



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 474 OF 2015

(FORMERLY HIGH COURT CIVIL CASE NO. 34 OF 2008)

CONSOLIDATED WITH

ELC CASE NO. 276 OF 2015

(FORMERLY HIGH COURT CIVIL CASE NO. 33 OF 2008)

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

CHARLES OYOO KANYANGI.....1ST DEFENDANT

AASHISH VALLABHDAS JETHWA.....2ND DEFENDANT

LALJI KARSAN RAMJI RABADIA.....3RD DEFENDANT

WILSON GACANJA.....4TH DEFENDANT

BANK OF BARODA KENYA LIMITED.....5TH DEFENDANT

MAYHOOD LIMITED.....6TH DEFENDANT

JUDGMENT

KISUMU ELC CASE NO. 474 OF 2015 [Formerly KISUMU HIGH COURT CIVIL CASE NO. 34 OF 2008] and KISUMU ELC CASE NO. 276 OF 2015 [Formerly KISUMU HIGH COURT CIVIL CASE NO. 33 OF 2008] were consolidated for purposes of this trial. This judgment is therefore in respect to the consolidated suit.

Prior to the consolidation, the Kenya Anti-Corruption Commission (Plaintiff herein) had on 21st April 2008 filed **KISUMU HIGH COURT CIVIL CASE NO. 33 OF 2008** against the following parties:-

- 1. MAYHOOD LIMITED 1ST DEFENDANT**
- 2. LALJI KARSAN RAMJI RABADIA 2ND DEFENDANT**
- 3. CHARLES OYOO KANYANGI 3RD DEFENDANT**
- 4. WILSON GACANJA 4TH DEFENDANT**
- 5. BANK OF BARODA KENYA LIMITED 5TH DEFENDANT**

seeking judgment against them jointly and severally as follows as per Paragraph 14 (a) (b) (c) (d) and (e) of their Plaint:

a) A declaration that the allocation and excision of part of KISUMU MUNICIPALITY BLOCK 8/22 so as to create KISUMU

MUNICIPALITY BLOCK 8/458 in favour of the 1st Defendant and the subsequent sale of the said parcel of land by the 1st Defendant to the 2nd Defendant was fraudulent, illegal, null and void and thus conferred no interest or right upon the 1st, 2nd and 5th Defendants.

b) An order for rectification of the register by cancellation of the Certificate of Lease and all entries on the land register for KISUMU MUNICIPALITY BLOCK 8/458.

c) An order of preservation and a permanent injunction restraining the 2nd and 5th Defendants by themselves, their servants or agents or otherwise howsoever from dealing with the properties known as KISUMU MUNICIPALITY BLOCK 8/458 (being part of KISUMU MUNICIPALITY BLOCK 8/22) otherwise than by surrender or transfer to the Judiciary/Government of Kenya.

d) Costs and interest of this suit.

e) Any other remedy that this Honourable Court may deem fit and just to grant.

The basis of the Plaintiff's claim against the above Defendants was that at all material times, that parcel of land delineated on **Survey Plan No: 29664-5** and **F/R NO: 32/319 of 1930** and described as **Section XIV** – Kisumu Township measuring 1.884 acres (commonly known as Kisumu Law Courts) had been reserved for the Judiciary by the Commissioner of Lands since May 1951. In 1975 the land parcel was designated as **KISUMU MUNICIPALITY BLOCK 8/22** and the Government of Kenya was registered as the proprietor and the Judiciary has been in occupation thereof part of which is constructed a court house and another open space was left for future expansion. In 1994 following a “no objection” letter written on behalf of the Judiciary, the Commissioner of Lands allocated to the 1st Defendant part of the land which was excised to create **KISUMU BLOCK 8/458** and the 4th Defendant executed a lease thereof in favour of the 1st Defendant for a 99 year term. The 1st Defendant then sold its interest therein to the 2nd Defendant yet it was common knowledge that the land was public land occupied by a functional court. The 2nd Defendant then mortgaged the said parcel to the 5th Defendant which has now threatened to exercise its statutory power of sale. It is the Plaintiff's case therefore that the purported allocation, excision, survey and sub-division of Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** to create **KISUMU MUNICIPALITY BLOCK 8/458** was a sham done with the purpose of alienating public land and the subsequent transactions were invalid, null, void and fraudulent particulars of which are pleaded in Paragraphs 17(a) to (s) of the Plaintiff.

Further and in the alternative, the 3rd and 4th Defendants acted in breach of their Fiduciary duties, trust, and also abused their offices particulars of which were pleaded in Paragraph 19 (I) to (VIII) and Paragraph 20 (I) to (VI) of the Plaintiff. That gave rise to that suit.

The record in **KISUMU HIGH COURT CIVIL CASE NO. 33 OF 2008** shows that only the 2nd, 3rd, 4th and 5th Defendants filed their respective defences to that claim. There was no record of any defence filed by the 1st Defendant.

In its defence, the 2nd Defendant pleaded, inter alia, that the suit is res judicata and statute barred and that the Plaintiff is a busy body lacking the locus standi to so challenge its title to Parcel No. **KISUMU MUNICIPALITY BLOCK 7/458 (SIC)** which it had purchased from the 1st Defendant vide an agreement dated 1st December 1995 at a consideration of Kshs 1,500,000 and is the registered proprietor as leasee from the Government of Kenya for a term of 99 years from 1st February 1994. That the validity or otherwise of its title is the subject of another case being **HCCC NO. 2126 OF 2007** and before purchasing the property, it has confirmed that the title was clean and yet in July 2007, the Honourable Chief Justice purported to enter and take possession of the land and has since fenced it off thus depriving the 2nd Defendant of its property without following the procedure set out in the **Land Acquisition Act**. The 2nd Defendant averred that it is an innocent purchaser and denied in toto the allegation that it was aware the land had been illegally alienated from **KISUMU MUNICIPALITY BLOCK 8/22** and therefore sought the dismissal of the Plaintiff's suit with costs.

The 3rd Defendant, while admitting that at all times material to the suit he was the Principal Magistrate in charge of Kisumu Law Courts, denied all the allegations levelled against him including the particulars of alleged breach of Fiduciary duties which he dismissed as a figment of the Plaintiff's imaginations and sought that the suit be dismissed with costs.

The 4th Defendant denied having been aware that the Land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** had been reserved for the Judiciary adding that his acts were within his powers as Commissioner of Lands and hence lawful and valid. He added that he is a stranger to the averments that 1st Defendant sold Parcel No. **5/458 (SIC)** to the 2nd Defendant or that the Judiciary has raised a claim upon the same. He also denied all the particulars of fraud, breach of duty or abuse of office pleaded in Paragraphs 17 and 18 of the Plaintiff adding that all his actions were intravires his powers as the then Commissioner of Lands and that by the time of the alleged investigations by the Plaintiff in 2007-2008, he had already retired from the Civil Service. Therefore, having ceased to be the Commissioner of Lands, this suit is selective, unconstitutional, malicious, vexatious and scandalous and should be dismissed with costs.

The 5th Defendant pleaded in its defence that it is a stranger to the fact that at all times material to this suit, all that land parcel delineated on **Survey Plan No. 29664-5** and **F/R NO. 32/319 of 1930** and described as **Section XIV KISUMU TOWNSHIP** had been reserved for the Judiciary by the Commissioner of Lands since 1951 and put the Plaintiff to strict proof thereof. It also denied knowledge of the fact that the said land was renumbered **KISUMU MUNICIPALITY BLOCK 8/22** or that a court house is constructed thereon and has been occupied by the Judiciary for almost 60 years. It also pleaded that it is a stranger to the fact that in 1994, the 1st Defendant solicited for allocation of part of **KISUMU MUNICIPALITY BLOCK 8/22** from the Commissioner of Lands and received an allotment letter or that the 3rd Defendant gave a no objection letter on behalf of the Judiciary to the replanning of **KISUMU MUNICIPALITY BLOCK 8/22** following which a portion thereof was excised and Parcel No. **KISUMU BLOCK 8/458** was created and a lease for 99 years issued to the 1st Defendant who sold it to the 2nd Defendant despite the knowledge that it was occupied by a functioning court. It however admitted that **KISUMU MUNICIPALITY BLOCK 8/458** had been mortgaged to it by the 2nd Defendant and the outstanding loan was Kshs 21,317,800.72 which is

unpaid and continues to attract interest and no notice was issued to it by the Judiciary and neither were any restrictions placed on the land otherwise it would not have accepted it as security. It therefore denied any knowledge of the fact that the allocation, excision survey and sub-division of the land comprised in **KISUMU MUNICIPALITY BLOCK 8/22** so as to create **KISUMU MUNICIPALITY BLOCK 8/458** was a sham done with the object of improperly alienating public land reserved for the Judiciary.

The 5th Defendant similarly denied all the allegations of fraud pleaded against it with respect to the land parcels No. **KISUMU MUNICIPALITY BLOCK 8/22** and **KISUMU MUNICIPALITY BLOCK 8/458** or that the 4th Defendant was acting in excess of his statutory duties by allocating land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** to the 1st Defendant and subsequently to the 2nd Defendant. Instead, the 5th Defendant pleaded that the 4th Defendant was acting in his capacity as an employee of the Ministry of Lands and therefore all acts done by him in relation to the land were valid. Further and without prejudice, the 5th Defendant pleaded that the 3rd Defendant was acting in the course of his employment as a Judicial Officer. That the Judiciary having notice of the 2nd Defendant's interest in Parcel No. **KISUMU MUNICIPALITY BLOCK 8/458** was negligent in not placing any restrictions on the title from 1995 up to the time the same was charged in favour of the 5th Defendant in 2003. The 5th Defendant pleaded that before registering a charge on **KISUMU MUNICIPALITY BLOCK 8/458**, it carried out an official search which confirmed that the 2nd Defendant had been issued with a lease by the Government with no restrictions and the said parcel was vacant. And when the 5th Defendant noticed that construction was being carried out on the Parcel No. **KISUMU MUNICIPALITY BLOCK 8/458**, it immediately notified the Judiciary of its interest therein and requested proof of the Judiciary's interest in the said land but none was availed. That the Judiciary had no title issued in its favour in respect to the said land and so its claim over the same has no basis in law. And it was only when the 5th Defendant state exercising its rights under the charge by issuing a notice of sale that the Judiciary and the Plaintiff started investigating the issue. The 5th Defendant therefore prayed that the Plaintiff's suit against it be dismissed with costs.

The Plaintiff filed replies to the defences joining issues with the same and reiterating the allegations in the Plaintiff.

Simultaneously with **KISUMU HIGH COURT CIVIL CASE NO. 33 OF 2008**, the Plaintiff also filed **KISUMU HIGH COURT CIVIL CASE NO. 34 OF 2008** this time against the following Defendants;

1. CHARLES OYOO KANYANGI 1ST DEFENDANT
2. AASHISH VALLABHDAS JETHWA 2ND DEFENDANT
3. LALJI KARSAN RAMJI RABADIA 3RD DEFENDANT
4. WILSON GACANJA 4TH DEFENDANT
5. BANK OF BARODA KENYA LIMITED 5TH DEFENDANT

The remedies being sought against the Defendants and the basis of the same were similar to the averments in **KISUMU HIGH COURT CIVIL CASE NO. 33 OF 2008**. From the record, it is clear that the 2nd Defendant did not enter any appearance or file a defence to the claim. The other Defendants basically repeated their respective defences as filed in **KISUMU HIGH COURT CIVIL CASE NO. 33 OF 2008**.

The orders consolidating the suits were made by KIBUNJA J. on 20th March 2018 and when the consolidated suit was placed before me for hearing on 1st November 2018 during the service week in Kisumu, the Plaintiff was represented by MR. MUREI and MR. BIL. The 1st Defendant was in person while the 3rd Defendant was represented by MR. OMA YA. The court allowed the hearing to proceed after Counsel for the Plaintiff confirmed that the hearing date had been taken by consent and the 1st and 2nd Defendants had been served while the 2nd Defendant had never entered appearances.

Before the hearing commenced, MR. OMA YA, Counsel for the 3rd Defendant informed the court that his client was conceding the claim. The following consent order was therefore recorded in respect to the 3rd Defendant who was present :

“In the circumstances, the 3rd Defendant having conceded to the claim against him, orders are made with respect to him in terms of prayers (a) (b) and (c) of the Plaintiff as Counsel have agreed on costs. It is noted that the 3rd Defendant in this case is the 2nd Defendant in ELC CASE NO. 276 OF 2017 and so the orders apply in that case too.”

The Plaintiff called three witnesses in support of their case. These were **HASSAN ZACHARIA MOSOSI** a land surveyor in the Ministry of Lands (**PW1**), **DEDAN OKWAMA** an Investigator with the Ethics and Anti-Corruption Commission (**PW2**) and **JOSEPH MALOBA WERE** a Principal Magistrate in the Office of the Chief Registrar Judiciary. They all adopted as their evidence their statements filed herein while **CHARLES OYOO KANYANGI (DW1)** was the only witness for the defence.

HASSAN ZACHARIA MOSOSI (PW1) told the court that the land in dispute and which was previously delineated on **F/R NO. 32/319 of 1930** and described as **Section XIV – 2 KISUMU Township** and measuring 1.884 Acres had been reserved for the Judiciary by the Commissioner of Land since 1951. It later became Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22**. In 1994 Parcel No. **KISUMU MUNICIPALITY BLOCK 8/458** was carved out of the said parcel, and **KISUMU MUNICIPALITY BLOCK 8/307** was created. All this was done without surrendering the initial document of title. All this was done by private surveyors.

DEDAN OKWAMA (PW2) also testified that Land Parcel No. **KISUMU MUNICIPALITY 8/22** had been reserved for the Judiciary which had never relinquished its rights thereto. However, his investigations revealed that the said land had been encroached upon and two parcels being Land Parcels No. **KISUMU MUNICIPALITY BLOCK 8/307** and **8/458** were created and allocated to the 1st and 6th Defendants respectively and the Judiciary protested the said allocations. He added that the allocations were fraudulent since the land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** was reserved for the Judiciary. He produced as part of the Plaintiff's documentary evidence the list of exhibits filed herein.

JOSEPH MALOBA WERE (PW3) similarly adopted as his evidence his statement dated 13th September 2017 in which he has stated that the land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** belongs to the Judiciary and houses both the Court of Appeal and the High Court. He added that Parcel No. **KISUMU MUNICIPALITY BLOCK 8/307** was excised out of the said parcel and was allocated to the 1st Defendant who was then the Magistrate in charge of the Kisumu Law Courts. He then transferred it to the 2nd Defendant. He too added that the alienation of the land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/27** was done fraudulently and without consulting the Judiciary and that notwithstanding that knowledge, the 3rd Defendant charged land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/307** to the 5th Defendant.

The 1st Defendant **CHARLES OYOO KANYANGI (DW1)** told the court that he is currently an Advocate of the High Court of Kenya but previously worked as a Magistrate for 24 ½ years and during the period 1994-1995 he was the Magistrate in-charge Kisumu Law Courts. He too relied on his statement filed herein on 28th November 2016 in which he states that on a date he could not recall, two persons from the Provincial Planning Office in Kisumu approached him to write a no objection letter to enable the allocation committee allocate some two plots near the court house. So he and his Executive Officer viewed the plots which were separated by iron sheets and he was informed that while one plot was reserved for the court's future expansion, the other plot was vacant and so he wrote a no objection letter in respect to the vacant plot.

However, after his transfer from Kisumu, he was informed by the **KWACH COMMITTEE** that he had been involved in grabbing of a plot belonging to the court. It was then that he realized that he had been tricked into writing the no objection letter which he would not have done had he known the correct position. He added that he wrote the letter in good faith with no intention of committing any fraud.

Submissions were thereafter filed both by MR. KOSKEY ROBERT KIMUTAI BII Counsel for the Plaintiff and the 1st Defendant.

I have considered the evidence both oral and documentary by the Plaintiff and the 1st Defendant as well as their respective submissions.

At this point I need to clarify that following the consolidation of the two suits, the lead file became **KISUMU ELC CASE FILE NO. 474 OF 2015** and the parties were:

1. **CHARLES OYOO KANYANGI 1ST DEFENDANT**
2. **AASHISH VALLABHDAS JETHWA 2ND DEFENDANT**
3. **LALJI KARSAN RAMJI RABADIA 3RD DEFENDANT**
4. **WILSON GACANJA 4TH DEFENDANT**
5. **BANK OF BARODA KENYA LIMITED 5TH DEFENDANT**
6. **MAYHOOD LIMITED 6TH DEFENDANT**

Before I consider the evidence both by the Plaintiff and the 1st Defendant who are the only parties that testified, I need to determine the merits or otherwise of important issues raised by the 3rd Defendant in his defence notwithstanding that he conceded the claim against him before the trial commenced. This is because those issues go to the jurisdiction of this court and can be raised even suo motto.

In Paragraph 3(II) of his defence the 3rd Defendant has pleaded that the Plaintiff has no locus standi to file this suit and that the proper authority with powers to seek the revocation of title is the Commissioner of Land. Further, in Paragraphs 22 and 23 of his defence, the 3rd Defendant pleads that the Plaintiff's suit is statute barred and res judicata respectively.

On the issue of locus standi, the Plaintiff is a body corporate established under **Section 3** of the **ETHICS AND ANTI-CORRUPTION COMMISSION ACT 2011** whose mandate under **SECTION 11(1)(j)** is to institute and conduct proceedings in court for the purpose of recovery and protection of public property. The Plaintiff's claim is that land Parcel No. **KISUMU MUNICIPALITY 8/22** is public land which was alienated by the Defendants fraudulently. It cannot be a serious assertion therefore that the Plaintiff has no locus standi to file this suit.

On the pleading that the suit is statute barred, the Plaintiff has alleged in Paragraph 17 of the Plaintiff that the allocation excision, survey and sub-division of the land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** so as to create Parcel No. **KISUMU**

MUNICIPALITY BLOCK 8/307 was a sham done with the object of improperly alienating public property reserved for the Judiciary and therefore the sale of the said land by the 1st Defendant to the 2nd Defendant and then the 3rd Defendant was invalid, null and void. The Plaintiff has itemized the particulars of fraud and illegality and the pleaded in Paragraph 23 as follows:

“The fraud and illegality in the process of alienation of the parcel of land referred to herein were not discovered until an investigation undertaken by the Plaintiff in 2007/8. This claim indicates public interest in the suit property.”

There was no evidence by the Defendants to deny the above yet the onus was on them to prove that this suit which was in fact filed in 2008 was caught up by the statute of Limitation. That claim is therefore rejected.

Finally, the 3rd Defendant pleaded that this suit is res judicate which is provided for Under **Section 7** of the **Civil Procedure Act** as follows:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.” Emphasis added.

If therefore evidence was placed before this court that the subject matter herein has been the subject in a previous suit heard and finally decided, then that would be a complete bar to this suit and indeed ought to have been raised as a Preliminary Objection to be determined at the earliest opportunity. That was not done. All that the 3rd Defendant did was to make reference to **NAIROBI HIGH COURT CIVIL CASE NO. 2126 OF 2007** but no evidence was led to demonstrate that the **NAIROBI CASE** involved the parties herein litigating over the same land and most importantly, that the said case was *“heard and finally decided”*. The onus is on the party pleading res judicate to lead evidence to prove that fact. **Section 109** of the **Evidence Act** states that:

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its evidence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

In the absence of such proof either by the 3rd Defendant or any of the other Defendants, the plea of res judicata must be dismissed.

Having settled the issues of locus standi, limitation and res judicata, I shall now examine the merits or otherwise of the Plaintiff’s claim.

Although the 1st Defendant did not, unlike the 3rd Defendant, concede to the Plaintiff’s claim in clear terms, it is obvious to me that he really did not dispute the Plaintiff’s case against him. That case was hinged principally on the fact that as the Magistrate in-charge of the Kisumu Law Courts, he had solicited for an allocation of part of the land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** from the Commissioner of Land and written a no objection letter that led to the excision of part of that land which had been set aside for the court’s expansion. In the penultimate paragraph of his statement which he adopted as his evidence during the trial, this is what he states:

“At this point, I realized that I had been tricked into aiding the improper allocation of court land. Somebody had apparently made up a fake part development plan to convince me into believing that that land was vacant and available for alienation. I have seen the genesis of the land and I am very clear in my mind that had all that been known to me, I would never have written that no objection letter.”

Even though the 1st Defendant is pleading lack of knowledge, it is also a fact that he had no proprietary interest in the land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/307** which he sold to the 2nd Defendant.

But that is not all. In his evidence **HASSAN MOSOSI (PW1)** gave un-controverted evidence to the effect that the land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** which was initially delineated on **F/R NO. 32/319 of 1930** and described as **Section XIV-2 Kisumu** had since 1951 been reserved by the Commissioner of Land for the Judiciary. It was therefore not available for alienation to the 1st Defendant or any other party. This was also confirmed by the Plaintiff’s Investigator **DEDAN OKWAMA (PW2)** who in his statement dated 2nd October 2018 and which he adopted as his evidence, he stated as follows at Page 4:

“From the resultant investigation, it is evident that there was impropriety in the alleged alienation of block 8/22 and the creation of KISUMU MUNICIPALITY BLOCK 8/307 and the transactions which purported to create was an illegality as the KISUMU MUNICIPALITY BLOCK 8/22 was alienated way back in 1930 when the first survey was done and the reservation for the Judiciary was made way back in May 1951 hence the land was not available for alienation and the title for KISUMU MUNICIPALITY BLOCK 8/22 was already registered in favour of the Government in trust of the Judiciary. In any evident (sic) there was no surrender of title to KISUMU BLOCK 8/22 before the land was sub-divided and allocated to private persons and the purpose for reservation of KISUMU BLOCK 8/22 for the Judiciary has never ceased. It’s therefore evident that the decision by Mr. Wilson Gachanja the 4th Defendant and other officers at the Lands Office to issue titles for KISUMU MUNICIPALITY BLOCK 8/307 was not proper as the Green Card shows no record of excision or sub-division as the acreage would have changed.”

The 1st Defendant cannot really hide behind the claim that he was *“tricked into aiding the improper allocation of court land.”* As a serving Judicial Officer in-charge of the Kisumu Law Courts, the moment he was approached by the officers from the Provincial Planning Offices to write a no objection letter, the most prudent thing should have been to refer the officers to the Registrar of the Judiciary who was then the custodian of Judiciary property. After all, he was approached not as the owner of the land but rather as the agent of the Registrar who entrusted him with the responsibility of protecting property belonging to the Judiciary in Kisumu where he was in-charge. By failing to do so, he clearly abused his office and the trust that the Judiciary had bestowed upon him. The same applies to the 4th Defendant and it follows, therefore, the titles obtained by the 2nd, 3rd and 5th Defendants are all null and void because the 1st Defendant had no legal interest in the land Parcel No. **KISUMU MUNICIPALITY BLOCK 8/22** or any part thereof which he could purport to transfer to the other Defendants. Sections 27 and 28 of the repealed Registered Land Act which was the applicable law at the time of the transactions complained of could not

protect a title obtained in contravention of the law. In **CHEMNEY INVESTMENT LIMITED V. ATTORNEY GENERAL & OTHERS C.A CIVIL APPEAL NO. 349 OF 2012**, the Court of Appeal, citing other cases, affirmed the position that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense. I have no doubt therefore that on the evidence before me, the Plaintiff has proved its case against the Defendants herein.

Then there is the consent recorded on 1st December 2018 between the Plaintiff and the 3rd Defendant conceding the claim against him. Counsel for the Plaintiff has submitted, and I agree with those submissions, that the effect of that consent was to extinguish any claims that the 3rd Defendant may have had on land Parcels No. **KISUMU MUNICIPALITY BLOCK 8/22, KISUMU MUNICIPALITY BLOCK 8/307 or KISUMU MUNICIPALITY BLOCK 8/458**. The 3rd Defendant therefore had no valid title to charge to the 5th Defendant. A person who has no registrable legal interest in property cannot purport to offer it as security to obtain any other advantage from another party such as selling it or charging it.

On the issue of costs, the Plaintiff's Counsel has made the following submission in urging this court to condemn the 1st Defendant to meet the costs of the suit:

“It is our submission that the 1st Defendant was not candid with the court and took the court in circles. His conduct throughout the hearing of the suit did not show any remorse or contrition.

He took the court through his exhibit 1 and suggested that the Plaintiff was biased in Suing for the recovery of the suit property. The fact that others were involved in the fraudulent and illegal alienation of Government land does not make his actions any better. He is an un-repentant grabber who does not see the follies of his ways. Though he has stated that he is not opposed to the suit properties reverting to the Public, he unnecessarily took the court's time caused the Plaintiff to incur hearing expenditure in investigations as well as filing the recovery suits. He should therefore suffer the full consequences of the law including being condemned to pay costs of the suit. He could have saved Judicial time by admitting the Plaintiff's claim right from the outset.”

On his part, the 1st Defendant made the following submission with regard to costs in Paragraph 16:

“Having highlighted the issued above, the 1st Defendant conceded that the prayers by the Plaintiff may be granted to it but with no order as to costs.”

It is clear from **Section 27(1) of the Civil Procedure Act** that Costs of any suits ***“shall be in the discretion of the Court or Judge”***. It is further provided that ***“costs of any action shall follow the event unless the Court or Judge shall for good reasons otherwise order”***.

The Plaintiff's contention on the issue of costs is that the 1st Defendant should bear the costs of this suit because he ***“did not show any remorse or contrition”, he is “an un-repentant grabber” and also “he unnecessarily took the court's time and caused the Plaintiff to incur hearing expenditure”***.

It is clear to me however that the 1st Defendant regrets the action that he took in the matter. He said so in his evidence during cross-examination when he stated that he ***“regretted”***. That was a demonstration of remorse on his part and I think it would be harsh to describe him as ***“un-repentant”***. I observed him in court during the trial and I have no doubt that he regrets his role in the events that led to this suit. The Plaintiff has also taken issue with the fact that the 1st Defendant could have saved time by admitting the Plaintiff's case right from the start. That is true. However, this court also notes that no order for costs was sought against the 3rd Defendant in the consent recorded just before the trial commenced on 1st November 2018. The only difference between the 3rd and 1st Defendants is that in the case of the former, the consent was recorded just before the trial while in the case of the latter, the admission was made after the trial. Both events occurred on 1st November 2018 and so really, in terms of consuming Judicial time, there is no much difference between the routes taken by the 1st and 3rd Defendants and in my view, it would be discriminatory to treat the two Defendants differently in terms of costs if only the 1st Defendant is made to ***“suffer the full consequences of the law”*** with regard to costs. Justice is about fairness and I think the interests of justice will best be met if both the 1st and 3rd Defendants are treated in a similar manner with regard to costs.

Ultimately therefore there shall be judgment for the Plaintiff as against all the Defendants jointly and severally as per the Plaintiff in the consolidated suits. Costs shall be met by the 2nd, 4th, 5th and 6th Defendants only.

B. N. Olao

Judge

21st March 2019

Judgment dated, delivered and signed in open Court at Kisumu this 21st day of March 2019

Mr. Bii for Plaintiff present

All Defendants absent

Right of Appeal

B. N. Olao

Judge

21st March 2019