, and it is contended that in the said case, the court found that Kenya Revenue Authority (KRA) has no claim over LR Nos. MN/III/3653 and 3654, and that KRA did not appeal that decision. It was denied that LR No. 293/III/MN or LR No. 2974/III/MN were ever reserved, planned or used, as a customs outpost/watchtower, or that the same was alienated before the issuance of the letter of offer to Mr. Ali. It is pleaded that the 2nd defendant purchased the suit land in good faith and for valuable consideration from Mr. Ali. They pleaded that the process of resurveying, renumbering and making a grant in respect of LR No. 2974 and the subsequent subdivision was done with the sanction of the Director of Surveys and the concurrence of the Commissioner of Lands, and thus the 1st – 6th defendants cannot be visited or held responsible for any acts of commission or omission in the administrative process. They denied all allegations of fraud and the alleged breach of statute. It is pleaded that the 2nd defendant transferred to the 1st defendant the subdivided plots for good consideration and bona fides. It is pleaded that the 1st defendant has developed and mortgaged part of the land. A Reply to Defence was filed to traverse the issues pleaded in the defence of the 1st – 6th defendants.

8. For the 7th defendant, he admitted in his defence that he served as a Commissioner of Lands. He however denied executing the documents complained of in this case. He pleaded that he exercised his powers as delegated to him by the President. He pleaded that Sections 8 and 130 of the Government Land Act (now repealed), takes away jurisdiction from the plaintiff to file and prosecute this suit, and also the jurisdiction of this court to hear this case. He pleaded further that the suit is time barred; that the suit is premature and reiterated that this court has no jurisdiction.

9. There was an 8th defendant, M/s Savings & Loan Company Limited. They were enjoined in the matter because they held a charge over one of the subdivisions, LR No. MN/III/3657. They however filed an application to be removed from the proceedings since the loan had been paid. The application was allowed by consent on 22 October 2015. That is why we only have 7 defendants in the cases.

10. It was mentioned on 30 March 2017 that the 3rd defendant is deceased. There was no substitution and the case against him has abated.

B. EVIDENCE OF THE PARTIES

11. PW-1 was Dedan Ochieng Okwama who testified that he is an investigator with the plaintiff. He had prepared a witness statement which he relied on as his evidence in chief. I have gone through it. The statement avers that it is the Government which held the land parcel MN/III/293 measuring 0.4047Ha and on which stood two Department of Customs houses which were used as guard houses for the members of staff of the then Department of Customs, a Customs Watchtower, and a well for drawing water. When the Kenya Revenue Authority (KRA) was formed in the year 1995, it took over the assets of the Department of Customs and Excise including the suit property. He stated that he obtained a map dating back to 1922, being FR No. 22/49 which showed that MN/III/293 had been surveyed for customs purposes and the land was within the beacons T1, T2, T3 and T4 in the map. His investigations showed that on 14 September 1994, Mr. Ali applied to the Commissioner of Lands, through the District Commissioner, Kilifi, seeking to be allocated the property, on the grounds that he had “done a lot for KANU” but “has not enjoyed the fruits of uhuru.” The then acting District Commissioner noted on the face of the letter that there were two customs houses on the land. He also referred to a letter dated 23 September 1994 from the Registrar of Titles, which noted that on the said land stood “the old customs house.” He stated that in light of this, the land formed part of Government land, reserved for use by the Customs Department, set apart for a public purpose, and was thus held as public utility for housing officers of the Department of Customs and Excise, and thus not available for alienation. He stated that this notwithstanding, Mr. Ali was issued with a letter of allotment for the land on 8 February 1995. The letter provided for acceptance and payment of the prescribed fees within 30 days.

12. He stated that Mr. Ali was never registered as owner of the said land. He continued that on 10 July 1995, the property was purportedly “sold” and “informally transferred” to the 2nd defendant, Francis Githui Wahome (2nd defendant or Mr. Wahome). He stated that there is nothing in property law known as an “informal transfer” and thus the purported transfer was null and void. On 29 September 1995, Mr. Ali purported to accept the offer and made payments for the prescribed fees. He observed that the payments were made about six months outside the period noted in the letter of allotment. He stated that in what appears to be a scheme to conceal the illegality, the property was mischievously renumbered MN/III/2974.

13. On 29 July 1996, the Commissioner of Lands (at the time the 7th defendant) issued a grant of the property MN/III/2974 to the 2nd defendant. He averred that his investigations showed that there was no prior approval by the President before the Grant was made. He revealed that Mr. Wahome was employed by the East African Customs and Excise Department as a preventive officer. After the collapse of the East African Customs and Excise Department, Mr. Wahome was absorbed by the KRA as Section Preventive Officer until 1 July 1997. He stated that Mr. Wahome caused the property to be subdivided and he transferred the subdivisions to the 1st defendant company (Frann Investments Limited) on 19 April 2007.

14. In his oral evidence he added that the directors of Frann Investments Limited are the 2nd to 6th defendants. He mentioned that the original title was never surrendered for subdivision. He stated that there were no field reports and no letter of no objection from the Customs Department and asserted that the Commissioner of Lands had no authority to alienate the land as it was already alienated.

15. Upon cross-examination, PW-1 stated that he visited the land but he did not see a customs house. Instead, there is a storeyed development. He did not see approvals for the development of a customs house. He acknowledged that the developments now on the land must have occurred in full view of the government. He stated that they could not commence proceedings against the developer until they carried out investigations. He affirmed that the subdivisions were approved by the Director of Surveys and there was nothing to suggest that the Director of Physical Planning had rejected the development on the land. He did not get any evidence that corruption was used by the 1st and 2nd defendant to get the land. In his view there was illegality rather than corruption.

16. Cross-examined by counsel for the 7th defendant, he acknowledged that the letter of allotment to Mr. Ali was signed by Otieno F.O for the Commissioner of Lands. The instruction for preparation of the allotment letter was also made by F.O Otieno. The instruction to prepare a new lease/grant to read LR No. MN/III/2974 was from one Dr. Kithuka. The consent to transfer from Mr. Ali to Mr. Wahome was consented to by Mr. Z.A Mabea for Commissioner of Lands. He acknowledged that these documents were not signed by the 7th defendant save that the 7th defendant signed the grant. He was shown an internal memo written by one S.M. Mwaniki of KRA, which inter alia bore a paragraph stating that the President authorised the allocation of the plot to Mr. Wahome. He asserted that the allocation was unprocedural because the property was not available for allocation as it was non unalienated. He stated that the (Land) Registrar was not sued because he was acting on instructions of the Commissioner of Lands. He was not sure if the 7th defendant was Commissioner of Lands in the year 2009. He stated that he was aware that the President could delegate to the Commissioner of Lands including allocating unalienated land on behalf of the President.

17. Re-examined, he testified that all other officers were acting on behalf of the Commissioner of Lands. He was not sure when the developments currently on the land were put up. He explained that vacant land does not mean that it is available for alienation. He stated that he never came across any authority from the President allocating the land.

18. PW-2 was Beatrice Wambui Thuo. She works with the Kenya Revenue Authority, Human Resource Department. She also adopted her written witness statement as her evidence in chief. She stated that Mr. Wahome was employed as a preventive officer by the East Africa Customs and Excise Department. He rose through the ranks to become a Senior Preventive Guard. With the formation of KRA in 1995, he got employed on contract as a Senior Preventive Officer until 1 July 1997. He thus worked from the year 1964 to 1997. His duties as a preventive guard involved manning customs gates, patrol bases, and the watchtowers, so as to prevent the entry into the country of uncustomed goods. She stated that to aid their operations, the Authority had a number of patrol bases, one of which was on the property in dispute. She stated that as a senior officer, Mr. Wahome would know of the location of the patrol bases. She referred to the records to point out that the 3rd defendant is wife to Mr. Wahome, whereas the 4th, 5th and 6th defendants are his children.

19. Cross-examined, she was asked about the status of the land and she stated that she visited it 2 months prior to her giving evidence but she did not see a watchtower. She did not know where it disappeared. She had not seen a title deed issued to KRA before the year 1996. She did not have a document outlining Mr. Wahome’s job description but it did not include getting titles for KRA. She did not have records of the disputed land. No staff had been involved in disciplinary proceedings over the land. Re-examined, she stated that KRA does not have title to all its properties as some are still being processed.

20. PW-3 was Simon Mwaniki, he works with KRA in its property department. He also adopted his witness statement as his evidence in chief. He joined KRA Mombasa in the year 2002. He mentioned that during handover, the disputed property was one of those listed by his predecessor. He stated that the property MN/III/293 was set aside, planned and was in actual occupation by the Department of Customs and Excise. Once KRA was established in 1995 it took over the assets of this Department. He stated that there were two custom houses on the property, a water tank and a pit latrine, and that the property was used as a patrol base for officers on patrol duty. He stated that KRA instructed the District Physical Planner, Kilifi District, to plan the property for residential purposes, and that the process was initiated, and a notice placed in the Daily Nation on 21 November 2001. He had a PDP dated 17 October 2001 indicating that the plot is a residential plot for KRA. He visited the site on 17 June 2003. He observed that the houses were in ruins and there was need to redevelop. In the year 2003, he received information that the property may have been allocated to an individual. He wrote a memo to the property manager, Nairobi, asking him to conduct investigations. The investigations revealed the change of title of the property and subsequent title issued to Mr. Wahome. In the year 2005, KRA placed a caveat in the Daily Nation newspaper regarding the properties in issue. He referred to the survey map of 1922 as indicating that the plot is a customs house. He pointed out that Mr. Wahome was their employee and thus must have known that the property belonged to KRA.

21. He was cross-examined on the handover list which he did not have. He did not know when construction of the buildings currently on the

disputed land was undertaken. Construction was however ongoing in the year 2008. He visited the land in 2003 and 2004. There was no watchtower during this time and the houses were in ruins. There were no KRA officers stationed at the site at that time. He mentioned that he also testified in a previous suit to give evidence that KRA owned the property (presumably Mombasa HCCC No. 254 of 2000).

22. With the above evidence, the plaintiff closed its case.

23. Before commencement of the defence case, Mr. Mogaka, learned counsel for the 1st -6th defendants informed the court that the 3rd and 4th defendants are deceased. The only defence witness was Mr. Wahome, the 2nd defendant.

24. He affirmed that the directors of the 1st defendant are his family members. He adopted an affidavit that he had sworn on 20 July 2009 and filed on 22 July 2009 and the documents annexed as his evidence alongside his witness statement. He also relied on the judgment in *Mombasa High Court Petition No. 63 of 2012*. From his affidavit and statement, his evidence is that he first learnt of the land parcel LR No. 293/III/MN in 1995 when Mr. Ali (now deceased) approached him with an offer to sell his "inchoate" interest in the land which he claimed had been allocated to him. He saw that the land had a reference number and he inquired whether the land had been registered in the name of Mr. Ali. His efforts drew a blank as the Land Office in Mombasa intimated that it had no records of the land and they could not therefore issue a certificate of postal search. He stated that he had no reason to doubt this answer from the Land office and he entered into an agreement for sale of the interest of Mr. Ali on 10 July 1995. Mr. Ali then applied for the consent of the Commissioner of Lands to transfer his "inchoate" interest to him. He had documents to show how Mr. Ali applied for the land and how it was allotted to him. He paid all dues and a transfer to him was effected on 13 July 1995. He stated that there is no evidence that the land was reserved for use by the former Customs Department or the KRA. He also relied on a judgment in *Mombasa HCCC No. 254 of 2000* and stated that in that case, the Judge "found as a fact that KRA does not have a claim over LR Nos. 3653 and 3654." He stated that when he took possession of the land, the same was vacant, and that the 1st defendant developed some 10 flats on LR No. 3657. He stated that the remedy for KRA, or the plaintiff, would lie in damages against the government employees for fraud. He stated that the 1st defendant was incorporated over 10 years after he had acquired the land. He stated that he and the 1st defendant are purchasers for value without notice of any defect, fraud or illegality, and that the land was purchased from Mr. Ali for the sum of KShs. 403,000/=. He later subdivided the land into the plots No. 3650-3659. In his oral evidence, he stated that nowhere in the land records does it show that the land was reserved for KRA. He never saw a letter of allotment issued to KRA or the Customs Authority, and that the only letter of allotment he saw was that issued to Mr. Ali.

25. Cross-examined by counsel for the plaintiff, he stated that he was employed as a preventive officer with KRA. He stated that he was employed on 21 April 1965 and rose through the ranks to become Senior Preventive Officer. His main role was to deal with the ships coming in and going out so that smuggling does not happen. He would supervise between 10 and 20 officers. He stated that his job was concentrated at the port because this is where "a lot of prevention is done." He stated that there could have been some officers patrolling the coast but they were not under him. He did not know whether KRA had watchtowers. He did not know that the plot that he purchased had a KRA watchtower. He knew Mr. Ali as a friend even before he sold the land to him and he was based at Mtwapa. He knew the land previously as MN/III/293. He stated that it was not him who changed the number to MN/III/2974. He had no knowledge whether Mr. Ali paid for the allotment within the terms contained in the letter of allotment.

26. Re-examined, he stated that when he bought the house, there was no customs house and the land was bushy. He reiterated that his work was at Kilindini, at the port, and that his job did not involve taking care of KRA land or visiting KRA land. He stated that no complaint has ever been raised on the payments noted in the allotment letter to Mr. Ali.

27. The case of the 7th defendant was closed without calling any evidence.

C. SUBMISSIONS OF COUNSEL

28. Counsel filed written submissions which they fully relied on. I have taken note of these. Mr. Murei, learned counsel for the plaintiff, started his submissions by quoting the following dictum, made in the case of *Chemey Investment Limited vs Attorney General & 2 Others (2018)eKLR*, where the Court of Appeal stated as follows :- "There was a time in the history of this country, not too long ago, when public officers appeared to have been bitten by a bug that infested them with a malignant and shameless craving to acquire for themselves, their friends or relatives, public property in respect of which they were trustees or custodians." He submitted that it is the case of the plaintiff that the disputed property was reserved for the Customs Department and was not available for allocation. He referred me to the evidence tendered and to the documents exhibited by the plaintiff. He submitted that if there were custom houses, this was prima facie evidence that the land was planned, reserved and set aside for use by the Department of Customs and Excise. He submitted that in terms of the Government Land Act (repealed) the land was not available for alienation. He referred me to Section 3 of the Government Land Act (repealed) and submitted that it was clear that only the President was competent to alienate unalienated Government land. He submitted that the power is delegated to the Commissioner of Lands in certain limited circumstances, none of which fitted the circumstances of this case. He submitted that here, the land was apparently being allocated as a gift in recognition of the allottee's support for KANU, the then ruling party. He submitted that nowhere in the Survey Act, Cap 299, Laws of Kenya, is an allottee allowed to unilaterally survey an already surveyed property. He submitted that the fresh survey could only have been for purposes of by-passing the existing records which showed that the land is already surveyed and reserved for the Customs Department. He submitted that once the land is resurveyed, a fresh process of allocation was needed. Counsel submitted that Mr. Ali, as an allottee of land who had not yet obtained a proprietary interest, had nothing to sell to the 2nd and 3rd defendants. He referred to the case of *Dr. Joseph Arap Ng'ok vs Keiwua & 5 others (1997)eKLR*. He submitted that although the interest was sold to both the 2nd and 3rd defendants, title only issued to the 2nd defendant which was suspicious. He further raised issues on the time of acceptance of the allotment letter which was outside the 30 day period noted in the letter. He relied on the case of *Syedna Mohamed Barhanddudin Saheb & 2 Others vs Benja Properties and 2 Others (2007)eKLR* (which appears to have held that if an allotment letter is not accepted within time, then it "dies"). He submitted that the 1st - 6th defendants cannot be innocent purchasers as the 2nd defendant was in the employment of the Customs department as a preventive officer and must have known that the disputed property was a customs house and watchtower. He relied on the decision in *Chauhan vs Omagwa (1985) KLR 656*. He submitted that knowledge of fraud on any one of the directors or shareholders of the company was knowledge of fraud on the part of the company. He contested the claim that the suit is *res judicata* based on the case Mombasa HCCC No. 254 of 2000 and submitted that KRA was not litigating through Macro Insurance Brokers, the plaintiff in the said suit.

29. On the argument that the estate of Mr. Ali ought to have been enjoined to the suit, counsel submitted that the suit property did not form part of Mr. Ali's estate and importantly because Mr. Ali never acquired an interest in the property. He submitted that the 1st – 6th defendants were at liberty to enjoin his estate. He submitted that the 7th defendant had no authority to alienate the disputed land, assuming that it was available for allocation. He relied on the case of *James Joram Nyaga & Another vs Attorney General & Another (2007) eKLR*; *Kipsirgoi Investments Ltd vs Kenya Anti-Corruption Commission, Court of Appeal at Eldoret, Civil Appeal No. 288 of 2010* and *Funzi Island Development Ltd & 2 Others vs County Council of Kwale & 2 Others (2014)eKLR* to support the submission that title created in contravention of the law is invalid. He submitted that the 7th defendant abused his office and the abuse was committed against the Government and is thus personally liable. He relied on the case of *Ethics and Anti-Corruption Commission vs Judith Marylyn Okungu (2017)eKLR*.

30. On his part, Mr. Mogaka, learned counsel for the 1st – 6th defendants, inter alia submitted that parties are bound by their pleadings and that the burden of proof rests with the plaintiff. On the claim that the land was already alienated, counsel referred me to the definition of "unalienated Government land" in the Government Land Act (GLA) (repealed). He referred me to the evidence of the plaintiff's witnesses and submitted that their evidence is that the Customs Department falls under Treasury, but no witness was called from the Treasury and/or KRA, to explain the failure to adduce documentary evidence on the expenditure and approved building plans for the purported watchtower. He pointed out that no photograph of the ruins were produced as evidence, no neighbours of the property were called, and no handover list produced by PW-3. He submitted that failure to avail the relevant witnesses is to be adversely construed against the plaintiff. He submitted that from the plaintiff's own documents, government officers were involved in the process of recommendation and approval of the allocation of the land, but none were summoned as witnesses. Counsel submitted that no lease or allotment letter was produced by the plaintiff to show that the land belonged to the Customs & Excise Department and no officer from the office of the Director of Surveys called. He thus submitted that the land was unalienated and that it was vacant when allocated. He further submitted that the allotment letter was to be accepted within 30 days of the day it was posted but that no evidence was led on when it was posted. He submitted that no explanation was given why Otieno F.O who signed the letter of allotment was not summoned to testify on the sequence of events surrounding the letter of offer. He saw nothing untoward with the transfer of Mr. Ali's interest to the 2nd defendant. He relied on the cases of *Mbau Saw Mills Limited vs Attorney General & Another (2015) eKLR*, *Wreck Motors Enterprises vs Commissioner of Lands & 3 Others (1997)eKLR*, and *748 Air Services Ltd vs Theuri Munyi (2017)eKLR*. He further submitted that KRA has capacity to sue and to be sued, and power to hold immovable property, but it took no step to move the court to stop the developments on the land. He submitted that KRA acted indolently and watched the developments being made and no explanation given why they did not act earlier. He submitted that principles of acquiescence and waiver apply. He submitted that though PW-3 stated that they complained to the Ndungu Commission, the report was not presented in evidence.

31. On the claim that the land was acquired fraudulently, counsel referred me to the standard of proof in fraud. He submitted that there was no evidence tendered to challenge the position that the 2nd defendant acquired an interest in the suit property as an innocent purchaser for valuable consideration without notice. On the change of the title number, he submitted that the Director of Surveys was best placed to explain. He submitted that the failure to call the Director of Surveys should be construed adversely against the plaintiff. He submitted that any defect in title cannot be visited against the 1st – 6th defendants. He submitted that the persons who signed the letter of allotment and accepted the requisite fees have not been sued or criminally prosecuted and further submitted that they were acting within the scope of their authority. He submitted that there was no evidence that prevention officers operated from the suit land. He submitted that the plaintiff has failed to establish a case of fraud and illegality involving the 1st – 6th respondents and submitted that the plaintiff's case should be dismissed with costs.

32. On the part of the 7th defendant, Mrs. Umara, learned counsel, referred me to the defence of the 7th defendant and submitted that he exercised his powers as delegated to him by the President. She submitted that any acts performed by the 7th defendant were performed in his capacity as the Commissioner of Lands. She submitted that the proceedings thus needed to have been brought against the Attorney General because the 7th defendant was a public officer. She also referred me to the various documents exhibited by the plaintiff as emanating from the Land Offices and submitted that the 7th defendant was not directly involved in the allotment and transfer of the suit property. On whether the 7th defendant can be sued in his personal capacity, she submitted that he has been wrongly sued. She submitted that her client did not breach the provisions of statute and asked that the suit against him be dismissed with costs.

33. I have considered all the above. I take the following view of the case.

D. ANALYSIS AND DECISION

34. It will be recalled that this is a consolidated judgment in respect of the suits Mombasa ELC Nos. 215-224 of 2009. The suits seek cancellation of the titles MN/III/3650 – 3659. These titles arise from a subdivision of the land parcel MN/III/2974. The land parcel MN/III/2974 was therefore identified as LR No. MN/III/293. It is the case of the plaintiff that this land was not available for alienation; that the allotment of the land to Mr. Ali was illegal; that the Commissioner of Lands had no right to allocate the land. The plaintiff also insinuates that the 1st – 6th defendants are not innocent purchasers for value as the 2nd defendant was employed by the Customs Department, and it is its argument that he knew, or ought to have known, that the land had been set aside for use by the Customs Department, given his position within the same Department and later KRA. The 1st – 6th defendants' main contention is that they are innocent purchasers for value and thus have good title to the properties. They also do not see anything wrong in the manner that the land was allocated to Mr. Ali, and it is indeed their argument, that the land was unalienated at the time and thus could be allotted, which was done. They further argue that KRA waived their right to claim the land. The position of the 7th defendant is that he acted within his powers as provided by the prevailing law, and that in any event, it is the Government which should have been sued, and not him, in his personal capacity. It is precisely at this point that I wish to start my discussion of the matter.

35. I have gone through the record. I have seen that the 7th defendant did file an application dated 5 October 2015 seeking to be struck out of the suit. Among the grounds upon which the said application was based, was that the 7th defendant was a public servant, and performed his duties in his capacity as Commissioner of Lands, and thus the suit ought to have been brought against the Attorney General. It was further contended that the functions were imposed upon the 7th defendant by virtue of instructions lawfully given by the Government. Within that application, the 7th defendant heavily relied upon the decision of Mutungi J in the case of *KACC vs Judith Marilyn Okungu & Another*,

Nairobi ELC Case No. 8 of 2008 (2013)eKLR delivered on 15 November 2013. That was another case by the Kenya Anti-Corruption Commission for recovery of what it claimed to be public land unlawfully allotted to a private individual; among the defendants sued was Judith Marilyn Okungu who at some point served as the Commissioner of Lands. She did file a preliminary objection seeking to be struck out of the suit, inter alia, on the argument that she ought not to be sued in her personal capacity and that instead it is the Attorney General to be sued. The preliminary objection was upheld. I have however seen that this decision was successfully appealed against before the Court of Appeal in the case *Ethics and Anti-Corruption Commission vs Judith Marilyn Okungu & Another, Court of Appeal at Nairobi, Civil Appeal No. 183 of 2014*. The Court of Appeal stated as follows :-

“It would seem, with respect, that the learned Judge misunderstood the import of the two provisions (Sections 4 and 12 of the Government Proceedings Act, Cap 40). What they do is provide that the Government can be sued for the tortious acts of its officers in much the same way as private persons are vicariously liable for the tortious acts of their servants or agents and that when Government sues or is sued in civil proceedings, the said proceedings shall be in the name of the Attorney General. There is nothing in those two sections per se that provides a blanket immunity from suit for Government officers. All that can properly be deduced from them is that liability extends to the Government...There is ample authority to the effect that a person against whom fraud or illegality is alleged cannot escape personal liability (should the fraud or illegality be proved) on the basis that he was acting as an agent or servant of another. Indeed, government functionaries of whatever seniority are not immune from personal liability for unlawful acts such as deceit, fraud or contempt of court.”

36. I think the above decision speaks for itself. There is ample authority that a person engaged as a civil servant can be sued in his/her own capacity especially where the issues complained of relate to deceit, fraud or illegality. That is precisely what is claimed against the 7th defendant. Without belabouring the point, the 7th defendant can be sued in his own name given the issues herein. A decision had already been made on whether or not he can be sued in his own capacity, and a holding properly made that he can, and the 7th defendant cannot revisit the issue at this stage of the suit. But even if I was to consider the issue, as I have found above, the 7th defendant can be sued, and is thus properly sued in this matter.

37. One point that was argued at length was whether the land in issue was capable of being allotted or whether it was already alienated Government land. There was also argument on whether the 7th defendant had the power to alienate the land to Mr. Ali. It is of course the position of the defendants that the land was unalienated and could properly be allotted to Mr. Ali and that it was indeed so properly allotted. At the time that the allocation of the disputed land to Mr. Ali happened, and the time that 2nd defendant and later the 1st defendant obtained title, and even when this suit was filed, the current land laws comprised in the Land Registration Act, Act No. 3 of 2012, and Land Act, Act No. 6 of 2012, had not yet come into force. What was in operation then, was the Government Land Act, Cap 280 (repealed) (GLA), and the Registered Land Act, Cap 300 (repealed) (RLA) as the titles herein were issued under the latter statute. It is common ground that at the time the land was allocated, the same was Government land and was not held under any private tenure.

38. There is a question here as to whether or not the land was “alienated” or “unalienated” Government land. The GLA gave a definition of what “unalienated” Government land meant at Section 2, which provided as follows :-

“unalienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

It will be recalled that it was the argument of counsel for the 1st – 6th defendants, that there was no prior lease, and no allotment letter issued, prior to the allotment letter to Mr. Ali, and thus the land was “unalienated” and could be allotted to Mr. Ali.

39. Whereas there certainly cannot be a second allocation of land that the Government has previously assigned a lease or an allotment to, the law was rather grey on whether land that had been set apart for use for a certain public purpose, but where no lease or allotment letter has previously been issued, could be allocated to an individual for private use. I have not been pointed to any law by any of the counsel on record. My view would be that where Government land had been specifically assigned for a specific public purpose, then so long as that public purpose remains, that land ought to be considered to be part of Government land that cannot be alienated to private individuals for private use. I do not think any other interpretation would make sense. I say so because it is a fact that historically, not all Government land had been titled. Probably the Government was easy that because such land is under its use, or has been assigned a public use, then nobody is going to tamper with it. But does it mean that because the Government has not issued an allotment letter to such land, to say a Government parastatal or Government Department, and has not issued a title to the body that is supposed to make use of the land, then the said land can be allocated to private individuals for private use ? I do not think so. If this was to be the position, then developed infrastructure including roads, hospitals, schools, and even courts could be allocated to private individuals simply because no allotment letter or title had been issued. People would literally loot and grab all public infrastructure. Let us take the example of a court. If there is a survey plan, or a PDP that provides that certain land has been set aside by the Government for building a court, and a court is so built, but no allotment letter or title is issued to the judiciary, can a person now be allotted that land and hold private title to it for his own private use ? I think that result would be absurd and I do not think that this was the purpose of the law when it defined what “unalienated Government land” is under the GLA.

40. My view is that so long as land had, or has been, set aside by the Government for specific use, which use is apparent from the pertinent records, including survey plans and/or PDPs, or visible on the ground, then that land must be considered to be part of “alienated Government land.” That was indeed the basis of the holding by the Court of Appeal in the case of *Chemey Investment Limited vs Attorney General & 2 Others (supra)*. In that case an allocation was made to the appellant for land that was being used as the Eldoret District Hospital. The Court of Appeal held that the alienation of the land to the petitioner was wrongful as it was being actively used as a public hospital. I am not therefore persuaded by the argument of counsel for the 1st – 6th defendants that because no prior allotment letter or title had issued for the land in issue, then the land could be alienated for private use. I do not agree that it was unalienated Government land because I can see from the survey plan received on 28 September 1922, that the disputed land was a “customs house”. This is clearly indicated in the said plan. Subsequent survey maps maintain the same description of the land as a “customs house”. There is evidence that on the land stood some houses, which were used by customs officials. I am not so sure about the use of the land as a watchtower, for that is not indicated in the survey maps, but the use of it as a “customs house” cannot be disputed. That was indeed the purpose of setting apart that land, i.e for use as a

“customs house” and it was indeed used as a customs house. There is no indication that the Customs Department was approached so that they may say that they no longer need the land and affirm that it can be allocated to a private individual.

41. I have held that the suit land was not “unalienated Government land” because it was already assigned for use by the Government and the Government Department in use never gave consent for the allocation and never said that they would not wish to use the land any more. Being so, the land was not therefore capable of allocation to a private individual.

42. But let us assume that I am wrong in my definition of “unalienated Government land” and therefore the land was “unalienated”. Could it have been allotted by the Commissioner of Lands ? I do not think so. The allocation of unalienated Government land was provided for in Section 3 of the GLA which was drawn as follows :-

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

(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;*

(b) with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;*

(c) †extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him;

(d) accept the surrender of any lease or licence under this Act;*

(e)† accept the surrender of any certificate granted under the East Africa Land Regulations, 1897, or of any lease granted under the Crown Lands Ordinance, 1902, and grant to the lessee a lease under this Act of the area the subject of the surrendered certificate or lease, provided such surrender is made within such period as the President may by notice in the Gazette direct, such period to be not less than twelve months from the commencement of this Act;

Provided that this paragraph shall not apply to land granted under the East Africa Land Regulations, 1897, or leased under the Crown Lands Ordinance, 1902, upon terms which differ from the ordinary terms in force at the time at which such land was granted or leased; and

(f) accept the surrender of any freehold conveyance under the Crown Lands Ordinance, 1902, or freehold grant under this Act.

*(* The powers of the President under these paragraphs were delegated to the Commissioner of Lands (Cap. 155 (1948), Sub. Leg.) and for † The powers of the President under the said paragraphs to accept the surrender of a lease granted under the Crown Lands Ordinance, 1902, and to grant the lessee a lease of the same land under this Act were delegated to the Commissioner (Cap. 155 (1948), Sub. Leg)*

** The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—*

(a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;

(b) for town planning exchanges on the recommendation of the Town Planning Authority, Nairobi, within the total value, and subject to the conditions, laid down by the President;

(c) the sale of small remnants of land in the City of Nairobi and Mombasa Municipality acquired for town planning purposes and left over after those town planning needs have been met;

(d) for the use of local authorities for municipal or district purposes, viz. office accommodation, town halls, public parks, native locations, fire stations, slaughter-houses, pounds, incinerators, mortuaries, crematoria, stock sale yards, libraries, hospitals, child welfare institutions, garages, housing schemes, markets and public cemeteries;

(e) the extension of existing township leases on the fulfilment of the conditions specified therein as being precedent to such extensions;

(f) the temporary occupation of farm lands on grazing licences terminable at short notice;

(g) the sale of farms and plots which have been offered for auction and remain unsold, such grants being subject to the general terms and conditions of the advertised auction sale and the application therefor being submitted within six months of the date of the auction in the case of township plots and within twelve months in the case of farms, except that in the case of godown plots the

power to sell shall not be limited to a period of six months from the date of sale.

43. It will be seen from the above, that the institution that had power to allocate unalienated Government land was the President under Section 3 of the GLA. The Commissioner of Lands could exercise some delegated powers on behalf of the President, but as can be observed, the delegated power was limited to grants for religious or charitable purposes, or such other uses as defined above. I have not seen a delegation of the powers of the President for the Commissioner of Lands to allocate to a private individual, in his discretion, any unalienated Government land. Thus, even assuming that the land was unalienated, the Commissioner of Lands still had no power to allocate the disputed property and the allocation of it to Mr. Ali was not within his delegated powers as provided for in Section 3 of the GLA. It follows therefore that the allocation of the land to Mr. Ali was an illegal act on the part of the 7th defendant.

44. There was argument that the persons who signed the allotment letter and the initial documents have not been sued, and that the 7th defendant did not sign any document. My answer is that these documents were signed by the subordinates of the 7th defendant. If he did not approve of their actions, all he needed to do was to decline to sign and issue the grant to the 2nd defendant. The fact that he proceeded to sign the end product (the grant) means that the 7th defendant was comfortable with the acts of his subordinates. Given that position, their acts therefore bind the 7th defendant, for it was within his power to rebuke his subordinates for what they had done if he did not sanction the same. I see no substance in the argument that the initial documents were signed by other people and since they were not sued then the 7th defendant is not liable.

45. Apart from the above, there are many other problems with the allocation of the land to Mr. Ali and the subsequent transfer to the 2nd defendant. Firstly, in the letter through which Mr. Ali requested to be allocated the land, there is endorsed, inter alia, that there are two old customs houses on the land though not in use. There is another endorsement seeking that a ground report be made to establish whether there is a claim of title over the land. I have no record of any ground report or whether the Customs Department were consulted before the allotment letter was made, despite the recommendations by two Government officers. There is also the letter dated 23 September 1994 stating that tentative records have it that the old customs house stands on the plot. Mr. Ali of course must have known what was on the land and knew that there was a customs house on it. He must have known of this, because when he applied to be allocated the land, he specifically quoted LR No. 293/III/MN. He was certainly very familiar with the land to the extent of quoting its land reference number. However, in the approval for the allocation to Mr. Ali, dated 22 November 1994, the status of the plot is said to be "vacant" which certainly was not the case. There was clearly a misrepresentation on the status of the land when the application by Mr. Ali was being approved, and it is not far to find, that this was specifically for purposes of concealing the interest of the Customs Department over the land. There is also the suspicious change of the registration number of the land.

46. Now, if the land had already been surveyed and had a title LR No. MN/III/293, why wasn't title to Mr. Ali, or even to the 2nd defendant (Mr. Wahome), issued using this number? This, being the original number, is certainly what was in the existing survey maps. It is not usual to resurvey land simply for purposes of giving it a new number when there is no issue with the existing registration. I agree with the plaintiff, that the only purpose for the resurvey, and for the new number, was to try and cover up the fact that the land was LR No. MN/III/293 and that it had a customs house. I can come to no other conclusion. The defendants themselves did not in fact attempt to give any explanation, only stating that the Director of Surveys would have explained the issue. Since it was their title to protect, why didn't they call the Director of Surveys to explain the change of numbers? What was transferred to Mr. Wahome was LR No. MN/III/293. He never offered any explanation why he deemed it wise to appoint a surveyor merely for purposes of giving a new number to the same land. That is why I come to no other conclusion other than that the change of the parcel number by Mr. Wahome himself, was for no other reason other than to conceal the original parcel number.

47. There was argument that Mr. Ali could not transfer his interest to Mr. Wahome because he was yet to get title. I think this argument is neither here nor there. If the grant was proper, then I do not think that a person would be barred from transferring his interest to another person. I think the problem here is not so much that there was a transfer to Mr. Wahome, before Mr. Ali got title, but whether Mr. Ali, in light of the fact that the allocation of the land to him was illegal and improper and containing misrepresentations, was capable of passing any title to Mr. Wahome. My view is that Mr. Ali never got a good title that he could then transfer to Mr. Wahome. His allotment was illegal for the aforesaid reasons, and his title, even in its primordial stage, did not confer any interest to him. Having not acquired a good title, he had none to transfer to Mr. Wahome.

48. I also do not wish to dwell too much on the issue that the allotment letter was paid for way after the period noted in the said letter. I think if I was dealing with a case where there was a second allotment letter, and an issue arose as to which of the two created an interest, then I would have had an issue to try as to whether the recipient of the first allotment letter abided by its terms. But this is not the case here, and I do not need to address the point. Suffice to state that if the State has not issued a second allotment letter, and the purpose for the first allotment still remains, I see nothing wrong in an acceptance that is however out of time, for the State would not have committed itself to another allocation which would result in a clash with the first allotment. This is indeed what transpired in the case of *Syedna Mohamed Burhannuddin Saheb & 2 Others vs Benja Properties & 2 Others (supra)* cited by Mr. Murei, learned counsel for the plaintiff, but as I have said, I am not dealing with a clash of two allocations for the same land and I will rest the issue there.

49. So can the 2nd defendant and the subsequently the 1st defendant be protected under the doctrine of innocent purchaser for value? My holding is that they cannot, because firstly, they were not innocent purchasers for value, and secondly, the doctrine of an innocent purchaser for value cannot be used to sanitise a title that is null and void ab initio and neither can it breathe life into a null title. By no stretch of imagination can Mr. Wahome, the 2nd defendant, be said to be an innocent purchaser for value. He worked for the Customs Department, the same entity that had a house on the disputed land. I believe that given his senior position, he must have known of the Customs houses that were within his area of jurisdiction. I am unable to believe that he did not know that there was a Customs house in the land that he was purchasing. Given that knowledge, he cannot claim that he was buying land that he did not know that his employer had an interest in.

50. But let us even assume that he did not know that this was a customs house when Mr. Ali approached him with a request to purchase. I believe that after his interest had been drawn, Mr. Wahome must have asked Mr. Ali for his documents. I believe he saw the application for the land, which as I have mentioned earlier, had an endorsement of the land being a customs house. The land was already surveyed and in the

map, and due diligence would direct that he looks at the survey map, which would have demonstrated that the land was a customs house. Even if he did not do this kind of due diligence, he must have at least seen the houses on the land when he purchased Mr. Ali's alleged interest. On the land, there were houses, and I will not believe that he never inquired who has developed the houses, and what happened to them, since nobody was in residence. He must have known, one way or another, that these were customs houses owned by the Government, his very employer. Despite his evidence that the land was vacant when he purchased it, this is not true, because the documentary evidence and oral evidence adduced is clear, that there were customs houses on the land as late as at least the year 2003. It is therefore not true, that when Mr. Wahome purportedly purchased Mr. Ali's interest, the land was vacant, and that Mr. Wahome did not know that the land had been developed with Customs houses. Being alive to this fact, and assuming that he genuinely and innocently was purchasing Mr. Ali's interest, any prudent person would have inquired from the Customs Department on the sale of the property, so as to know the whereabouts of the allocation. In fact, given his position in the Customs Department, Mr. Wahome ought to first have been alarmed that it is a Customs House that was on sale, and at the very least, he ought to have raised his employer for clarification on whether this would be a good purchase. If this was not a scheme between Mr. Ali and Mr. Wahome to have the latter get this land on the cheap, Mr. Wahome knew that he was buying a house set aside for use by the Customs Department. He was certainly not an innocent purchaser for value.

51. Neither can the 1st defendant be said to be an innocent purchaser for value. The mind and body of the 1st defendant was with its subscribers and directors and Mr. Wahome was one of them. The company must thus be deemed to have had the background knowledge of the land and cannot be said to be innocent. The knowledge of the 2nd defendant is imparted to the 1st defendant. Even the transfer of the land to the 1st defendant to me is suspicious. No reason was given as to why the 2nd defendant deemed it fit to transfer the land to the 1st defendant. In as much as it was said to have been sold, there is no evidence of any consideration exchanging hands, and my take is that the transfer was for no other purpose, other than to attempt to sanitise the title in issue. Given my above discourse, my finding therefore is that the 1st and 2nd defendants cannot be protected under the doctrine of innocent purchaser for value.

52. My holding is that Mr. Ali never got a good title to the land. He thus had nothing to transfer to the 2nd defendant and in turn the 2nd defendant had nothing to transfer to the 1st defendant. The fact that the title was subdivided changes nothing. All downstream transactions being based on a title that is null and void, carry no proprietary interest, and are themselves also null and void. I do not hesitate to hold that the title of the 1st defendants to the subdivisions MN/III/3650 - 3659 are null and void.

53. Can the doctrine of waiver and acquiescence come in favour of the 1st – 6th defendants as submitted by Mr. Mogaka, learned counsel for the 1st – 6th defendants? The 1st -6th defendants argue that KRA did nothing to claim the land yet they took possession and developed it. I do not agree. It is apparent to me that KRA still believed that the title to the land was maintained as LR No. MN/III/293. This is borne by the various documents presented before me. It does indeed appear that at some stage, about the year 2001, KRA started planning the area for development of residential houses. KRA did commission and engage a private surveyor to undertake an audit of its properties and among the properties listed is LR No. MN/III/293. The District Physical Planner, Kilifi, was engaged to plan the property and a notice was placed in the Daily Nation of 21 November 2001. Regarding the suit *Mombasa HCCC No. 254 of 2000 Macro Insurance Brokers Limited vs Francis Githui Wahome*, the plaintiff in that case was a buyer of one of the subdivisions herein, but he backed off when he got hint that this land is a customs house for KRA and sued Mr. Wahome for a refund. Within that case, KRA to aid the cause of the plaintiff, sent a witness to demonstrate that this land is of KRA. Further, in the year 2005, KRA put up a "Caveat Emptor" notice in the Daily Nation newspaper of 5 October 2005, warning the public not to deal with the disputed land. That caveat emptor notice specifically mentions all the titles herein. It seems to me that it is after these maneuvers by KRA that the 1st defendant decided to develop the plots with haste.

54. I see a trend where some persons believe that if they can quickly develop a disputed plot then that will curry favour with the court. I am sorry that it does not, and indeed, any prudent investor in land, ought not to undertake developments on land that has a hanging dispute. The fact that the 1st defendant carried out developments on the land does not help its cause and neither does it sanitise the title. Indeed, in the case of *Chemey Investment (supra)*, the appellant, upon being receiving title to the land, proceeded to partly develop it with shops, but this did not deter the Court from holding that its title is invalid. In the case of *Gitwany Investment Limited vs Tajmal Limited & 2 Others (2006)eKLR*, the court did not hesitate to hold that title held by the 1st defendant, who had proceeded to fully develop the land, was unlawful, and the court directed the 1st defendant to remove the structures therein. So it really doesn't help a party to rapidly develop a property that is in dispute in the hope that the fact of that development will sway the court. A title that is illegal is not sanitised by proceeding to make developments in it.

55. What the 1st – 6th defendants needed to do, if they were not happy with the "caveat emptor" notice put up by KRA, was to proceed to sue KRA and demonstrate that KRA have no title to the land. The solution was not to proceed to develop the land. But it seems that the 1st defendant and its subscribers never wished for a direct confrontation with KRA and had no stomach for a direct head to head fight with KRA over the land and thus filed no suit against KRA to assert their title. Instead, they decided to develop the land when KRA had already hinted that the 1st defendant does not have good title to the land. I do not therefore see how it can be said that KRA acquiesced to the 1st defendant keeping title to the land, or waived their right to claim the same, simply because the 1st defendant proceeded to quickly undertake developments on the land. As I have said, it doesn't help the cause of the 1st -6th defendants to now claim that the land is developed. They undertook the development at their own risk without first ensuring that they have a clean title to the land.

56. There was contention by the 1st – 6th defendants that this suit is *res judicata* and the case *Mombasa HCCC No. 254 of 2000*, was cited. This is the case where a purchaser had sued Mr. Wahome for refund and among the witnesses of the plaintiff was PW-3 who worked for KRA. The case was decided with Maraga J (as he then was), holding that the plaintiff had made out a case for a refund. Within that case, he stated as follows (and this is the statement that the 1st -6th defendants are hanging on) :-

"I find no basis for the claim that the two pieces of land (LR Nos. 3653 and 3654) belong to Kenya Revenue Authority. That authority has not claimed the land in respect of which the defendant has a clean title. Taking all these into account I find that the plaintiff is entitled to a refund of Shs.100,000/= (sic) (certainly meant KShs.1,000,000/=)."

57. This statement was only made obiter, within the parameters of the dispute between the vendor and purchaser of the two parcels of land. The statement was never one that was aimed at making a concrete finding of the interest of KRA. Indeed, the court could not have made a

determination of the matter on the interest of KRA, as KRA was not a party to the said suit. The 1st-6th defendants cannot therefore hang on this obiter dictum. They cannot also be assisted by the decision in *Mombasa High Court Petition No. 63 of 2012, Frann Investment Limited vs The Registrar of Titles, Mombasa & 2 Others*. What prompted that suit is that through a Gazette Notice dated 8 June 2011, the Registrar of Titles, Mombasa, gazetted his decision to cancel and revoke the title of the 1st defendant. The 1st defendant then filed the said suit challenging this action by the Registrar of Titles. In a judgment delivered on 7 June 2017, the High Court (Mureithi J), did hold that the Registrar of Titles had no such powers and thus reinstated the title of the 1st defendant. But the court was careful to note that the 1st defendant will remain the registered proprietor “until the titles are revoked in accordance with the due process of the law or until further orders of the Environment and Land Court in the suits pending before it, or further orders of any court of competent jurisdiction.” That suit did not therefore make any determination on the veracity of the title of the 1st defendant which the court left for determination by this court. That is why I say that the decision therein does not help the cause of the 1st – 6th defendants.

58. I think I have said enough to demonstrate that the plaintiff’s suit must succeed and it does succeed. I now turn to the prayers sought by the plaintiff. The first is for a declaration that the conversion of and renumbering of LR No. MN/III/293 to LR No. MN/III/2974, and creation of subdivisions thereof were ultra vires, irregular, fraudulent, and illegal and consequently null and void. I allow this prayer. The second prayer is for a declaration that the making of a grant in respect of LR No. MN/III/2974 to the 2nd defendant was ultra vires the 7th defendant’s statutory powers, irregular, fraudulent, and illegal and consequently null and void. I have already demonstrated that the 7th defendant had no power to do so and therefore this prayer is also granted. The third prayer is an order for rectification of the register by cancellation of the Grant made to the 2nd defendant in respect of LR No. MN/III/2974 dated 29 July 1996 and registered on 4 October 1996. This is tied to prayer four and five which call for the rectification of the register by cancellation of the Transfer dated 11 April 2007 and registered on 19 April 2007 in respect of LR Nos. MN/III/3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657, 3658, and 3659. All these prayers are granted. The sixth prayer is for a permanent injunction to restrain the 1st – 6th defendants from the disputed properties. This is granted. The 7th prayer is for general damages for fraud and breach of fiduciary duty against the 7th defendant. The 7th defendant certainly breached his position of trust. He will pay general damages in the sum of KShs. 1,000,000/=. The 7th prayer regards costs. Costs shall be paid jointly and/or severally by the 1st – 7th defendants. The plaintiff has also sought any further orders deemed fit. I give the 1st – 6th defendants 30 days to give vacant possession of the properties herein. I am alive to the fact that there are developments on one or some of the properties. The 1st – 6th defendants are ordered to remove their developments within the next 30 days at their own cost. If they do not do so within this period, then it will be upon the plaintiff, or the public entity that will take over the property, to either keep or remove the developments. If they opt to remove the developments, the costs thereof will be passed over to the 1st – 6th defendants jointly and/or severally.

59. Judgment accordingly.

DATED AND DELIVERED THIS 12 DAY OF NOVEMBER 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA