

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELCPET NO. E019 OF 2021**

**IN THE MATTER OF ARTICLES**  
**2,3,10,19,20,21,22,23,40,47,60,61,64,67 AND 253 OF THE**  
**CONSTITUTION OF KENYA**

**BETWEEN**

**KUBAI INVESTMENTS LTD.....**  
**.....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL sued on behalf of**  
**THE MINISTRY OF LANDS.....1<sup>ST</sup>**  
**RESPONDENT**

**ATTORNEY GENERAL sued on behalf of**  
**THE REGISTRAR GENERAL OF COMPANIES.....2<sup>ND</sup>**  
**RESPONDENT**

**ATTORNEY GENERAL sued on behalf of**  
**THE BETTING CONTROL & LICENSING BOARD.....3<sup>RD</sup>**  
**RESPONDENT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup>**  
**RESPONDENT**

**NATIONAL LAND COMMISSION.....5<sup>TH</sup>**  
**RESPONDENT**

**EDIFICE REAL ESTATE LIMITED.....6<sup>TH</sup>**  
**RESPONDENT**

**AZAREAL INVESTMENT LIMITED.....7<sup>TH</sup>**  
**RESPONDENT**

**GALAXY WALKER LIMITED.....8<sup>TH</sup>**  
**RESPONDENT**

**TOURIST PARADISE INVESTMENT LIMITED.....9<sup>TH</sup>**  
**RESPONDENT**

**DOLPHIN HOLDINGS LIMITED.....10<sup>TH</sup>**  
**RESPONDENT**  
**KETAN SURENDRA SOMAIA.....11<sup>TH</sup>**  
**RESPONDENT**

### **JUDGMENT**

1. The petitioner filed the petition dated 17<sup>th</sup> May, 2021 seeking the following orders:-

- a. ***Permanent injunction stopping the building and/or any dealing by the respondents and/ or any other third party on No. 209/ 18886 (Original 209/ 7437).***
- b. ***A declaration that the title held by Edifice Real Investment Limited for land known as No. 209/18886 was improperly procured and same be cancelled and reverted to the original no. 209/7437 under Tourist Paradise Investment.***
- c. ***That the register of the land known as No. 209/18886 (original 209/ 7437) be rectified so as to remove the entry in favour of Edifice Real Investment Limited and the title to revert back to the proprietorship of Kubai Investment Ltd.***
- d. ***A declaration that property known as No. 209/1886 (original 209/7437) is private and not public land neither a public utility.***
- e. ***General aggravated and damages for deprivation of property.***
- f. ***In the alternative, compensation for the land at current market value.***

***g. Interest and costs.***

***h. Any other relief the court might deem just and equitable.***

- 2.** The gist of the petition is that the late Fredrick Polwarth Kubai, (hereinafter referred to as the late Fredrick Kubai) incorporated Tourist Paradise Limited on 7<sup>th</sup> March, 1967 together with Govindra Dave allocating themselves one share each. That on 1<sup>st</sup> October, 1968, the suit property known as LR. No. 209/7437 was allocated to the late Fredrick Kubai as a reward by the government for fighting for independence and the same was allocated to the 9<sup>th</sup> respondent.
- 3.** The late Fredrick Kubai incorporated Kubai Investments Limited on 12<sup>th</sup> November, 1970 and in 1971, he transferred his 24 shares to the petitioner and remained with one share within the 9<sup>th</sup> respondent's company. The petitioner further stated that the first lease of the suit property was issued in 1968 in favour of the 9<sup>th</sup> respondent for a term of 15 years and it was later renewed for another 7 years. That before the expiry of the initial lease, the 3<sup>rd</sup> respondent entered into an agreement with the 9<sup>th</sup> respondent which was littered with fraud as it was entered into without the minutes of the company or any resolutions.

4. The petitioner stated that in 1990, the lease was extended for another period of 19 years without any condition of surrender thus overtaking the premature agreement of 1989 and at no point did the 3<sup>rd</sup> respondent own the suit property. Further, that there was no transfer of one share from the late Fredrick Kubai and the petitioner to the 10<sup>th</sup> respondent as the petitioner still holds the original share certificate and according to the records held by the 2<sup>nd</sup> respondent as communicated in the letter dated 18<sup>th</sup> November, 2014, the 10<sup>th</sup> respondent does not appear in its database as a registered company. The petitioner contended that after the illegal transfer of shares, and together with the late Fredrick Kubai, the petitioner lost control of the suit property.
5. Further, that through a series of illegal and fraudulent dealings, the grant of the suit property was charged, subdivided and surrendered to the government. The suit property was charged to NIC Bank on 14<sup>th</sup> November, 1994 by the 9<sup>th</sup> respondent including a debenture dated 15<sup>th</sup> June, 2000. The petitioner stated that the 9<sup>th</sup> respondent defaulted in repaying the amount secured and the bank exercised its statutory power of sale.
6. As a result, the suit property was transferred to the 7<sup>th</sup> respondent by the 8<sup>th</sup> respondent and on 16<sup>th</sup> October, 2012, the 7<sup>th</sup> respondent sold the same to the 6<sup>th</sup> respondent.

Further, that the family of the late Fredrick Kubai, wrote complaints to the 5<sup>th</sup> respondent where a ruling was delivered on 6<sup>th</sup> September 2016 that confirmed that the suit property is legally registered in the name of the 6<sup>th</sup> respondent. The petitioner further contended that the 3<sup>rd</sup> respondent has never held the land, and that it has never been public land or utility. Further, that by determination of ELC JR No. 25 of 2017, the court held the power of the 5<sup>th</sup> respondent to review the grant of public land lapsed on the title.

7. The petitioner pleaded particulars of fraud, illegality, negligence, deceit and misrepresentation against the respondents. The petitioner cited the constitutional provisions violated and outlined the provisions of **Articles 10 (1), 22 (2)(b) and (c), 23(1) and (3), 40 (1) and (3), 162 (2)(b), 165 (3)(b) and 258** of the **Constitution**.
8. The petition was supported by the affidavit of Stephen Kubai, the director/shareholder of the petitioner sworn on even date. The affidavit depones to the contents of the petition and there would be no need to reproduce the same.
9. The 3<sup>rd</sup> respondent filed its replying affidavit sworn on 8<sup>th</sup> September, 2022 by Cyrus K. Maina for and on behalf of the 1<sup>st</sup>

and 4<sup>th</sup> respondents. The 3<sup>rd</sup> respondent deposed that the government's ownership of the suit property under gran I.R 36538 arose out of an agreement between the 9<sup>th</sup> respondent and the government through the 3<sup>rd</sup> respondent for grant of two casino licenses; one in Museum Hill and another in Mombasa. Further, that this agreement came from a request by the 9<sup>th</sup> respondent to operate the casino business in the country after the enactment of the Betting Lotteries and Gaming Act Cap 131. It was agreed between the parties that the license was for a period of fifteen years and that the same was approved by the directors of the company who were F. Labriola, F.P.K Kubai, P.G Dave and G.B Dessy as the secretary. The 3<sup>rd</sup> respondent deposed that the terms of the agreement provided for the operations of the business including surrender after the expiry of the fifteen-year period, importation of equipment among other responsibilities.

10. The 3<sup>rd</sup> respondent further deposed that a second agreement dated 11<sup>th</sup> June 1982 was entered into varying the initial agreement for a further period until 31<sup>st</sup> October, 1990 and the government issued the 9<sup>th</sup> respondent with a grant on L.R No. 209/7437 for the period commencing on 1<sup>st</sup> May 1987, and in consideration of clause 6 (a) of the agreement, the 9<sup>th</sup> respondent agreed to surrender to the government the suit property and the

buildings including the equipment thereon. It was further deposed that at the expiry of the further agreement on 17<sup>th</sup> February, 1989, the 9<sup>th</sup> respondent and the 3<sup>rd</sup> respondent entered into another agreement dated 31<sup>st</sup> December, 2000 wherein it was agreed that the 9<sup>th</sup> respondent would surrender the suit property and everything on it to the government on 1<sup>st</sup> January, 2001 as well as its titles and interest, if any, on the land.

- 11.** The 3<sup>rd</sup> respondent deposed that the fourth and final agreement was extended on 29<sup>th</sup> June, 1993 for a term of ten years from 1<sup>st</sup> January, 2001 to 31<sup>st</sup> December 2010, and at the expiry of this contract the 9<sup>th</sup> respondent refused to surrender the suit property to the government. Further, that it learnt that the 9<sup>th</sup> respondent acted in bad faith and procured a bank loan and charged the property to the Bank for a sum of Kshs.60,000,000 which it failed to repay. Further, that they learnt that the 9<sup>th</sup> respondent had charged the property to a third party without the consent of the commissioner of land which was illegal, fraudulent and a violation of the rights of the government on land. The 3<sup>rd</sup> respondent contended that without due diligence on the rights of the government on the suit property, the bank sold the property in exercise of its statutory power of sale to the 8<sup>th</sup> respondent and granted a further term of lease for 15 years from 1<sup>st</sup>

November, 2008 being grant no. I.R 114050 which was unlawful as it sold government land.

- 12.** Further, the 3<sup>rd</sup> respondent deposed that subsequent sale of the suit property to the 7<sup>th</sup> respondent who later sold it to the 6<sup>th</sup> respondent were illegal transactions. That following a complaint by the estate of the late Fred Kubai, the 5<sup>th</sup> respondent found that the suit property was legally registered to the 6<sup>th</sup> respondent which was an erroneous decision. Further, that other parties have also laid claim of ownership of the suit property besides the government through the 3<sup>rd</sup> respondent, and the 5<sup>th</sup> respondent corrected this error vide gazette notice no. 6862 dated 17<sup>th</sup> July 2017 revoking the said title under grant no. L.R 114050. That upon revocation, the suit property was vested in the Cabinet Secretary Treasury to hold in trust for the 3<sup>rd</sup> respondent in accordance with the agreement of 1968.
- 13.** That in a judgment delivered on 26<sup>th</sup> July, 2018, the court found that it was necessary to establish whether the suit property was private or public land and the investigations were seized by the Directorate of Investigations. Further, that following the seizure, the buildings which were to be surrendered were demolished by the parties in this case.

14. In conclusion, the 3<sup>rd</sup> respondent deposed that the petitioner's allegations of any interest in the company should be directed to the 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> respondents as the matter of change of directors was an internal company matter.

15. The petition was canvassed by affidavit evidence and by way of written submissions. The petitioner filed its written submissions dated 5<sup>th</sup> May, 2025 where it raised the following issues for determination: -

1. ***Whether the transfer of shares from the petitioner to the 10<sup>th</sup> respondent was illegal.***
2. ***Whether there was a fraudulent transfer of the shares from the petitioner to the 10<sup>th</sup> respondent.***
3. ***What is the effect of the fraudulent transfer of shares from the petitioner to the 10<sup>th</sup> respondent on the proprietorship of L.R. Number 209/7437.***
4. ***Whether the petitioner is entitled to the prayers sought.***
5. ***Whether the petitioner is entitled to the costs of this application.***

16. On the first issue, the petitioner submitted that pursuant to **Section 81 (3) of the Companies Act, Cap 486 (repealed)**, and in the absence of a duly executed certified and stamped

transfer in favour of the 10<sup>th</sup> respondent, the acquisition of the shares in the 9<sup>th</sup> respondent by the 10<sup>th</sup> respondent was done illegally. While the 2<sup>nd</sup> respondent admitted this act in a letter dated 18<sup>th</sup> November, 2014, its actions were complicit, illegal and a blatant disregard of the due process.

17. On the second issue, and while relying on the case of **Arthi Highway Developers Ltd v West End Butchery Limited & 6 Others [2015] eKLR**, and **Ruben & Another v Great Fingall Consolidated (1906) A.C 439**, the petitioner submitted that the 10<sup>th</sup> respondent caused to be registered in its name shares illegally acquired from the petitioner in full knowledge with the intention to defraud it of its right to own shares in the 9<sup>th</sup> respondent. Further, that the illegal transfer of shares from itself to the 10<sup>th</sup> respondent led to the ouster of the petitioner from the control in the 9<sup>th</sup> respondent and usurpation of ownership rights of the petitioner by the 10<sup>th</sup> and 11<sup>th</sup> respondent. The petitioner further submitted that the illegal charging of the suit property by the 10<sup>th</sup> and 11<sup>th</sup> respondent while in control of the 9<sup>th</sup> respondent fell outside the agreement between the 9<sup>th</sup> respondent and the 3<sup>rd</sup> respondent. Further, that the illegal transfer of shares, charging the suit property and subsequent default on payment were calculated acts of fraud meant to deny

the petitioner its right to ownership of the shares in the 9<sup>th</sup> respondent and the suit property.

- 18.** On the third issue, the petitioner submitted that there was fraudulent transfer of its shares to the 10<sup>th</sup> respondent, and it follows that all the dealings relating to the suit property were illegitimate based on the evidence produced. The petitioner relied on the cases of **Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)**, **Sehmi & another v Tarabana Company Limited & 5 others [2025] KESC 21 (KLR)** and **Dr. Joseph Arap Ngok v Justice Moiwo ole Keiwua & 5 others, Civil Appeal No. Nai 60 of 1997.**
- 19.** On the fourth issue, the petitioner submitted that it has provided proof that it is the beneficial owner of the suit property through ownership of majority of the shares in the 9<sup>th</sup> respondent to which the land was allocated. To buttress on this issue, the petitioner relied on the cases of **Charles Muturi Macharia & 6 others v The Standard Group and 4 others (Petition No. 13 of 2022)**, and **City of Vancouver v Ward [2010] 2 SCR 28.**
- 20.** On the fifth issue and in conclusion, the petitioner submitted that the costs of the petition ought to be borne by the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> respondents.

21. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents filed their written submissions dated 25<sup>th</sup> June, 2025 where they raised the following issues for determination: -

*a. Whether this court has jurisdiction to determine the illegality or otherwise of transfer of shares from the petitioner.*

*b. Whether the petitioner is entitled to the prayers sought.*

22. On the first issue, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondent submitted that the petitioner has invited the court to make a finding that the transfer of the petitioner's share in the 9<sup>th</sup> respondent was illegally and fraudulently done as the same was done without the consent of the petitioner or the late Fredrick Kubai. They submitted that pursuant to **Article 162 (2)** of the **Constitution** of Kenya and **Section 13** of the **Environment and Land Court Act**, this court lacks jurisdiction to determine the illegality or otherwise of transfer of the petitioner's shares held by the respondent to the 10<sup>th</sup> respondent.

23. On the second issue, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that the petitioner has never been registered as the owner of the suit property and by its own admission, the suit property was first registered in the name of the 9<sup>th</sup> respondent in 1968, and

that it's interest in the land was by virtue of its shareholding in the 9<sup>th</sup> respondent which it transferred to the 10<sup>th</sup> respondent. They submitted that the issue of the alleged illegality in the said transfer cannot be determined by this court. Further, that while the suit property is registered in the name of the 6<sup>th</sup> respondent as evidenced in the judgment in ELC JR No. 25 of 2017, the suit property reverted back to the government on 31<sup>st</sup> December 2010 following the expiry of the agreement executed on 29<sup>th</sup> June, 1993 between the government and the 9<sup>th</sup> respondent. They submitted that the suit property is public land.

24. The 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents further submitted that the root of the title held by the 6<sup>th</sup> respondent can be traced back to the 9<sup>th</sup> respondent who had no proper title over the suit property to transfer the same to the 8<sup>th</sup> respondent. They agreed with the petitioner that the court should declare that the title held by the 6<sup>th</sup> respondent was improperly procured and ought to be cancelled. Reliance was placed in the case of **Dina Management Limited v County Government of Mombasa & 5 others [2021] KECA 503 (KLR)**.

25. In conclusion, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents submitted that the petitioner is not entitled to the prayers sought as it has been demonstrated that it was not the registered owner of the suit

property. They submitted that the petition should be dismissed with costs.

**26.** The 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> respondents did not file their response to the petition. Be that as it may, I have considered the petition, the replying affidavit and the written submissions filed by the respective parties. In my view, the issues for determination are as follows: -

*1. Whether this court has jurisdiction to determine the legality or otherwise of transfer of shares from the petitioner.*

*2. Whether the petitioner is entitled to the prayers sought.*

*3. Costs.*

**27.** The petitioner herein contended that the suit property was allocated to the late Fredrick Kubai as a reward for his fight for independence by the government. This fact was not corroborated by evidence as the first registration of the suit property was in the name of the 9<sup>th</sup> respondent wherein the late Fredrick Kubai was a shareholder. The business dealings of the suit property in Museum Hill and Mombasa to run a casino has not been refuted, and it is evident that the the license to transact the business was extended between the parties through the various agreements

over a long period. As I have noted, the petitioner does not state with precision, how the relevant articles of the **Constitution** referred to under paragraph 3 of the body of the petition were violated. Instead, a general reading of the petition would point towards an ordinary civil claim.

28. The jurisdiction of this court has also been called to scrutiny. Indeed, it is trite law that jurisdiction is everything. In the case of **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited [1989] KLR 1**, it was held: -

*“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”*

29. When the jurisdiction of a court is challenged, the court is first called to determine this issue before anything else. In my view, it was incumbent upon the petitioner to respond to the issue of jurisdiction since it is the party that moved the court seeking

relief. While the response by the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents was filed in 2022, the petitioner did not find any need to respond to the same. **Section 13(2)** of the **Environment and Land Court Act** provides that:-

*“In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—(a)relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;(b)relating to compulsory acquisition of land (c)relating to land administration and management;(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e)any other dispute relating to environment and land.”*

30. In the case of **Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & Others [2012] eKLR** the Court held that:

*“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”*

**31.** While asserting that the 3<sup>rd</sup> respondent never owned the suit property, by its own admission, the petitioner contended that it was after the illegal transfer of shares that the petitioner lost control of the suit property. The petitioner argued that at no point did the petitioner and specifically the late Fredrick Kubai transfer shares to the 10<sup>th</sup> respondent. It was argued that since there was no document effecting the transfer, then all the transactions that followed thereafter were illegal and fraudulent. The petitioner now invites this court to find that indeed all the land transactions that took place was unlawful based on the absence of the transfer of shares. In doing so, the petitioner wants the court to grant a permanent injunction and a rectification of the title to indicate the 9<sup>th</sup> respondent and the petitioner as the registered owner of the suit property.

**32.** While one might argue that this is a mixed grill case, the nature of the dispute revolves around the internal dealings of the affairs of the 9<sup>th</sup> respondent. In my view, resolving this issue first would enable this court effectively deal with the issue of interest in the suit property. My attention has been drawn to the issues for determination as submitted by the petitioner which to a large extent are not issues for this court to determine. The letter dated 18<sup>th</sup> September, 2013 by the Registrar of Companies reflects the

situation at hand. The petitioner vehemently refuted claims that the late Fredrick Kubai transferred shares to the 10<sup>th</sup> respondent. The 2<sup>nd</sup> respondent advised that a transfer of shares form ought to be executed by both the transferee and the transferor and the necessary stamp duty to the collector of stamp duty. It was advised that such form should be in the custody of the company secretary and that it was not a legal requirement that the same should be filed with the Registrar of Companies. The petitioner was urged to consult the Company Secretary.

- 33.** From this letter and based on the annual return filed in 1989, the late Fredrick Kubai transferred his shares and to that extent he lost his interest on the suit property. There is nothing that has been shown that a follow up was made with the company secretary. Equally, the petitioner did not challenge the 2<sup>nd</sup> respondent's findings on the alleged fraudulent transactions. At this juncture, I am not persuaded that the petition is a land matter until the allegations of transfer of shares has been determined. The jurisdiction of this court is limited to dealing with title and tenure of land. The issues for determination as submitted by the petitioner are not within the purview of this court to determine.

34. In **Joel Kyatha Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] eKLR**, it was held as follows:-

*“We reiterate the position taken in Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna (supra), that in construing whether the ELC had jurisdiction in a matter, the consideration must be the dominant issue in the dispute and whether that issue relates to the environment and the use and occupation of, and title to, land.”*

35. While I place reliance on the above authority and looking at the predominant issues raised in the petition, it is my finding that this court lacks jurisdiction to hear and determine the same. The petition dated 17<sup>th</sup> May, 2021 is thus dismissed. Each party to bear their own costs.  
Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 13<sup>TH</sup> DAY OF OCTOBER, 2025.**

**HON. MBOGO C.G.  
JUDGE  
13/10/2025.**

**In the presence of:**

*Mr. Benson Agunga - Court assistant*

*Ms. Nyawira for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents*

*Mr. Namude and Mr. Fred Athuok for the Petitioner - absent*