Kenya Anti-Corruption Commission v Gigiri Court Limited & 3 others (Environment and Land Case 1571 of 2007) [2025] KEELC 7315 (KLR) (23 October 2025) (Judgment)

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REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE 1571 OF 2007

MD MWANGI, J

OCTOBER 23, 2025

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF

AND

GIGIRI COURT LIMITED ..... 1ST DEFENDANT

JOHN JOSEPH KAMOTHO ..... 2ND DEFENDANT

WILSON GANCHANJA ..... 3RD DEFENDANT

JAMES RAYMOND NJENGA ..... 4TH DEFENDANT

JUDGMENT

Introduction

1. This matter was commenced by way of a plaint dated 10th September 2007 and filed by the Plaintiff, the Kenya Anti-Corruption Commission (KACC) the predecessor in title to the Ethics and Anti-Corruption Commission (EACC). The Plaintiff brought this suit pursuant to its statutory mandate to protect public property.

2. The suit is against four Defendants: the 1st Defendant, Gigiri Court Limited, a limited liability company duly incorporated in Kenya; the 2nd Defendant, John Joseph Kamotho, an adult male and at all material times a Member of Parliament and Cabinet Minister; and the 3rd and 4th Defendants, namely Wilson Gacanja and James Raymond Njenga, who at all material times served as Commissioners of Lands under the provisions of the Government Lands Act (Cap. 280) (now repealed).

3. The Plaintiff's claim, in summary, arises from the alleged unlawful and fraudulent alienation of public land, namely parcels known as Nairobi Block 91/130, Nairobi Block 91/333, and Nairobi Block 91/386, portions of which had been reserved for the Kenya Technical Teachers College (KTTC) and

parts of which comprised Karura Forest, a gazetted central forest under the then applicable Forests Act (Cap. 385). It is contended that the allocations to the Defendants were irregular, illegal, null and void ab initio, having been effected in blatant disregard of the statutory framework governing government land and forest reserves.

4. In particular, the Plaintiff avers that the 2nd Defendant dishonestly applied for and accepted allocations of land reserved for public use, and that the 3rd and 4th Defendants, acting as Commissioners of Lands, exceeded their statutory authority by purporting to allocate forest land and land reserved for KTTC to private individuals. The 1st Defendant, Gigiri Court Limited, is alleged to have subsequently acquired interests in the said parcels, including the creation and registration of Nairobi Block 91/386, which is said to have been consolidated from illegally allocated parcels and further extended through unlawful excision of an additional 3.8 hectares of Karura Forest.

5. The Plaintiff therefore seeks, inter alia, declarations that the said allocations and subsequent titles were fraudulent, irregular and illegal, an order of cancellation of the Certificates of Lease issued in respect thereof, rectification of the land register, general damages for fraud and breach of fiduciary duty, and a permanent injunction restraining the 1st Defendant from dealing with Nairobi Block 91/386 otherwise than by way of surrender to the Government of Kenya.

6. Upon service of summons to enter appearance, the 3rd Defendant duly entered appearance and filed his Statement of Defence dated 21st November 2007. He acknowledged that the Plaintiff was a body corporate established under the *Anti-Corruption and Economic Crimes Act* No. 3 of 2003, but challenged its competence and capacity to institute the present proceedings, putting it to strict proof thereof.

7. The 3rd Defendant denied that the suit properties, including Nairobi Block 91/130, were ever reserved for the Kenya Technical Teachers College or that Karura Forest was, at all material times, a gazetted forest. He averred that the land in question was not unalienated government land and was therefore available for allocation. He further denied that the allocations were irregular, unlawful or fraudulent, asserting instead that the same were regular, intra vires, lawful, valid, and in conformity with established procedures under the Government Lands Act.

8. He contended that in effecting the allocations, he acted strictly within his statutory powers as Commissioner of Lands, and that all requisite steps and approvals were duly vetted and confirmed by other officers within the Ministry. He added that the Minister responsible for lands had sanctioned the allocations, rendering them lawful and valid in all respects.

9. The 3rd Defendant further denied having acted in excess of his powers or in abuse of office, maintaining that the allegations of irregularity, illegality and fraud were unfounded. He asserted that the Plaintiff's suit against him was bad in law for want of capacity, unconstitutional, selective, malicious, frivolous, scandalous and vexatious, and disclosed no cause of action against him personally. He indicated his intention to raise a preliminary objection in limine to have the suit struck out on those grounds.

10. The 3rd Defendant also contended that the suit, having been instituted eight years after he ceased to hold office as Commissioner of Lands, was misconceived, malicious, actuated by ill-will, and in violation of his constitutional right to a fair trial under section 77 of the (former) Constitution. Save for what he expressly admitted, the 3rd Defendant denied each and every allegation contained in the plaint and prayed that the Plaintiff's suit against him be dismissed with costs.

11. The Plaintiff thereafter filed a Reply to the 3rd Defendant's Statement of Defence dated 5th December 2007. In the said Reply, the Plaintiff denied all the positive factual averments contained in the 3rd

Defendant's Defence, save for the admission of his address of service, and reaffirmed the contents of the Plaint in their entirety.

12. The Plaintiff specifically denied the 3rd Defendant's assertions that the allocation of the suit properties was regular, intra vires, valid, or lawful, maintaining that the same was illegal, fraudulent, and undertaken in excess of statutory authority. The Plaintiff further denied that the 3rd Defendant had acted within his lawful powers as Commissioner of Lands, or that the allocations had been sanctioned by the Minister as alleged.

13. In response to the 3rd Defendant's contention that the suit was bad in law, unconstitutional, malicious, frivolous, or vexatious, the Plaintiff rejected those allegations and put the 3rd Defendant to strict proof thereof. The Plaintiff equally denied that the proceedings were misconceived or in violation of the 3rd Defendant's constitutional rights, asserting that the claim was properly grounded in law and fact.

14. The 4th Defendant entered appearance and filed his Statement of Defence dated 21st July 2008. In the said Defence, he admitted the descriptive particulars relating to his identity and position as a former Commissioner of Lands. He averred that he had retired from the civil service in September 1989.

15. Save for what was expressly admitted, the 4th Defendant denied each and every allegation contained in the Plaint as if the same were set out and traversed seriatim. He specifically denied the Plaintiff's averments regarding the alleged unlawful alienation of public land and the involvement attributed to him in the process. He asserted that the Plaintiff's suit against him was incompetent, misconceived, and did not disclose any reasonable cause of action. He contended that the suit was malicious, frivolous, and filed in abuse of the process of the court, its main object being to harass and embarrass him.

16. The 4th Defendant denied that the parcels known as Nairobi Block 91/130, Nairobi Block 91/333, and Nairobi Block 91/386 were ever reserved for public use or for the Kenya Technical Teachers College (KTTC). He further denied that Karura Forest was, at all material times, a gazetted forest, and rejected the Plaintiff's assertion that the 2nd Defendant had been offered or allocated any portion thereof. He maintained that he had no personal knowledge of any such allocation, nor did he participate in or authorize the same.

17. In the alternative and without prejudice to his denials, the 4th Defendant averred that if any such allocation were made (which he denied), it was done in the normal course of public service, under the directions and authority of superior officers within the Ministry, and not for personal benefit. He stated that his role, if any, was limited to executing lawful instructions in performance of public duty.

18. The 4th Defendant categorically denied all particulars of irregularity, illegality, fraud, and abuse of office attributed to him, contending that he had acted, at all times, within the confines of the law and his official duties. He further asserted that he no longer had in his possession or control any documentation or official correspondence relating to the matters in dispute, as such records were retained within the Ministry of Lands. He added that, having retired in 1989, he was a stranger to many of the acts alleged in the Plaint, which were said to have occurred subsequent to his departure from office.

19. The 4th Defendant also denied that the Plaintiff had suffered any loss or damage as alleged and maintained that the reliefs sought, including those of cancellation, injunction, and damages, were incapable of enforcement against him, as equity would not act in vain. The 4th Defendant further indicated that, should the Court find that any alienation or allocation had been effected, such acts were undertaken under ministerial direction, and he therefore reserved the right to apply for leave to issue third-party proceedings against the Honourable the Attorney-General. In conclusion, the 4th Defendant prayed that the Plaintiff's suit against him be dismissed with costs, or in the alternative, that his name be struck out from the proceedings with costs to him.

20. The 1st Defendant entered appearance and filed a Statement of Defence, which was subsequently amended pursuant to a Consent dated 24th March 2016 and filed on 10th May 2016.

21. The 1st Defendant's Amended Statement of Defence asserted its position that it lawfully acquired the suit property(s) and denied all allegations of illegality and fraud. The Defendant admitted only to the descriptive averments in paragraphs 1 to 4 of the Plaint. It asserted that it was the duly registered proprietor of the suit property known as Nairobi Block 91/386, measuring approximately 7.11 hectares, held on a leasehold basis for a term of 99 years from 1st May 1989, the same having been allocated by the Government of the Republic of Kenya for good and valuable consideration.

22. The 1st Defendant further averred that the registration was carried out pursuant to the provisions of the Registered *Land Act*, Cap 300 (repealed), which vested in it all the rights and privileges of proprietorship, including exclusive possession and occupation, and which Act continues to apply to the suit property pursuant to the provisions of Section 107 of the *Land Registration Act*, No. 3 of 2012.

23. In response to the Plaintiff's contention that the suit property was not available for alienation, the 1st Defendant pleaded that Kenya Technical Teachers College (KTTC) had no legal or equitable interest in the land known as Nairobi Block 91/130 (the First Parcel) as alleged or at all, having never been registered as proprietor nor issued with a letter of allotment in respect thereof. The Defendant maintained that at the time of allocation to the 2nd Defendant, the land was un-alienated Government land available for allocation, and that KTTC had neither taken possession nor utilized it in any way.

24. The Defendant was therefore of the view that the parcel was lawfully available for allocation and that the Plaintiff's assertions to the contrary had no basis in fact or law. It further denied all other allegations in paragraphs 6 to 8 of the Plaint and maintained that KTTC held no letter of allotment, putting the Plaintiff to strict proof thereof.

25. In answer to paragraphs 9 to 18 of the Plaint, the 1st Defendant denied that the suit property was public land and averred that it held a duly registered lease issued by the Government of Kenya through the Commissioner of Lands, thus rendering the land private property. It further asserted that it acquired the property in good faith and for valuable consideration, on the strength of representations by authorized Government officers that the land was available for alienation.

26. The 1st Defendant contended that all processes of alienation and registration were undertaken solely by duly authorized officers of the Government acting in their official capacities, and therefore their actions were binding upon the Government. It denied participation in any fraud, pleaded that it was a bona fide purchaser for value without notice, and noted that it had consistently discharged its obligations under the lease, including payment of land rent and rates.

27. The Defendant also invoked the doctrine of estoppel, arguing that since the Government had derived benefit from the alienation, registration, and payment of rent, the Plaintiff—being its agent—was precluded from asserting any claim to the contrary.

28. It further pleaded that having acquired the property for value and being the first registered proprietor under the Registered *Land Act*, its title could not be defeated except as provided under Section 28 thereof, and by virtue of Section 143, even allegations of fraud could not justify rectification. The Defendant also invoked Article 40 of *the Constitution* and Part VIII of the *Land Act*, No. 6 of 2012, asserting that the only means by which the Government could lawfully take possession of the land was through compulsory acquisition upon payment of full and just compensation.

29. The Defendant denied KTTC's claim over a 0.566-hectare portion of the suit property, reiterating that its proprietary rights were conferred by first registration. It clarified that the land was originally

allocated to J.J. Kamotho (the 2nd Defendant), not Gigiri Court Limited, and that the delineation and registration processes were carried out entirely by the authorized Government officers.

30. The 1st Defendant further averred that the Plaintiff's claim for damages was statute-barred under the *Limitation of Actions Act*, Cap 22, Laws of Kenya, the alleged acts having occurred outside the prescribed limitation period. It therefore contended that the reliefs sought under paragraphs 20 to 22 of the Plaint could not obtain. While admitting the jurisdiction of this Court, the 1st Defendant denied that any cause of action had arisen to entitle the Plaintiff to the remedies sought and prayed that the Plaintiff's suit be dismissed with costs.

Plaintiff's Evidence

31. The Plaintiff, through learned counsel Ms. Maina, called five witnesses in support of its case. The first witness, Dedan Ochieng Okwama, testified that he was an investigator with the Ethics and Anti-Corruption Commission and that he had recorded a statement dated 6th December 2012, which he wished to adopt as his evidence in chief. He stated that he was part of the team that investigated the suit property following a complaint that it had been irregularly allocated to private individuals. According to him, investigations revealed that prior to 1987 the property in dispute formed part of Karura Forest and the Kenya Technical Teachers College, with Block 91/130 being part of the college land and Block 91/333 being part of Karura Forest. He further testified that the two parcels were later amalgamated following a private survey, resulting in the creation of Land Reference Number 91/386.

32. The witness stated that the suit property was not available for allocation to private individuals as it was public land reserved for KTTC and part of Karura Forest. He referred to a letter dated 21st April 1986 addressed by the Commissioner of Lands to the Principal, KTTC, stating that Block 91/130 did not form part of the land reserved for the college. He identified the Plaintiff's list of documents dated 28th March 2012 containing fifty-one documents, and the supplementary list dated 31st January 2020 containing three documents, which were produced as Plaintiff's Exhibits 1 to 54 in the order in which they were listed. He testified that the investigations established that the suit property had been irregularly allocated to private persons without any lawful degazettement, change of user, or part development plans. He therefore prayed that the property reverts to its original public use.

33. On cross-examination by learned counsel for the 1st Defendant, the witness stated that he had served as an investigator for fifteen years and confirmed that Gigiri Court Limited was the registered proprietor of the suit property, its directors being the 2nd Defendant and his wife. The company, he said, was later sold and a share transfer executed on 19th October 1994. He admitted that there was no evidence of payment of consideration for the transfer and that no statements were recorded from the 3rd Defendant, Wilson Gachanja, or from John Joseph Kamotho and James Raymond Njenga. He stated that although the lease and certificate of lease bore the signature of Wilson Gachanja and reflected a consideration of Kshs. 2.2 million, no criminal charges were ever preferred against the Defendants. He confirmed that Gazette Notice No. 2019 of 20th April 1989 only declared an intention to alter the forest boundaries but that no legal notice was ever issued to effect the same. He also stated that there was no evidence of a part development plan, nor proof of payment of rent or rates by Gigiri Court Limited. He maintained that a prudent purchaser was expected to verify the status of the land beyond an official search and that payment of rent or rates could not sanitize an illegal allocation.

34. When cross-examined by counsel for the 3rd Defendant, the witness stated that he was generally familiar with the land allocation processes in Kenya and confirmed that the Commissioner of Lands was one among several officers involved in the process. He confirmed that the letter dated 21st April 1986 was signed by one S. K. Maina for the Commissioner of Lands, then one James Raymond Njenga, and that the first allotment letter in question was issued on 23rd April 1987. He stated that by the

time the complaint was received in 2006, Mr. Gachanja was no longer in office. He confirmed that no statements were recorded from officers in the Ministry of Lands and that the Commission relied on documentary evidence.

35. Upon re-examination, PW1 stated that where a person failed to explain the allocation, the Commission proceeded to recover the property through a suit. He reiterated that the lease over the amalgamated property was signed by Wilson Gachanja on 6th September 1995 and pointed out that the acreage had increased from 3.31 hectares to 7.11 hectares without explanation.

36. The second witness, Peter James Kamwara Gathogo, testified that he was a retired surveyor from the Kenya Forest Service, where he had served as the Head of Forest Survey and Mapping until his retirement in June 2014. He adopted his witness statement dated 16th October 2012 as his evidence in chief and stated that Karura Forest was declared a public forest in 1932 through Proclamation No. 44 and later as a Central Forest under Legal Notice No. 174 of 1964, measuring 2,580 acres. He stated that any change of user required a legal degazettement under the Forests Act (Cap. 385). He referred to Gazette Notice No. 2019 of 18th April 1989 which only expressed an intention to alter the forest boundaries to excise 2.668 hectares but stated that no legal notice was subsequently published. He thus maintained that the excision in favour of the 2nd Defendant was illegal.

37. He further referred to a map at page 141 of the Plaintiff's bundle showing that Land Reference No. 91/386, measuring approximately 7.11 hectares, comprised part of Karura Forest and a small triangular portion of KTTC land. He also made reference to the Ndung'u Land Report which identified the suit property as illegally acquired.

38. On cross-examination by counsel for the 1st Defendant, PW2 confirmed that he joined the Kenya Forest Service in 1997 and therefore was not in the institution at the time of the alleged allocation. He reviewed documents showing correspondence on the proposed excision but confirmed that no legal notice had been issued. He agreed that the allottee was not responsible for gazettement. He could not explain the increase in acreage from 2.668 to 7.11 hectares.

39. In further cross-examination by counsel for the 4th Defendant, PW2 stated that although he was familiar with allocation procedures, he had never worked at the Commissioner of Lands' office. He reiterated that the forest boundaries remained intact and the forest continued to be conserved.

40. Upon re-examination, PW2 confirmed that no legal notice was issued after the expiry of the 28-day period following the intention to alter the boundaries and that the subject property therefore remained part of Karura Forest.

41. The third witness, Charles Imbenzi Imbali, a retired Principal of KTTC, adopted his witness statement dated 10th October 2012 as his evidence in chief. He stated that he served as the Principal between 2003 and 2014. During his tenure, he said, attempts were made to fence off part of the college land, prompting him to report the matter to the Permanent Secretary in the Ministry of Education, the Commissioner of Lands, and the Kenya Anti-Corruption Commission. He referred to the letter dated 21st April 1986 from the Commissioner of Lands concerning the subject property and stated that KTTC had been allocated land by a letter of allotment dated 14th November 1996 combining Blocks 91/128 and 130, and that the college had occupied the land since 1976.

42. On cross-examination by counsel for the 1st Defendant, PW3 confirmed the 1996 letter of allotment acknowledging that it contained a clause disclaiming government's liability in case of prior commitments. He admitted he could not tell the exact acreage or boundaries of the respective blocks. He identified correspondence showing that Hon. J. J. Kamotho had been allotted land on 23rd April 1987 and 17th July 1989. On cross-examination by counsel for the 3rd Defendant, he admitted that

disputes over the property dated back to 1985 and that he had not seen any document signed by either Wilson Gachanja or James Raymond Njenga. In re-examination, he confirmed that KTTC had occupied the land peacefully since 1976 and that no claim had ever been made by Hon. Kamotho or the 1st Defendant over the portion occupied by the college.

43. The fourth witness, Victor Kiprono Kirui, a surveyor attached to the Ministry of Lands, adopted his witness statement dated 11th December 2019. He stated that he was instructed to verify the survey status of several parcels including Land Reference Numbers 91/130, 91/333, 384, 385, and 386. Referring to the survey plan at page 139 of the Plaintiff's bundle, he stated that Block 91/130 extended into Karura Forest.

44. On cross-examination by counsel for the 1st Defendant, PW4 stated that the plan was authenticated on 19th August 1976 and confirmed that KTTC occupied the area on the ground while the portion said to have been allocated was forested. He stated that though the maps and plans were authentic, ownership could not be ascertained from them alone. When cross-examined by counsel for the 3rd Defendant, he stated that the Commissioner of Lands played no role in the preparation of survey plans. In further cross-examination by counsel for the 4th Defendant, he explained that the survey plan for parcel number 128 corresponded to Land Reference Number 12269 and that parcel 120 formed part of KTTC land.

45. The fifth witness, Gordon Ochieng, who is the Director of Land Administration at the Ministry of Lands, adopted his witness statement dated 22nd December 2019 as his evidence in chief. He narrated that the records of the Ministry showed that on 9th January 1987 Hon. J. J. Kamotho had applied to the Commissioner of Lands for allocation of Land Reference Number 91/130. An allotment letter was issued on 23rd April 1987, but the land was later found to form part of KTTC property. Consequently, an alternative plot was allocated on 15th May 1989, and a further allotment of 0.566 hectares made on 17th July 1989. He confirmed that there was no record of presidential approval for the allocation. He further referred to a letter of allotment dated 14th November 1996 issued to KTTC combining Blocks 91/128 and 130 and a certificate of lease showing that Land Reference Number 91/386 was registered in the name of Gigiri Court Limited on 11th September 1995. He stated that there was no record of any degazettement of Karura Forest in the correspondence files.

46. On cross-examination by counsel for the 1st Defendant, PW5 explained the allocation procedure and confirmed that by April 1987 there was no allotment in favour of KTTC. He acknowledged that the letter dated 21st April 1986 from the Commissioner of Lands indicated that Block 91/130 was not part of KTTC land. He confirmed that the process of allocation to Hon. Kamotho involved correspondence, acceptance of offer, and payment of requisite fees, which were received and not refunded, and that the sale to Gigiri Court Limited was duly approved by the Commissioner of Lands, leading to the issuance of title in 1995. On cross-examination by counsel holding brief for the 3rd Defendant, he confirmed that Mr. Wilson Gachanja acted in his official capacity as Commissioner of Lands at the time and that the process involved several departments. When cross-examined by counsel for the 4th Defendant, he stated that the irregularity in this case arose from the allocation of forest land before its lawful degazettement, a power which rested with the Minister for Environment and Natural Resources. He confirmed that both KTTC and the Kenya Forest Service had raised concerns over the allocation. In re-examination, he reiterated that there was no evidence of any legal notice de-gazetting the area forming part of Karura Forest and that the lease to Gigiri Court Limited was signed by Wilson Gachanja in his official capacity. This marked the close of the Plaintiff's case.

1st Defendant's Evidence

47. The first defence witness, Mandip Singh Amrit, testified that he was a director of the 1st Defendant company and an engineer by profession. He stated that the 1st Defendant was engaged in the real estate business and that he had recorded a witness statement dated 22nd February 2019, which he adopted as part of his evidence-in-chief. He informed the court that the 1st Defendant company was incorporated on 7th July 1994, with its initial subscribers and shareholders being John Joseph Kamotho and Eunice Wambui Kamotho.

48. According to the witness, he first came across a newspaper advertisement announcing the sale of the suit property, which prompted him to contact the agent indicated therein. The agent subsequently connected him with the sellers, who referred him to their lawyers, Messrs. Kirundi & Co. Advocates. He never met the sellers personally but dealt with their advocates throughout the transaction. Upon meeting the sellers' lawyer, he was shown all the necessary documents and assured that it was a straightforward transaction. Having been satisfied, he instructed the same lawyer to act for him.

49. He explained that he was interested in purchasing properties within the general area where the suit property was situated, describing it as a high-end diplomatic area opposite the Canadian Embassy. His intention was to develop a mixed-use project on the property. Before making the purchase, he visited the site and confirmed its location. He stated that the property measured approximately 3.31 hectares and that a certificate of lease existed for it.

50. Mr. Amrit testified that the transaction entailed the transfer of shares in Gigiri Court Limited, which occurred on 19th October 1994. The consideration paid for the purchase was Kshs. 16 million, for which a receipt was issued by Kirundi & Co. Advocates. Following the transaction, the former directors of the company resigned. He further stated that after purchasing the land, the Survey of Kenya advised the company on the need to re-align the property to allow for a road to other adjoining properties. Consequently, the company applied to the Government of Kenya through the Ministry of Lands for an additional parcel measuring approximately 3.8 hectares.

51. The witness testified that the company surrendered the initial title and received an amalgamated one comprising the two parcels, the surrender being dated 8th September 1995 and registered on 11th September 1995. A new lease was then issued for a property measuring 7.11 hectares, known as Nairobi Block 91/386, as reflected at page 45 of the 1st Defendant's consolidated bundle. A premium of Kshs. 2.2 million was paid, and the annual rent was revised from Kshs. 49,200 to Kshs. 440,000.

52. He narrated that around the years 2005 and 2006, the 1st Defendant commenced preparations to develop the land by engaging architects and engineers to prepare a master plan for a mixed-use development. The development was to include hotels and office blocks. He stated that the firm of Bowman Associates was contracted to design architectural plans, which were duly submitted to the City Council of Nairobi for approval. The Council issued a receipt dated 29th September 2005 for Kshs. 32,500 in acknowledgment of the application for approval. However, the 1st Defendant did not get an opportunity to proceed with the intended development because the Plaintiff instituted the present suit in 2007.

53. Mr. Amrit testified that the suit property remained vacant and was later fenced off by the Kenya Forest Service (KFS), despite the 1st Defendant not having been compensated for the land. He maintained that the company continued to pay rates and land rent to the government until the property was taken over by KFS, as evidenced by receipts contained at pages 50 to 61 of the 1st Defendant's bundle. He stated that KFS did not notify or consult the company before fencing off the land, nor was the company offered any form of compensation. He asserted that the company had purchased the property

in good faith, through a lawful process, without notice of any defects in title, and with all documents duly issued by the Government of Kenya. He denied any collusion with the 3rd and 4th Defendants, emphasizing that they acted in their official capacities as Commissioners of Lands. He also stated that he had not been charged with any offence in relation to the property.

54. Upon cross-examination by learned counsel Ms. Ngure for the 3rd Defendant, the witness confirmed that in paragraph 6 of his witness statement he had stated that he conducted due diligence and confirmed the title to the property was clean. He explained that the letters of allotment he was shown by the seller's lawyer were at page 55 of the Plaintiff's bundle, dated 23rd April 1987, 18th May 1989, and 17th July 1989, respectively. He also referred to the lease issued to the 1st Defendant dated 11th October 1995. He reiterated that the process of transfer of the property by the government had commenced as far back as 1987 and maintained that he found no defects in title. According to him, all relevant permits and approvals had been obtained from the appropriate authorities, and had there been any irregularities, the said authorities would not have issued the title. He stated that he did not personally know Mr. Wilson Gachanja and denied any collusion with him, asserting that the acquisition process was properly documented.

55. During cross-examination by learned counsel Ms. Maina for the Plaintiff, Mr. Amrit stated that he had acquired the initial title by virtue of his acquisition of shares in the 1st Defendant company. He referred to page 36 of his bundle, containing a resignation letter by John Joseph Kamotho dated 18th October 1994, and to page 32, which contained the share transfer dated 19th October 1994. He also produced the Memorandum and Articles of Association of the company and referred to clause 9(b), which required any member wishing to transfer shares to give a transfer notice. He admitted that he had no such notice. He also acknowledged that clause 9(c) required allocation of shares by the board after twenty-one days.

56. He further referred to page 34 of his bundle, which contained a receipt issued by Kirundi & Co. Advocates for the consideration paid, clarifying that there was no formal sale agreement since the transaction was effected through a transfer of shares. He stated that he never took possession of the property, which at the time of purchase was undeveloped. He also referred to page 37 of his bundle, which contained a company search indicating the registered office as Plot Nairobi/Gigiri Block 91/130.

57. When questioned about the application for additional land, he admitted that he did not have a copy of the application letter nor documentary proof of payment of the Kshs. 2.2 million premium. He confirmed that the property was fenced off by KFS in 2011 and identified a letter at page 131 of the Plaintiff's bundle from M&MCP Advocates, and another at page 133 from the Chief Conservator of Forests confirming that the property formed part of a forest reserve. He stated that he had hoped the issue would be resolved or that compensation would be offered. He admitted that he had no evidence of degazettement of the second portion applied for, was unaware that the property had been listed in the Ndung'u Report as irregularly acquired, and had not met Mr. and Mrs. Kamotho personally. He visited the ground, identified the beacons, and confirmed that the property bordered Karura Forest, a main road, and an internal road. He reiterated that he had engaged Mr. Kirundi as his lawyer but was unaware whether the advocate conducted an official search for the land on his behalf.

58. In re-examination by Mr. Njoroge, the witness stated that Mr. and Mrs. Kamotho were the sellers of their shares to him. He confirmed that in the lease issued to him, the Government acknowledged receipt of Kshs. 2.2 million and that he had not been served with any demand for the sum of Kshs. 2.2 million. He referred to the letter at page 133 of the Plaintiff's bundle dated 4th March 2005, noting that by then he already held a valid title to the property. He asserted that the Ministry of Lands had never communicated that his title infringed on forest land and that he continued to pay land rent to the government, which was never rejected on the basis of illegality. He stated that he was never

summoned or questioned by the Ndung'u Commission and maintained that he had no reason to doubt the genuineness of the title purchased from Mr. and Mrs. Kamotho.

4th Defendant's Evidence

59. The 4th Defendant's witness statement, which had been duly filed, was adopted by the Court as his evidence in chief. The witness, Mr. James Raymond Njenga, was unable to testify orally owing to his medical condition, as he suffers from dementia. Consequently, his statement was admitted into evidence, though the Court noted that its probative value was limited.

60. In his statement, the 4th Defendant introduced himself as an adult male of sound mind and discretion, residing and working for gain in Nairobi. He stated that he served as the Commissioner of Lands in the Ministry of Lands and Settlement from 1st April 1975 until his retirement in 1989. Upon retirement, he handed over all official records to his successor and has since had no access to the said records. He therefore expressed difficulty in recalling with precision the events surrounding the allocation, survey, or issuance of title deeds in respect of the property forming the subject matter of the present proceedings.

61. He further averred that during his tenure as Commissioner of Lands, he executed his public duties in accordance with the law and under the directions of superior officers within the Ministry of Lands. He noted that under the then applicable Government Lands Act, the President of Kenya possessed the ultimate authority to grant or dispose of any unalienated Government land. The Ministry was under the leadership of the Minister, with the Permanent Secretary acting as the accounting officer, assisted by deputy secretaries and other senior officers, all of whom were superior to the office of the Commissioner of Lands. He therefore performed his functions under their direction. He also explained that for administrative convenience, there were subordinate officers empowered to perform certain acts or duties on behalf of the Commissioner under the Government Lands Act.

62. He further indicated that all such directions and decisions were duly documented and retained in the official records of the Lands Office. Since he no longer had access to those records, he stated that he could not independently recall the particulars of the transactions concerning the allocation of the suit property.

63. From the pleadings and documents supplied by the Plaintiff, the 4th Defendant stated that it appeared that the Office of the Commissioner of Lands had, by a letter dated 21st April 1986, clarified to the Principal of the Kenya Technical Teachers College (KTTC) that Plot No. Nairobi/Block 91/130 did not form part of the land reserved for the college. He further referred to an application dated 9th January 1987 by the 2nd Defendant, addressed to the President of Kenya, seeking allocation of the said parcel of land on the basis that it was vacant and unreserved. The 2nd Defendant was subsequently granted a Letter of Allotment over Nairobi/Gigiri/Block 91/130 measuring approximately 2.50 hectares on 23rd April 1987.

64. The 4th Defendant also made reference to an internal memorandum dated 29th September 1989 addressed to the Commissioner of Lands, in which the Kenya Technical Teachers College requested that, since the College had agreed to relinquish a strip of land to create an access road, the plot previously allocated to Mr. Kamotho be reallocated to the College and that Mr. Kamotho be considered for an alternative plot elsewhere. He further cited correspondence exchanged between the Office of the Commissioner of Lands, the Director of Forestry, and the Ministry of Environment and Natural Resources, which suggested that the 2nd Defendant was subsequently considered for an alternative un-surveyed plot measuring approximately 2.50 hectares. The allocation, however,

was subject to the de-gazettement of the said parcel by the Ministry of Environment and Natural Resources.

65. He referred to Gazette Notice No. 2019 published on 28th April 1989 by the Minister for Environment and Natural Resources, giving twenty-eight days' notice of the intention to alter the boundaries of the Karura Forest so as to exclude an area of land known as L.R. No. 14878 measuring approximately 2.668 hectares. Consequently, the 2nd Defendant was granted a further Letter of Allotment on 18th May 1989 over an unsurveyed plot measuring approximately 2.50 hectares and another one over an unsurveyed plot measuring approximately 0.566 hectares.

66. He observed that the remainder of the Plaintiff's documents related to a period subsequent to his retirement and that he was therefore not involved in the dealings, transactions, or correspondence relating to the suit property after 1989.

67. The 4th Defendant further averred that, during his tenure, section 4(1) of the Forests Act (Cap. 385) empowered the Minister for Environment and Natural Resources to declare unalienated government land as forest, to alter forest boundaries, and to de-gazette forest areas, subject to a 28-day public notice through the Kenya Gazette. He stated that, from the documents availed, the relevant procedures prescribed by law appeared to have been followed, with the Kenya Forest Service being involved in the entire process. He particularly referred to an internal memorandum to the Director of Forestry dated 24th November 1988, which indicated that permission had been granted to excise 2.5 hectares for Mr. Kamotho and to engage a surveyor to undertake the necessary formalities.

68. He stated that, without access to the original records, he could not conclusively confirm whether the parcel in question had been allocated to the Kenya Technical Teachers College, nor could he verify whether the unsurveyed plot measuring 0.566 hectares had previously been set aside for the institution. Nevertheless, from his assessment of the Plaintiff's documents, he did not find any indication of fraud or abuse of office on his part.

69. The 4th Defendant lamented that the suit had been brought approximately eighteen years after his retirement, by which time he was 81 years old and unable to recall with clarity the particulars of such land transactions. He denied any illegality, irregularity, or abuse of office during his tenure, asserting that all government land allocations at the time were undertaken lawfully, under the direction and sanction of the Office of the President. He concluded by stating that all relevant records concerning the allocation of the suit property were retained at the Office of the Commissioner of Lands and that he had no personal involvement in any fraudulent act as alleged by the Plaintiff.

70. The 3rd Defendant did not call any witness and therefore closed its case without tendering evidence.

Analysis of Submissions

71. The Plaintiff's submissions were filed in support of the claim seeking recovery of public land known as Nairobi Block 91/386, situated in Nairobi County. The Plaintiff, the Kenya Anti-Corruption Commission (now the Ethics and Anti-Corruption Commission), instituted the present suit on the 10th of September, 2007, under its statutory mandate conferred by the repealed *Anti-Corruption and Economic Crimes Act*, 2003 and subsequently under the *Ethics and Anti-Corruption Commission Act*. It was submitted that the Commission is empowered to investigate and institute civil proceedings for the recovery or protection of public property unlawfully alienated or acquired.

72. The Plaintiff's submissions set out the background of the dispute and the circumstances under which the suit property, measuring approximately 7.11 hectares, was allegedly alienated. It was contended that the suit property is an amalgamation of two distinct parcels, namely Nairobi Block 91/130, which was

reserved for the Kenya Technical Teachers College (KTTC), and Nairobi Block 91/333, comprising portions of Karura Forest, a gazetted central forest. The Plaintiff submitted that the alienation of the said land was illegal, irregular, and fraudulent as the same was public land reserved for public and environmental purposes and not available for allocation to private individuals. The Court had, on 17th July 2008, issued an order preserving the suit property pending determination of the case.

73. It was further submitted that the suit abated against the 2nd Defendant, John Joseph Kamotho, who passed away and was not substituted within the statutory period of one year. However, the Plaintiff maintained that the cause of action remained alive as against the 1st, 3rd, and 4th Defendants, noting that the deceased had already parted with his purported interest in the property and that no orders were sought against his estate. In support of that position, the Plaintiff cited appellate authority to the effect that substitution was unnecessary in such circumstances.

74. The submissions recalled that the 1st Defendant, Gigiri Court Limited, had filed an amended defence asserting that it was the first registered proprietor of Nairobi Block 91/386. The Plaintiff, however, maintained that the 1st Defendant's title was unlawfully obtained, as the Commissioner of Lands (the 3rd Defendant) acted ultra vires his powers under the repealed Government Lands Act (Cap 280) by purporting to allocate land that was already reserved for a public institution and a gazetted forest.

75. In summary of its prayers, the Plaintiff urged the Court to declare that the alienation of the parcels comprising Nairobi Block 91/130, 91/333, and 91/386 to the 1st and 2nd Defendants was irregular, fraudulent, and illegal; that the Certificate of Lease issued to the 1st Defendant was null and void; to order rectification of the register by cancelling the lease and certificate of lease for Nairobi Block 91/386; to issue a permanent injunction restraining the 1st Defendant from dealing with the property; and to grant general damages for fraud and breach of fiduciary duty.

76. In support of its case, the Plaintiff relied on the evidence of five witnesses whose testimonies were restated in the submissions. The Plaintiff submitted that PW1, the lead investigator, testified that the suit property was derived from land originally reserved for KTTC and portions of Karura Forest that had never been lawfully de-gazetted. It was his evidence that the 3rd and 4th Defendants, as Commissioners of Lands, lacked legal authority to alienate or allocate forest or public institutional land. He further observed that allocation for residential use was outside the statutory mandate of the Commissioner under the Government Lands Act.

77. The submissions further referred to the testimony of PW2, the former Head of Forest Survey and Mapping, who confirmed that no formal de-gazettement procedures were undertaken to excise the 2.5 hectares and 3.8 hectares of forest land used to create the suit property. He stated that the suit property fell within Karura Forest Reserve, which remains a closed canopy forest under the control of the Kenya Forest Service, and that the land was listed in the Ndung'u Land Report as public land unlawfully alienated.

78. PW3, the former Principal of KTTC, was cited as having confirmed that KTTC was sued by Gigiri Court Limited for trespass, even though the land in question had always been part of the institution's reservation. He testified that Nairobi Block 91/130 was irregularly acquired and subsequently amalgamated with a portion of Karura Forest to form the suit property.

79. PW4, a licensed surveyor, confirmed that Nairobi Block 91/130 was hived off from KTTC land and the remaining 2.5 hectares were excised from Karura Forest to create Nairobi Block 91/333, which was later amalgamated with an additional 3.8 hectares to produce Nairobi Block 91/386.

80. PW5, a Deputy Director in the Land Administration Department, reiterated that Nairobi Block 91/130 was committed for allocation to KTTC and therefore unavailable for any other alienation.

He also confirmed that there were no records of de-gazettement in respect of the 2.5 hectares portion allegedly excised from Karura Forest.

81. With respect to the defence, the Plaintiff submitted that the 1st Defendant's witness claimed to have acquired the land following a newspaper advertisement for disposal of the property and through transfer of shares from the 2nd Defendant. The witness also alleged to have been allotted a second parcel measuring 3.8 hectares for which he paid a premium of Kshs. 2.2 million. The Plaintiff noted, however, that no documentary evidence was produced in court to support the purported application, allotment, or payment. On cross-examination, the 1st Defendant's witness conceded that he was not aware of any de-gazettement of Karura Forest land touching the suit property and that he was unaware of the Ndung'u Report, which had classified the land as public property.

82. As for the 3rd Defendant, it was submitted that his counsel closed the defence case without calling any witnesses, while the 4th Defendant, through counsel, requested the court to adopt his witness statement and a medical report due to illness and inability to attend court. The Plaintiff, however, objected to the weight of that evidence, contending that the absence of cross-examination limited its evidential value.

83. The Plaintiff proposed for determination the questions whether the suit property was alienated for a public purpose and whether it was available for allocation to private individuals; whether due process was followed in the alleged allocation of forest land; whether the 3rd Defendant possessed lawful authority to allocate and issue title to Nairobi Block 91/386; and whether the 1st and 2nd Defendants could be deemed bona fide purchasers for value without notice.

84. In further elaboration, the Plaintiff detailed the process of amalgamation to demonstrate how the suit property was unlawfully created. It was submitted that Nairobi Block 91/130 was initially reserved for KTTC; that 0.566 hectares were irregularly allocated to the 2nd Defendant; that this portion was amalgamated with 2.5 hectares of unsurveyed Karura Forest land to form Nairobi Block 91/333; and that the boundaries of that parcel were further extended by adding another 3.8 hectares of Karura Forest to create Nairobi Block 91/386. Documentary evidence was tendered to confirm that the land remained reserved for public use, and the 2nd Defendant's letter of allotment had been cancelled by the Commissioner of Lands in 1987 with instructions that he be considered for an alternative plot elsewhere. The alternative land proposed for him, it was submitted, was located within Karura Forest, whose excision was never lawfully completed.

85. The Plaintiff's submissions concluded by invoking the principle articulated by Justice Nyamu in John Peter Mureithi & 2 Others v Attorney General & 4 Others [2006] eKLR, to the effect that the courts must not permit the subjugation of public interest to private interests in matters of land allocation, and that titles founded upon illegal or fraudulent alienations of public land cannot be protected by the law.

86. In their written submissions, the 1st Defendant, Gigiri Court Limited, vigorously opposed the Plaintiff's claim for recovery of the parcel of land known as Nairobi Block 91/386 measuring approximately 7.11 hectares. The 1st Defendant's defence is premised upon the doctrine of indefeasibility of title, maintaining that its acquisition of the suit property was lawful, undertaken for valuable consideration, and is therefore protected by law. It was contended that the suit property resulted from the consolidation and amalgamation of three parcels of land, namely, a parcel originally allotted to the 2nd Defendant as compensation for the cancellation of his earlier allotment of Nairobi Block 91/130 which, according to the 1st Defendant, was not reserved for the Kenya Technical Teachers College; a triangular unsurveyed parcel measuring 0.566 hectares; and an additional 3.8 hectares excised from Karura Forest pursuant to a Gazette Notice, the amalgamation of which created Nairobi Block 91/386.

87. The 1st Defendant submitted that the title in respect of a portion of the property, issued in 1994, constituted a first registration within the meaning of the repealed Registered *Land Act*, Cap 300, and as such enjoys enhanced legal protection against rectification. Counsel relied on Section 143 of the said statute, which, it was argued, expressly insulated a first registration from rectification, even in circumstances where allegations of fraud or mistakes are made, save for very limited exceptions provided by law. To buttress this submission, reliance was placed on several judicial authorities, including Chief Lands Registrar & 4 others v Natha Tirop & 4 others, Ambale v Masolia, and Obiero v Opiyo & others, which were said to affirm the constitutional underpinning of property rights and the principle that a title derived from a first registration is indefeasible notwithstanding allegations of fraud. On this basis, it was submitted that the title conferred upon the 2nd Defendant, from whom the 1st Defendant later derived its interest, was absolute and indefeasible, having been issued long before the alleged allotment of Nairobi Block 91/130 to the Kenya Technical Teachers College in 1996.

88. The 1st Defendant further argued that it acquired the property lawfully, in good faith, and for valuable consideration amounting to Kshs. 16,000,000. It was submitted that prior to the purchase, the Defendant conducted due diligence at the Lands Registry and at the Survey of Kenya, confirming that the title was valid and free from encumbrances, and that the 1st Defendant had no notice, actual or constructive, of any fraud or illegality. Counsel maintained that this transaction satisfied the requirements for statutory protection under Section 143(2) of the repealed Registered *Land Act*, and that Section 28 of the same statute unambiguously protected a proprietor who acquired title either on first registration or subsequently for valuable consideration. To reinforce this argument, reliance was placed on the authorities of Muriuki Marigi v Richard Marigi & 2 Others and Samuel Kamere v Lands Registrar, Kajiado, where the courts held that a registered proprietor holds an absolute and indefeasible title which cannot be defeated except as provided by statute.

89. The Defendant also invoked the equitable doctrine of estoppel, contending that the Government, through its officers—the 3rd and 4th Defendants—misrepresented the legal availability of the additional 3.8 hectares and is therefore estopped from challenging the title now. It was argued that the Government not only facilitated the alienation and registration of the land but also received annual rent payments in respect thereof, thereby affirming the legality of the transaction. In support of this contention, counsel relied on Section 120 of the *Evidence Act*, Cap 80, which codifies the principle that when one person has, by their representation or conduct, induced another to believe a fact to be true and to act upon such belief, the former is precluded from denying the truth of that fact. The 1st Defendant placed further reliance on Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagia, which emphasized that a party cannot resile from representations upon which another has relied to their detriment, and on Nthenge v Mwajoro & 7 others, where it was held that the Government, having facilitated and benefited from a transaction, may be estopped from denying its validity.

90. Lastly, the 1st Defendant contended that the Plaintiff's claim for general damages founded on fraud is statute-barred. It was submitted that the cause of action, having arisen in 1994 when the alleged wrongful acts occurred, became time-barred after the lapse of three years under the *Limitation of Actions Act*, Cap 22, yet the present proceedings were instituted in 2007, well outside the prescribed limitation period. In support of this proposition, reliance was placed on Gathoni v Kenya Co-operative Creameries Ltd, where the Court held that the law of limitation is designed to protect defendants against unreasonable delay in bringing suits, and on Chepkwony & 2 others v Mwaura & 3 others, where it was stated that where a claim is time-barred, the court is under a duty to dismiss it regardless of its merits. The Defendant thus urged the court to find that the Plaintiff's claim is not only unmeritorious but also barred by limitation, and that the 1st Defendant's title remains indefeasible in law.

91. In his written submissions, the 3rd Defendant, sued in his capacity as the former Commissioner of Lands, urged the Court to dismiss the claims brought against him, contending that the suit as framed is fundamentally flawed and unsustainable in law. He maintained that his role was purely administrative and that he acted as an implementer of government policy rather than as a principal decision-maker. The 3rd Defendant asserted that the claims against him personally were misconceived, malicious, and an abuse of the court process.

92. The 3rd Defendant's first line of defence was anchored on the law of limitation of actions. It was submitted that the cause of action, if any, arose between the years 1987 and 1995 when the transactions relating to the allocation of the suit property were undertaken, whereas the present proceedings were instituted in 2007—more than a decade later. He argued that the claim is therefore statute-barred under the *Limitation of Actions Act*, Cap 22 Laws of Kenya. The Defendant emphasized that where a cause of action is founded on negligence, misfeasance, or breach of statutory duty, the law imposes a limitation period of three years from the date the cause of action accrues. He invited the Court to find that since the Plaintiff had failed to institute proceedings within the prescribed period, the entire suit against him was incompetent and incapable of being sustained in law. Counsel cited judicial authorities to the effect that once a matter is shown to have been filed outside the statutory limitation period, the court is divested of jurisdiction and the suit must be struck out regardless of its substance.

93. The 3rd Defendant further contended that his actions were taken strictly in his official capacity as Commissioner of Lands and were, therefore, protected under the law. He argued that he acted at all material times on the instructions and authority of the President and the Minister responsible for lands, and that the issuance of the Gazette Notice, which the Plaintiff relied upon, was evidence of the Minister's involvement and exercise of executive authority. It was submitted that the 3rd Defendant did not act in his personal capacity and that the decisions in question were the result of government policy rather than his own initiative. Counsel relied on Section 59 of the *Interpretation and General Provisions Act*, Cap 2, which protects public officers from civil liability for acts done bona fide in the execution of their statutory duties. The 3rd Defendant maintained that there was no evidence whatsoever that he acted in bad faith, with malice, or outside the scope of his statutory authority.

94. On the allegations of fraud, the 3rd Defendant maintained that the Plaintiff had failed to discharge the requisite standard of proof. It was submitted that the 3rd Defendant was a stranger to the alleged fraudulent acts, and that no evidence had been placed before the Court to demonstrate his personal involvement in any fraudulent transaction. He reminded the Court that allegations of fraud are of a criminal character and must therefore be proved to a standard higher than that required in ordinary civil cases, though not beyond reasonable doubt. To this end, reliance was placed on the decision in Gichuhi v Gichuhi, where the Court affirmed that allegations of fraud must be strictly proved by cogent and credible evidence. It was accordingly argued that the Plaintiff's sweeping allegations of fraud, unaccompanied by direct or documentary evidence linking the 3rd Defendant personally, could not suffice to meet this elevated evidentiary threshold.

95. Lastly, the 3rd Defendant submitted that the suit against him amounted to an abuse of the court process. He argued that the Plaintiff had unfairly singled him out for prosecution while deliberately omitting to join other government officers and officials who were equally involved in the allocation process. This, it was submitted, demonstrated clear bias and selective prosecution. Counsel further contended that the Plaintiff's actions constituted a gross abuse of its statutory powers under the *Ethics and Anti-Corruption Commission Act*, 2011, particularly given that the 3rd Defendant had left public service in 1999 and no longer had access to official records or exculpatory evidence necessary to mount an adequate defence. The Defendant therefore invited the Court to find that the proceedings against him were oppressive, devoid of merit, and liable to be dismissed with costs.

96. In his written submissions, the 4th Defendant contended that the claims against him were misconceived, unfounded, and contrary to both the facts and the law. He asserted that at all material times, he acted in his official capacity as a public officer and within the lawful discharge of his duties under superior direction. The 4th Defendant emphasized that during his tenure as Commissioner of Lands between 1975 and 1989, all actions he undertook were pursuant to lawful instructions from competent authority and in strict compliance with statutory and administrative procedures governing the management of government land.

97. He submitted that his role was primarily administrative and executed under the direction of superior officers, including the President and the Minister responsible for lands. It was his argument that under the Government Lands Act (now repealed), the President possessed the power and authority to make grants and dispositions of unalienated government land. The 4th Defendant maintained that his duty as Commissioner of Lands was confined to implementing those executive directives and ensuring that allocations were documented in accordance with established procedures. He further distinguished his actions from those taken under delegated authority pursuant to Section 3 of the Government Lands Act, emphasizing that in the present case, the 2nd Defendant's application for allocation of land had been made directly to the President. His role, therefore, was limited to executing formalities necessary to give effect to presidential decisions.

98. With respect to the allocation involving the excision of forest land, the 4th Defendant submitted that due process was fully observed. He pointed out that the Minister for Environment and Natural Resources duly published a Gazette Notice declaring the Government's intention to alter the boundaries of Karura Forest, thereby excluding a defined parcel of land. He contended that this procedure was in conformity with Section 4 of the repealed Forestry Act, which empowered the Minister to vary forest boundaries through gazettement. The 4th Defendant argued that this step demonstrated that the process was lawfully sanctioned and that he had merely implemented a legitimate government policy decision.

99. A significant aspect of his defence was that the acts complained of by the Plaintiff occurred after his retirement from public service in 1989. The 4th Defendant pointed out that the subsequent issuance of the allotment letter to the 2nd Defendant in July 1989 and the later allotment to the Kenya Technical Teachers College (KTTC) in 1996 took place well after his departure from office. He therefore disclaimed any involvement in, or knowledge of, those events, asserting that he had no control over actions taken by his successors in office. He added that having retired more than three decades ago, and given his lack of access to official records since that time, he was unable to recall specific details of the transactions in question.

100. On the question of personal liability, the 4th Defendant contended that he should not have been sued in his individual capacity, as the impugned acts, if any, were performed within the course of his official employment. He invoked the principle of vicarious liability, submitting that any alleged wrongful acts committed by a public officer in the execution of official duties are attributable to the employer—in this case, the Government of Kenya. To support this contention, he relied on the decision in Onesmus Kinyua Muchudu v Mishi Kambi Charo & Another, which in turn cited Joel v Morison (1834), for the proposition that a master is vicariously liable for the wrongful acts of his servant committed in the course of employment. The 4th Defendant therefore submitted that if any liability were to arise, it should properly attach to the Government, represented by the Attorney General, and not to him personally. He further argued that no evidence had been presented to demonstrate that he acted outside his authority, without the President's approval, or for any fraudulent or personal gain.

101. Finally, the 4th Defendant invited the Court to take into account his current health condition. He informed the Court that he suffers from Alzheimer's syndrome, a condition that impairs memory and the ability to recall events. On this basis, he prayed that the Court admit his written statement as credible evidence pursuant to Section 33(d) of the *Evidence Act*, which provides for the admissibility of statements made by persons who, owing to illness or infirmity, are incapable of testifying. He urged the Court to consider his statement in the interest of justice and fairness, given his advanced age and medical condition, and to find that the claims against him were unsupported by evidence and should accordingly be dismissed with costs.

Issues for Determination

102. Having considered the pleadings, the evidence adduced, and the submissions on record, the Court finds that the following issues arise for determination:

I. Whether the allocation and subsequent registration of the parcel of land known as L.R. No. Nairobi Block 91/386 was lawful, regular, and in accordance with the law governing the disposition of public land.

I. Whether the Plaintiff has proved, on a balance of probabilities, that the said allocation and registration were tainted with fraud, illegality, or procedural impropriety, and if so, whether the resultant title is liable to cancellation.

I. Whether the 1st Defendant's title to L.R. No. Nairobi Block 91/386, being a first registration, is protected under the law, and if so, whether such protection operates to defeat the Plaintiff's claim for cancellation or recovery of the suit property.

I. Whether the 3rd and 4th Defendants, in their respective capacities as former Commissioners of Lands, acted within the scope of their statutory mandates, and if not, whether any personal liability attaches to them; and further, whether the claims against them are maintainable in light of the *Limitation of Actions Act* and the legal principles governing acts performed in an official capacity by public officers.

I. Whether the Plaintiff is entitled to the reliefs sought in the Plaint, including cancellation of title, recovery of the suit land, and any other consequential orders.

I. Who should bear the costs of the suit.

Analysis and Determination

I. Whether the allocation and subsequent registration of the parcel of land known as L.R. No. Nairobi Block 91/386 was lawful, regular, and in accordance with the law governing the disposition of public land

103. The first issue for determination is whether the allocation and subsequent registration of the parcel of land known as L.R. No. Nairobi Block 91/386 was lawful, regular, and in accordance with the law governing the disposition of public land.

104. At the material time, the disposition of unalienated Government land was governed by the Government Lands Act (Cap. 280) (now repealed). Section 3 thereof provided that:

> " 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; and

(b) with the consent of the purchaser, lessee or licensee, accept the surrender of any land, lease or license granted under this Act."

This statutory provision empowered the President to alienate unalienated Government land—and no other. The term "unalienated Government land" was defined in Section 2 of the same Act as:

> " 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."

105. Further Section 4(1) of the Forest Act, provided that:

> " The Minister may, from time to time, by notice in the Gazette-
>
> a. declare any unalienated Government land to be a forest area;
>
> b. declare the boundaries of a forest area;
>
> c. alter the boundaries of a forest area; or
>
> d. declare that a forest area shall cease to be a forest area: Provided that no such declaration shall be made except after the expiration of twenty-eight days' notice of the intention to make such declaration has been published in the Gazette."

Land that had been gazetted as forest land did not therefore constitute unalienated Government land and could not be lawfully disposed of by the President or the Commissioner of Lands without first being lawfully degazetted in accordance with the Forest Act (Cap. 385) (repealed).

The legal position under the current constitutional framework remains consistent. Article 62(1)(g) of *the Constitution* of Kenya, 2010 provides that:

> " Public land includes— all government forests other than forests to which Article 63(2)(d)(i) applies."

106. Further, Section 12(1) of the *Land Act*, No. 6 of 2012 provides:

> " Public land shall not be allocated unless it is unalienated Government land, and the allocation shall be made on the basis of an approved development plan prepared by the National Land Commission."

Therefore, both under the repealed law and the current law, public forest land could not lawfully be alienated without strict compliance with statutory procedures, including de-gazettement, public notice, and adherence to public interest requirements. I need to add that public participation too is mandatory before a decision of such magnitude and that has an impact on the environment is made.

107. The Plaintiff's evidence which was corroborated by documentary exhibits, establishes that the suit property was originally part of Karura Forest, a gazetted public forest, before its alleged excision and subsequent allocation to the 2nd Defendant and thereafter to the 1st Defendant.

108. While the 4th Defendant in his statement averred that the Minister for Environment and Natural Resources issued a Gazette Notice purporting to degazette a portion of the Karura Forest, a reading

of the Gazette Notice number 2019 of 18th April 1989 discloses that the same was merely the 28-day statutory notice required under Section 4(1) of the Forest Act. The actual declaration altering the boundaries of Karura Forest was not exhibited.

109. This Court is guided by the jurisprudence in James Joram Nyaga & Another v The Attorney General & Another [2007] eKLR, where the Court emphatically held that:

> " The President and the Commissioner of Lands had no power to alienate any land that had already been set aside for a public purpose. The allocation of such land was therefore null and void ab initio."

110. In Republic v Minister for Transport & Communication & 5 Others ex parte Waa Ship Garbage Collector & 15 Others [2006] eKLR, the Court underscored that:

> " Public land, once reserved for a public purpose, cannot be otherwise allocated unless the purpose is lawfully changed and due process is followed. Any alienation of such land without compliance with the procedural and substantive safeguards is ultra vires and invalid."

111. In the instant case, the Court notes that the excision of land from Karura Forest and the subsequent allocation to the 2nd Defendant occurred without demonstrable compliance with the mandatory statutory procedures prescribed under Section 4(1) of the Forest Act. There could be no lawful alienation of Karura Forest unless the forest had been legally and regularly de-gazetted as a forest in accordance with the law.

112. The Commissioner of Lands, acting purportedly under the direction of superior officers, lacked the legal authority to allocate Karura forest land which, by definition, was not unalienated Government land.

113. The Court also observes that the subsequent registration of the title as Nairobi Block 91/386 was therefore premised on an illegality. The doctrine of "indefeasibility of title" under Section 143(1) of the repealed Registered *Land Act* (Cap. 300) did not extend to titles obtained through illegality or fraud. That section provided:

> " Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."

114. The successor provision under Section 80(1) of the *Land Registration Act*, 2012 is in pari materia, providing that:

> " Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that the registration was obtained, made or omitted by fraud or mistake."

115. Thus, even under the current statutory regime, a title founded on an unlawful allocation cannot be accorded legal protection. The principle of indefeasibility cannot sanitize a transaction born in illegality.

116. In view of the foregoing, this Court finds and holds that the allocation and subsequent registration of L.R. No. Nairobi Block 91/386 were undertaken contrary to the Government Lands Act (Cap. 280) and the Forest Act (Cap. 385) (both repealed), and are inconsistent with *the Constitution* of

Kenya, 2010 and the *Land Act*, 2012.The process of excision and allocation was tainted with illegality, procedural impropriety, and want of jurisdiction. Accordingly, the said allocation and the resultant title are null and void ab initio, incapable of conferring any proprietary rights or interests upon the allottees or their successors in title.

I. Whether the Plaintiff Proved Fraud and Illegality to the Required Standard, and Whether the Title Held by the 1st Defendant Should be Cancelled

117. The next issue for determination is whether the Plaintiff, the Kenya Anti-Corruption Commission (now the Ethics and Anti-Corruption Commission), discharged its evidentiary burden in proving that the allocation and subsequent registration of the parcel known as Nairobi Block 91/386 were tainted with fraud and illegality.

118. The legal principles governing proof of fraud and the power of the Court to cancel illegally obtained titles are found in both the repealed and current laws.

119. Under the repealed Registered *Land Act* (Cap. 300), Section 143(1) provided:

> " Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."

120. Its successor provision is found in Section 80(1) of the *Land Registration Act*, No. 3 of 2012, which provides in pari materia:

> " Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that the registration was obtained, made or omitted by fraud or mistake."

Further, Section 26(1) of the *Land Registration Act* reinforces this principle in the following terms:

> " The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor, shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except— (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

121. The evidentiary burden and standard of proof for fraud were succinctly stated by the Court of Appeal in Kinyanjui Kamau v George Kamau [2015] eKLR, where it was held:

> " It is trite law that any allegations of fraud must be pleaded and strictly proved. Although the standard of proof may not be as heavy as to require proof beyond reasonable doubt, it is more than a balance of probabilities. The onus is on the party alleging fraud to prove it by evidence that is clear and convincing."

Similarly, in Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR, Tunoi JA (as he then was) held:

> " It is well established that fraud must be specifically pleaded and that the particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."

122. In the present case, the Plaintiff specifically pleaded that the allocation and registration of the suit property were fraudulent, irregular, and illegal, and that the title issued to the 1st Defendant was procured through a collusion involving public officers (the 3rd and 4th Defendants) acting ultra vires their statutory authority.

123. The evidence on record, particularly from PW1, PW2, and PW5, established that the suit property comprised portions of land that were (a) reserved for a public institution (KTTC), and (b) part of a gazetted public forest (Karura Forest) that had not been degazetted. Both categories of land fell outside the ambit of "unalienated Government land" within the meaning of Section 2 of the Government Lands Act (Cap. 280) (repealed). Consequently, any alienation thereof was void ab initio.

124. The Plaintiff produced documents showing that the 2nd Defendant's initial allotment for Nairobi Block 91/130 was cancelled, and he was expressly advised to apply for an alternative plot. Notwithstanding this, the same public officers facilitated the allocation of the "alternative land," which turned out to be part of Karura Forest, without lawful de-gazettement or ministerial approval in accordance with Section 4(1) of the Forest Act (Cap. 385) (repealed).

125. The 1st Defendant's claim of bona fide purchase is untenable. The Registered *Land Act* (Cap. 300), though conferring protection to bona fide purchasers, did not extend that protection to titles derived from void or illegal allocations. The law does not protect fraud. In Arthi Highway Developers Limited v West End Butchery Limited & 6 Others [2015] eKLR, the Court of Appeal held:

> " We have stated that fraud and illegality entitle the court to cancel any registration, whether the title is a first registration or not. The law cannot countenance a situation where a party purports to rely on an illegality to sustain a claim to property. No rights can flow from an illegality."

Similarly, in Chemey Investment Limited v Attorney General & 2 others [2018] eKLR, the Court held:

> " Where land has been acquired through fraud, corruption, or misrepresentation, the law does not recognize such acquisition as conferring any proprietary interest. The title is impeachable and must be cancelled."

The Court further recalls the dictum of Nyamu J. (as he then was) in John Peter Mureithi & 2 others v Attorney General & 4 others [2006] eKLR, where His Lordship held:

> " Courts must firmly resist the temptation to sanctify the subjugation of public good to private greed. The law will not lend its aid to a party who founds his cause of action upon an immoral or illegal act."

126. In the instant case, the evidence overwhelmingly demonstrates that the land in question was public land, irregularly excised and fraudulently alienated to a private individual who subsequently disposed

it off to the 1st Defendant. The 3rd and 4th Defendants, as public officers, acted outside their statutory authority. Their purported actions in allocating forest land for private use were void ab initio, as they had no authority to deal with such land.

127. This is the period when there was a crave to acquire public land in this country as described by the court in Chemey investment ltd vs AG & 2 others (2018) eKLR, where the court stated that;

> " 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. This appeal is a throwback to those days...."

128. It is clear from the evidence that the 2nd Defendant, John Joseph Kamotho was a Member of Parliament and a Cabinet Minister in the Moi Government; a state officer who used his closeness to power for his selfish personal gain to have the subject property carved out of Karura Forest; a national heritage and an urban gem, and allocated to him. The shepherd who was supposed to tend the flock turned against the sheep, 'eating the fat ones and using their wool to make clothes for himself and his wives'.

129. The 1st Defendant, though not a direct participant in the initial alienation, cannot escape the taint of illegality. Having acquired title to land that was a gazetted forest and reserved for public use, and with no demonstrable due diligence regarding its legal status, the 1st Defendant's title is impeachable under Section 26(1)(b) of the *Land Registration Act*, 2012, which expressly provides for the cancellation of titles "acquired illegally, unprocedurally or through a corrupt scheme."

130. The Plaintiff's evidentiary burden was, therefore, fully discharged. The totality of the evidence points to a systematic scheme involving the unlawful alienation of public land under the guise of an allotment, without compliance with statutory and constitutional requirements.

131. Upon weighing the evidence and the law, the Court finds that the Plaintiff has proved fraud and illegality to the required standard, being higher than a balance of probabilities but below 'beyond reasonable doubt'.

132. The process leading to the allocation and registration of Nairobi Block 91/386 was riddled with irregularities, fraud, and illegality. The title held by the 1st Defendant was therefore obtained illegally, unprocedurally, and through a corrupt scheme, within the meaning of Section 26(1)(b) of the *Land Registration Act*, 2012.

133. Accordingly, this Court finds and holds that the title to L.R. No. Nairobi Block 91/386 is null and void, and the register shall be rectified forthwith by cancelling the Certificate of Lease issued in the name of the 1st Defendant, Gigiri Court Limited.

III. Whether the 1st Defendant's title to L.R. No. Nairobi Block 91/386, being a first registration, is protected under the law, and if so, whether such protection operates to defeat the Plaintiff's claim for cancellation or recovery of the suit property.

134. The 1st Defendant, in its statement of defence and submissions, invoked the protection afforded under Section 143(1) of the repealed Registered *Land Act* (Cap. 300), contending that being a first

registration, its title to L.R. No. Nairobi Block 91/386 is insulated from rectification or cancellation by the Court. The said provision stated as follows:

> " Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."

135. The gravamen of the 1st Defendant's argument is that the Court lacks jurisdiction to interfere with a first registration, even where the process of acquisition is impugned.

136. With respect, that argument by the 1st Defendant cannot be sustained either in law or principle. The statutory protection of first registration was never intended to clothe with legitimacy a title that is the product of illegality, fraud, or procedural impropriety.

137. Section 143 (1) of the repealed Registered *Land Act* existed prior to the 2010 constitution. With the new constitutional dispensation, the argument is unpalatable. Article 40 (6) is explicit that:

> " The rights under this article do not extend to any property that has been found to have been unlawfully acquired"

The Court must, therefore, interrogate the root of the title and determine whether the registration was anchored on a lawful process.

138. The Supreme Court in Dina Management Limited v County Government of Mombasa & 5 others [2023] KESC 26 (KLR), decisively settled this question in the following terms:

> " A title issued pursuant to a process that is marred by illegality, irregularity, or fraud cannot confer good title to the holder. Such a title is a nullity ab initio and incapable of protection under Article 40 of *the Constitution* or Section 26 of the *Land Registration Act*. The sanctity of title does not extend to cover fraudulent or illegal acquisition."

139. That pronouncement makes it abundantly clear that the shield of registration, whether as a first registration or otherwise, cannot operate to sanitize an illegality. The rationale is grounded in the broader constitutional imperative that property rights under Article 40 do not extend to property found to have been unlawfully acquired.

140. The Court of Appeal was equally categorical in General & another v Hussein & 3 others (Civil Appeal 100 (ELD NO. 32) of 2018) [2025] KECA 1022 (KLR), where it stated:

> " The doctrine of indefeasibility of title is not a licence for impunity. A party cannot rely on registration to defeat proven allegations of fraud or illegality in the process leading to acquisition. The *Land Registration Act* itself limits protection to titles that were lawfully obtained. Once it is demonstrated that the root of title is tainted, the resultant registration cannot stand.....A first registration procured through fraud or illegality is not insulated by the bar against rectification of first registration; it is void and non-existent in law."

141. The jurisprudential thread running through these authorities is unmistakable: the principle of first registration cannot be invoked to perpetuate illegality. The protection envisaged under Section 143(1) was intended to safeguard bona fide titles lawfully obtained, not to shield those founded on fraudulent or unlawful conduct. The Courts have consistently maintained that the registration of title does not by itself validate an otherwise void transaction.

142. In the present case, the Plaintiff has, on a balance of probabilities, demonstrated that the process leading to the allocation and registration of L.R. No. Nairobi Block 91/386 was fraught with irregularities, procedural impropriety, and acts that were contrary to the governing legal framework on the disposition of public land. The root of the 1st Defendant's title is therefore shown to be tainted by illegality. It would be an affront to justice and public policy to allow such a title to subsist under the pretext of first registration.

143. Accordingly, the Court finds and holds that Section 143(1) of the repealed Registered *Land Act* cannot avail a lawful defence to the 1st Defendant in the circumstances of this case. The bar against rectification of a first registration does not extend to titles that were unlawfully or fraudulently acquired. As pronounced in Dina Management Limited v County Government of Mombasa & 5 others (supra), such a title is "a nullity ab initio and incapable of protection." Consequently, the 1st Defendant's title to the suit property, having been founded upon illegality and fraud, is void and liable to cancellation.

I. Whether the 3rd and 4th Defendants are Personally Liable for the Illegal Allocation, and Whether the Suit Against Them is Time-Barred.

144. The issue for consideration is whether the 3rd and 4th Defendants, both former Commissioners of Lands, can be held personally liable for the illegal allocation of the suit property, and whether the suit as instituted against them is barred by limitation under the *Limitation of Actions Act* (Cap. 22) or by virtue of any statutory protection accorded to public officers under the law.

145. The governing principles arise from both statutory law and case law addressing (a) limitation of actions, (b) protection of public officers, and (c) personal liability for ultra vires or fraudulent acts.

146. Section 7 of the *Limitation of Actions Act*, Cap. 22 provides:

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

However, Section 26 of the same Act creates an important exception, providing that:

> "Where, in the case of an action for which a period of limitation is prescribed, either— (a) the action is based upon the fraud of the defendant or his agent; or (b) the right of action is concealed by the fraud of such person; or (c) the action is for relief from the consequences of a mistake; the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."

147. The import of the above provision is that where fraud is alleged and proved, the defence of limitation cannot avail the wrongdoer, as time does not begin to run until discovery of the fraud.

148. The 3rd and 4th Defendants invoked Section 59 of the *Interpretation and General Provisions Act* (Cap. 2), which provides:

> "Where an act or omission is done in the bona fide exercise of a power or performance of a duty under an Act, no civil or criminal proceedings shall lie against any person for such act or omission."

149. However, such protection is not absolute. It is contingent on the act having been done bona fide and within lawful authority. The law is clear that acts done mala fide, in excess of authority, or in

contravention of statute, attract personal liability. In Gitobu Imanyara & 2 others v Attorney General [2016] eKLR, the Court of Appeal held

> " Public officers are not immune from personal liability where it is proved that they acted in excess of their powers or in bad faith. The cloak of public duty cannot be used to shield illegal or malicious acts."

150. Similarly, the principle of personal responsibility of public officers for unlawful acts was reiterated in Republic v Kenya Anti-Corruption Commission & 4 others ex parte Jackson Gichohi Mwangi [2009] eKLR, where the Court observed:

> " A public officer acting in the name of the State must demonstrate that his act was authorized by law. Where authority is exceeded or abused, such an officer steps outside the protective cover of the office and exposes himself to personal liability."

151. The repealed Government Lands Act (Cap. 280) vested power to alienate unalienated government land in the President under Section 3, which provided:

> " The President in person or through the Commissioner of Lands may make grants or dispositions of any estates, interests or rights in or over unalienated Government land."

However, such delegated authority was subject to the confines of legality and public interest. The Commissioner's power was purely ministerial and not sovereign. In James Joram Nyaga & Another v Attorney General & Another [2007] eKLR, Nyamu J. (as he then was) held:

> " The Commissioner of Lands has no authority to alienate land that has already been set aside for public purpose. Any such alienation is illegal, null and void."

152. Thus, where the Commissioner or such other officer acts outside the limits of delegation — such as alienating forest land or land reserved for a public institution — he acts ultra vires and cannot be afforded legal protection.

153. In the instant case, the 3rd and 4th Defendants contended that the acts complained of occurred between 1987 and 1995, long before the filing of the suit in 2007, and that the same are therefore time-barred under Section 4(2) and Section 7 of the *Limitation of Actions Act*.

154. However, the Court notes that the Plaintiff's claim is grounded on fraud and illegality, both of which are exceptions under Section 26 of the Act. The cause of action, therefore, did not accrue until the fraud was discovered, which evidence shows occurred upon the forensic audit conducted in 2005 and the subsequent gazettement of the Commission's investigations.

155. In Republic v Registrar of Titles & Another ex parte Kenya Anti-Corruption Commission [2012] eKLR, the Court held that:

> " Fraud in the acquisition of public land cannot be defeated by the plea of limitation. The law does not protect a fraudster, and time cannot run to protect an illegality."

Accordingly, the plea of limitation raised by the 3rd and 4th Defendants is without merit.

156. Turning to the question of personal liability, the 3rd Defendant's defence that he was merely an "implementer of policy" and acted under ministerial direction cannot exonerate him where the actions were manifestly illegal. The record shows that both the 3rd and 4th Defendants facilitated or

authorized the allocation of land forming part of Karura Forest and land reserved for Kenya Technical Trainers College (KTTC) — parcels that were not "unalienated government land" within the meaning of Section 2 of the repealed Government Lands Act.

157. By purporting to alienate land that was constitutionally protected and reserved for public use, they acted ultra vires, and their actions cannot be shielded by Section 59 of Cap. 2. The acts were neither bona fide nor within statutory authority, and therefore the protective clause does not apply.

158. The Court finds persuasive the reasoning in Mureithi & 2 others v Attorney General & 4 others [2006] eKLR, where Nyamu J. held:

> " It is no defence for a public officer to say that he was acting under orders when those orders were patently unlawful. The doctrine of public interest and accountability requires that such officers be held personally liable for acts of illegality committed under their watch."

159. Furthermore, the argument by the 4th Defendant that he had retired by the time the final letters of allotment were issued does not absolve him. The 'chain' of illegality was set in motion during his tenure, and the subsequent acts were a direct continuation of the irregular processes he initiated.

160. The 4th Defendant's reliance on vicarious liability is similarly misplaced. The doctrine of vicarious liability operates to extend liability to the employer, not to absolve the servant. The Government may indeed be vicariously liable for wrongful acts of its officers, but where the acts were beyond the scope of employment or tainted with fraud, the officer is personally answerable.

161. This principle was captured in Onesmus Kinyua Muchudu v Mishi Kambi Charo & another [2016] eKLR, where the Court cited Joel v Morison (1834) 172 ER 1338, holding that:

> " If the servant was on his master's business, the master is answerable; but if he was on a frolic of his own, the master is not liable."

In this case, the alienation of forest land and land reserved for public use could not, by any stretch, constitute the "business of Government."

162. The Court finds and holds that the 3rd and 4th Defendants, in their capacities as Commissioners of Lands, acted ultra vires, illegally, and without lawful authority. Their actions were in clear contravention of the Government Lands Act (Cap. 280) and the Forest Act (Cap. 385) (both repealed), and are not protected under Section 59 of the *Interpretation and General Provisions Act* (Cap. 2). They may be held personally liable.

163. The plea of limitation of actions is untenable, the suit having been properly filed within time under Section 26 of the *Limitation of Actions Act* (Cap. 22), once the fraud was discovered. Consequently, the Court finds the 3rd and 4th Defendants personally liable for the unlawful alienation and the resultant loss of public land, and their conduct cannot be shielded under the guise of official duty.

I. Whether the Plaintiff is Entitled to the Reliefs Sought, including Cancellation of Title, Recovery of Land, and General Damages

164. The final issue for determination is whether, having found that the allocation and acquisition of the suit property, Nairobi Block 91/386, was unlawful and fraudulent, the Plaintiff is entitled to the reliefs sought — namely, (a) cancellation of the title issued to the 1st Defendant, (b) reversion of the property to the Government for public use, and (c) award of general damages for fraud and illegal alienation of public land.

165. The determination of these issues is guided by statute and case law governing cancellation of titles, recovery of illegally acquired public land, and the award of damages in such circumstances.

166. Under the repealed Registered *Land Act* (Cap. 300), Section 143(1) provided:

> "Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made, or omitted by fraud or mistake."

167. The current law, Section 80(1) of the *Land Registration Act*, No. 3 of 2012, similarly provides:

> "Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made, or omitted by fraud or mistake."

168. However, both statutes contain the important qualification in subsection (2) that the rights of a bona fide purchaser for value without notice shall not be affected. Section 80(2) of the *Land Registration Act* provides:

> "The register shall not be rectified to affect the title of a proprietor who is in possession and acquired the land, lease, or charge for valuable consideration, unless the proprietor had knowledge of the omission, fraud, or mistake, or substantially contributed to it by any act, neglect, or default."

169. The underlying principle was clearly articulated in Arthi Highway Developers Limited v West End Butchery Limited & 6 others [2015] eKLR, where the Court of Appeal held:

> "It is our finding that the acquisition of the suit property by the appellant was illegal and fraudulent. It therefore follows that the appellant cannot benefit from the doctrine of indefeasibility of title. No one can transfer a better title than he himself possesses."

170. The Court of Appeal in Munyu Maina v Hiram Gathiha Maina [2013] eKLR, stated:

> "When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument that is challenged and the registered proprietor must go beyond the instrument to demonstrate the legality of how he acquired the title and show that the acquisition was legal, formal, and free from any encumbrance."

Similarly, in Funzi Island Development Ltd & 2 others v County Council of Kwale & 2 others [2014] eKLR, the Court of Appeal held that:

> "Any title that results from an unlawful allocation of public land is a nullity. The doctrine of indefeasibility of title does not apply to titles acquired through fraud, corruption, or illegality."

Thus, where a title is tainted with illegality, fraud, or violation of statute, the court has both the jurisdiction and duty to order its cancellation.

171. The jurisprudence on this issue is well settled. In Kenya Anti-Corruption Commission v Online Enterprises Ltd & 4 others [2019] eKLR, Mativo J. (as he then was) held:

> " Public property that has been unlawfully acquired or irregularly alienated cannot be protected by the shield of title. Courts are enjoined by Article 40(6) of *the Constitution* to deny protection to such acquisitions."

Article 40(6) of *the Constitution* provides verbatim:

> " The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."

172. With respect to general damages, courts have held that such damages are not ordinarily awardable since the primary remedy is restoration rather than compensation. However, damages may be awarded against individual defendants personally, where fraud, malice, or bad faith is proved. In Kenya Anti-Corruption Commission v Stanley Mombo Amuti [2017] eKLR, the Court held:

> " Public officers who abuse their positions to facilitate loss of public assets are personally liable to make good the loss, and the court may impose civil recovery orders against them."

173. Applying the foregoing principles to the instant matter, this Honourable Court has already found that the allocation and alienation of the suit property, Nairobi Block 91/386, was illegal, fraudulent, and ultra vires. The property was excised from Karura Forest and land reserved for KTTC, both being public lands that could not lawfully be allocated under Section 3 of the repealed Government Lands Act.

174. The 1st Defendant's title, therefore, though registered, is void ab initio, as its root is tainted with illegality. The Court reiterates the principle stated in Arthi Highway Developers Ltd (supra) that no one can confer a better title than they lawfully possess. The doctrine of nemo dat quod non habet applies squarely.

175. The argument by the 1st Defendant that it was an innocent purchaser for value cannot avail in view of Article 40(6) of *the Constitution*, which expressly excludes protection for unlawfully acquired property. The Court already stated that it is satisfied that the Plaintiff has discharged the evidential burden under Section 107 of the *Evidence Act* (Cap. 80), proving that the title was unlawfully acquired and thus liable to cancellation.

176. As for the 3rd and 4th Defendants, the Court has already found that their actions were ultra vires, contrary to statute, and lacking in good faith. They therefore cannot benefit from statutory protection under Section 59.

177. Regarding the claim for general damages, the Court is guided by Kenya Anti-Corruption Commission v Stanley Mombo Amuti (supra) and Attorney General v Halal Meat Products Ltd [2016] eKLR, where the Court of Appeal stated:

> " General damages cannot be awarded in addition to a decree for recovery of public land. The equitable remedy is restitution, not compensation."

178. Accordingly, the Court finds that the appropriate relief in this case is a declaration that the alienation to the 1st and 2nd defendants of the land comprised in Nairobi Block 91/130/333 and 386 was irregular fraudulent and illegal and consequently null and void, the rectification of the register, cancellation of

the title, and restitution of the land to the Government of Kenya, for reallocation to its rightful public use and of course an order of permanent injunction against the 1st Defendant and costs of the suit.

179. The court therefore enters judgement in favour of the Plaintiff in the following terms:

a. A declaration is hereby made that the alienation to the 1st and 2nd defendants of the land comprised in Nairobi Block 91/130/333 and 386 was irregular fraudulent and illegal and consequently null and void. Further, the certificate of lease issued to and held by the 1st Defendant in respect of Nairobi Block 91/386 was unlawfully and fraudulently obtained and is therefore null and void ab initio.

b. An order of rectification of the register by cancellation of the lease and certificate of lease and all entries on the land register for Nairobi Block 91/386 be and is hereby issued.

c. An order of permanent injunction be and is hereby issued against the 1st defendant, its agents, servants or assigns restraining them form leasing , transferring, charging, taking possession, or in any other manner howsoever from dealing with Nairobi Block 91/386 otherwise than by transfer or surrender to the Government of Kenya.

d. The claim for general damages is declined, the proper remedy being recovery and restitution of the land.

e. Costs of the suit are awarded to the Plaintiff against the 1st, 3rd, and 4th Defendants jointly and severally with interest thereon from the date of assessment until payment in full.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 23RD DAY OF OCTOBER 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kisaka h/b for Ms. Maina for the Plaintiff

Mr. Otieno h/b for Mr. Njoroge for the 1st Defendant

Mr. Charles Odino h/b for Mr. Kamaara for the 4th Defendant

N/A by the 2nd and 3rd Defendants

Court Assistant: Mpoye