



REPUBLIC OF KENYA



**Ethics & Anti-corruption Commission v Gacanja & 2 others (Environment and Land Case 127 of 2019) [2026] KEELC 272 (KLR) (26 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 272 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CASE 127 OF 2019  
NA MATHEKA, J  
JANUARY 26, 2026**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**WILSON GACANJA ..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH MUTUKU MUIA ..... 2<sup>ND</sup> DEFENDANT**

**FAMILY BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff avers that pursuant to its mandate investigated allegations that L.R No. 909/536 set aside for Public Utility for Government housing was illegally and/or irregularly subdivided and part of it alienated to third parties. That investigations indicate that the land was allocated to Rameshchandra Nathoo Shah on 22<sup>nd</sup> January 1968 by the Town Council of Masaku (then known as ‘Masaku Urban Council’), for a term of 33 years from 1<sup>st</sup> January 1968 pursuant to approval granted by the Commissioner of Lands on 4<sup>th</sup> May, 1967. Subsequently, the Land and nine other plots were allocated to the Ministry of Health for institutional housing. The parcels of land were thereby set aside for public Utility.
2. The Town council of Masaku on 2<sup>nd</sup> October 1975 through Commissioner of Lands gave alternative plots to the persons whose plots were reallocated to the Ministry of Health. Rameshchandra Nathoo Shah was given an alternative plot, namely, LR. NO. 909/701 after surrendering the land.
3. That upon acquiring the land, the Government developed a house registered at the Ministry of Housing as Mach/House/ HG.14. The house is presently classified as a ‘pool house’ which means that it can be rented to any public officer and it houses the Sub-County Police Commander (formerly known as, Officer Commanding Police Division (OCPD)).



4. Sometimes in 1993, letters of allotment were issued in respect of the part comprising the compound of the Government House referred to in the purported Part Development Plan (PDP) as plot number 3 and 4 in favour of Peter M. Ndunda (deceased) and Mutua Kilaka respectively. With respect to the letter of allotment in favour of Peter Ndunda, the same is dated 21<sup>st</sup> December, 1993 and required the allottee to accept the offer and make payments for stand premium, conveyancing and related charges totaling 18,040 within 30 days from the date of the letter failing which the offer shall lapse. The offer was accepted and requisite payments made on or about 23<sup>rd</sup> August 1994 long after the offer had lapsed for which reason the Plaintiff contends that there was nothing to accept and as such anything done pursuant thereto was null and void and incapable of conferring any interest or title.
5. The Plaintiff avers Peter M. Ndunda was the Mayor of Masaku Town Council and a member of Machakos Plot Allocation Committee and as such the acquisition of plot number 3 was in conflict of interest and abuse of his official power. The said Peter Ndunda subsequently purportedly transferred his interest in the letter allotment to the 2<sup>nd</sup> Defendant, who is his son, in 1995.
6. The Plaintiff contends that property to land accrues only upon issuance of letter of allotment, compliance with the terms thereof and payment of amounts due within 30 days of the letter and actual issuance of grant or lease. Given that Peter Ndunda had not acquired any title to the suit property, the Plaintiff maintains that there was nothing to transfer to the 2<sup>nd</sup> Defendant and the purported transfer was null and void ab initio.
7. That despite lack of legal authority and despite the fact that the land was reserved for public utility and therefore not available for alienation, 1<sup>st</sup> Defendant purported to grant a lease of Land Parcel Number Machakos Municipality Block 1/623 to the 2<sup>nd</sup> Defendant for a term of 99 years with effect from 1<sup>st</sup> November 1993. As a result, the land (L.R No. 909/536) was subdivided into 3 parcels, to wit; Land Parcel Number Machakos Municipality Block 1/622 approximately 0.3987 ha (Where the government house was constructed); Land Parcel Number Machakos Municipality Block 1/623 approximately 0.1602 ha (the suit property) (part of the compound of the Government house) and Land Parcel Number Machakos Municipality Block 1/624 approximately 0.1600 ha (part of the compound of the Government house).
8. That investigations by the Plaintiff have revealed that the Part Development Plan that purported to subdivide the land into the aforementioned three parcels of land and attached to the Letter of allotment to Peter Ndunda was not approved and does not exist in the records of the office of Physical Planning. The 1<sup>st</sup> Defendant charged the suit property to the 3<sup>rd</sup> Defendant on 23<sup>rd</sup> March 2018 to secure a loan of Kenya shillings Eight Million. (Kshs. 8,000,000) and commenced construction. Mutua Kilaka who was allotted plot 3 being Block 1/624 surrendered the parcel of land acknowledging that it is part of the land set aside for public utility as Government Housing.
9. The Plaintiff states that the suit property, having been alienated for public Utility, was not available for allocation and the purported alienation of the suit property by the 1<sup>st</sup> Defendant was illegal, fraudulent and ultra vires the statutory powers and functions of the 2<sup>nd</sup> Defendant as the Commissioner of Lands and therefore null and void ab initio. The Plaintiff further contends that the charge registered against the suit property in favour of the 3<sup>rd</sup> Defendant is also illegal, fraudulent, null and void in the circumstances.
10. The Plaintiff seeks a declaration that the purported alienation of the suit property to the 2<sup>nd</sup> Defendant and consequent charging of the property to the 3<sup>rd</sup> Defendant is null and void and incapable of conferring any rights, interests or title. The Plaintiff further prays for an order of rectification of the register by the cancellation of all entries pursuant to the purported transfers, and restoration of the



suit property to the government. The Plaintiff further prays for an order of permanent injunction to restrain the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants from leasing, charging, transferring, trespassing upon or in any other manner dealing with the suit property, otherwise than by way of transfer to the council.

11. The Plaintiff prays for Judgment against the Defendants jointly and severally for:
  - i. A declaration that the land parcel number Machakos Municipality Block 1/623 originally part of LR. No. 909/536 was set aside and/or reserved for public utility for government housing and therefore not available for alienation.
  - ii. A declaration that the alienation of land parcel number Machakos Municipality Block 1/623 to the 2<sup>nd</sup> Defendant is null and void ab initio and incapable of conferring any rights, interests or title.
  - iii. A declaration that the creation of a charge over land parcel number Machakos Municipality Block 1/623 in favour of the 3<sup>rd</sup> Defendant is null and void ab initio and incapable of conferring any rights, interests or title.
  - iv. An order of rectification of the register by the cancellation of all entries pursuant to the purported transfer Machakos Block 1/623 and restoration Machakos Municipality Block 1/623 to the Government.
  - v. The registration of the 2<sup>nd</sup> Defendant as proprietor of Land parcel number Machakos Municipality Block 1/623 be and is hereby cancelled.
  - vi. The registration of the 3<sup>rd</sup> Defendant as chargee of land parcel number Machakos Municipality Block 1/623 be and is hereby cancelled.
  - vii. An order for a permanent injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to restrain them by themselves, their agents, servants, or assigns from trespassing upon, selling, transferring, leasing, developing, wasting and/or dealing in any other manner with Machakos Municipality Block 1/623.
  - viii. Machakos Municipality Block 1/623 be registered in the name of Cabinet Secretary to Treasury in terms of Section 56C (2) of the [\*Anti-Corruption and Economic Crimes Act\*](#).
  - ix. Costs of and incidental to this suit.
12. The 1<sup>st</sup> Defendant avers that he served in the position of Commissioner of Lands for a period of ten (10) years from the year 1989 to 1999 when he ceased to hold office. The 1<sup>st</sup> Defendant without prejudice to the foregoing avers that, during his tenure as Commissioner of Lands (between 1989-1999), he duly discharged his duties strictly in accordance with the then Government Lands Act, Cap 280 (Repealed) and by dint of the provisions of Section 8 of the said Act, the present proceedings instituted against him in his personal capacity more than twenty (20) years after he ceased to hold that office, are discriminative, misconceived, scandalous, frivolous, vexatious and amounts to an abuse of the judicial process. The 1<sup>st</sup> Defendant further avers that the present proceedings brought against him in his personal capacity more than twenty years after he ceased to hold office are in contravention of the clear provisions of Articles 25, 27, 47 and 50 of [\*the Constitution\*](#) of Kenya, 2010 and by dint of the provisions of Article 2(4) of [\*the Constitution\*](#) the same are a nullity ab initio and should be struck out.
13. The 1<sup>st</sup> Defendant further and without prejudice avers that he was never privy to the alleged alienation of the parcel of Land L.R. No. 909/536 and did not execute any document to that effect either as alleged. That further and without prejudice to the foregoing, the 1<sup>st</sup> Defendant avers that in his official capacity as the Commissioner of Lands at the time, he never executed any Lease Certificate



or Documents relating to the Parcel of Land to wit Land Parcel No. Machakos Municipality Block 1/623 or purporting to transfer the same to the 2<sup>nd</sup> Defendant. . . . The 1<sup>st</sup> Defendant denies the allegations that the suit property was alienated for public utility and that he illegally, fraudulently and acted ultra vires of his statutory powers. The 1<sup>st</sup> Defendant avers that he was not privy to the purported alienation of the parcel of Land to wit Machakos municipality block 1/623 and that he never executed any document to that effect. The 1<sup>st</sup> Defendant denies that by purporting to allocate the suit property, the 1<sup>st</sup> Defendant was in breach of his fiduciary duties and denies the particulars of breach set out therein under paragraph 23(i) to (vi) each and in singular either as alleged. That 1<sup>st</sup> Defendant further and without prejudice to the foregoing avers that the alienation and/or allotment of Government Land was a result of several stages and processes undertaken, processed, vetted and approved by different cadre of officers in the then Ministry of Lands and that the 1<sup>st</sup> Defendant's role was to issue a Certificate of Lease based on recommendations of other officers. The allegations by the Plaintiff that he acted ultra vires, illegally and/or irregularly are therefore hollow and devoid of any factual basis and the Plaintiff is put into strict proof of any other allegations to the contrary. The 1<sup>st</sup> Defendant avers that the entire suit against him in his personal capacity is misconceived, and an abuse of the Plaintiff's powers under the provisions of the *Ethics and Anti-Corruption Commission Act*, 2011, as well as an abuse of this court's process and it ought to be struck out.

14. The 2<sup>nd</sup> Defendant stated that he is registered as the lessee of Land Reference number Machakos Municipality Block 1/623 with Municipal Council of Machakos (now County Government of Machakos) as the head lessor which still holds the reversionary interest in the lease. That there are no minutes and allotment/allocation letters to the said Ministry of Health neither are there the said minutes and surrender form/letter by the said Rameshchandra Nathoo Shah to government. That the Plaintiff has no Plans approved by the department of public works and housing for the construction of the alleged Mach/ House/HG.14. That Peter Ndunda was lawfully and legally allotted land which was available for allocation a clear reason demonstrated by the failure of the Plaintiff to sue him or his Estate. That 2<sup>nd</sup> Defendant states that after allotment of a Plot which is now registered as land reference number Machakos Municipality Block 1/623, the initial allottee complied with all the conditions set out in the allotment/offer and that is further cemented by the failure of the Plaintiff to produce any withdrawal and/or repudiation of allotment by the issuing authorities. The 2<sup>nd</sup> Defendant states that there was no conflict of interest and abuse of office and then District Commissioner was the chairman and the permanent and mandatory representative of the President and Commissioner Lands whereas the said Peter Ndunda was a member pursuant to him being a Mayor. The 2<sup>nd</sup> Defendants states that an offer was given to Peter Ndunda who, as admitted by the Plaintiff, paid all the requisite amounts and the same accepted by the government. He hastens to add that the Plaintiff has not produced any withdrawal and/or repudiation of allotment by the issuing authorities as required by law of Contract. As such, the land was available for transfer to the 2<sup>nd</sup> Defendant.
15. The 2<sup>nd</sup> Defendant states that the suit land was transferred to him by Peter Ndunda who had acquired it lawfully and legally. Subsequently, he was issued with a Certificate of lease. That the 2<sup>nd</sup> Defendant is a mere Lessee of the said parcel of land with Municipal Council of Machakos (now County Government of Machakos) being the lessor which still holds the reversionary interest in the lease yet it has not been sued. That the 2<sup>nd</sup> Defendant has been holding the title to the said suit land having acquired it lawfully and legally whereof the initial allottee was allotted the same by the President of the Republic of Kenya under the repealed Constitution of Kenya and proprietorship crystallized upon successful payment of the set fees. That the 2<sup>nd</sup> Defendant then applied for a loan from the 3<sup>rd</sup> Defendant to develop the same to the tune of Ksh 8,000,000/= but through malice and vendetta, the Plaintiff has been frustrating his attempts to complete construction through unnecessary Court cases.



16. The 2<sup>nd</sup> Defendant prays that the Plaintiff's suit be dismissed with costs to him and the counterclaim be allowed as against the Plaintiff in the following terms;
- a. A declaration that the Land Reference number Machakos Municipality Block 1/623 belongs to Municipal Council of Machakos (now County Government of Machakos) as the head lessor which still holds the reversionary interest in the lease with the 2<sup>nd</sup> Defendant being a lessee.
  - b. A declaration that the lease interest of 99 years in all that land known as Land Reference number Machakos Municipality Block 1/623 belongs to the 2<sup>nd</sup> Defendant, or
  - c. In the alternative to prayer "b" above, a mandatory Order do issue ordering the Plaintiff to compensate the 2<sup>nd</sup> Defendant for the said parcel of land in the sum of Kshs. 28,000,000/=.
  - d. A permanent injunction restraining the Plaintiff, its agents, servants, employees and/or any other person acting under its instructions from interfering with the 2<sup>nd</sup> Defendant's peaceful and lawful enjoyment of all that plot known as Land Reference number Machakos Municipality Block 1/623.
  - e. Special damages of Ksh. 2,712,318/= being the cost of the Loan facility occasioned by the Plaintiff's prevention of completion of the warehouse on time.
  - f. Mesne profit for loss of user assessed at Ksh. 2,712,318/=.
  - g. Cost of both the suit and counter-claim be awarded to 2<sup>nd</sup> Defendant as against Plaintiff
17. The 3<sup>rd</sup> Defendant states that it did not play any role whatsoever in the acquisition or registration of the 2<sup>nd</sup> Defendant or any other party as the owner of the property known as Machakos Municipality Block 1/623 and it does not issue titles to properties. The 3<sup>rd</sup> Defendant states that indeed on 23<sup>rd</sup> February, 2018, the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant executed a Letter of Offer to provide banking facilities to the 2<sup>nd</sup> Defendant in the sum of Kenya shillings eight million (Kshs. 8,000,000/=) which was to be secured by the legal charge for Kshs. 8,000,000/= over the 2<sup>nd</sup> Defendant's property known as Machakos Municipality Block 1/623. That it conducted the requisite due diligence prior to registering a charge over the property and all the official documentation indicated that the 2<sup>nd</sup> Defendant was the registered proprietor of the property. The suit property was valued by Liaison Valuers Limited who furnished a valuation report dated 28<sup>th</sup> March, 2018 giving the property a market value of Kenya shillings eighteen million and a forced sale value of Kenya shillings thirteen million five hundred thousand only. Prior to the registration of the security over the property, the 3<sup>rd</sup> Defendant carried out an official search and obtained a Certificate of Official Search for the property which search confirmed that the 2<sup>nd</sup> Defendant was the registered proprietor of the property. That on 17<sup>th</sup> April, 2018, a legal charge of Kenya shillings eight million was registered in the encumbrance section of the certificate of lease for the suit property.
18. The 2<sup>nd</sup> Defendant took out a Third Party notice dated 27<sup>th</sup> July 2023 against the County Government of Machakos. The 2<sup>nd</sup> Defendant sought the following orders against the Third Party;
1. A Mandatory order to issue ordering the Machakos County Government to compensate the 2<sup>nd</sup> Defendant in the sum of Kshs. 28,000,000.
  2. Special damages of Kshs. 2,712,318 being the cost of a loan facility occasioned by the prevention of the 2<sup>nd</sup> Defendant to complete the warehouse.
  3. Costs of this suit.



19. On the 29<sup>th</sup> October 2024, the court noted that on the 28<sup>th</sup> November 2023 the court granted the Third Party leave of thirty days to file and serve its defence including documents and witness statements. The Third Party despite proceeding to cross examine the Plaintiff's witness only filed their defence on 28<sup>th</sup> October 2024. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sought to have the defence struck off while the Plaintiff and the 1<sup>st</sup> Defendant left it to the court's discretion. The court struck off from the pleadings the defence of the Third Party having been filed out of time.
20. The Plaintiff submits that land parcel number L.R No. 909/536 was allocated to Rameshchandra Nathoo Shah on the 22<sup>nd</sup> January 1968 for a term of 33 years from 1<sup>st</sup> January 1968. That Machakos Plot Allocation Committee subsequently re allocated ten plots to the Ministry of Health amongst them parcel number L.R No. 909/536. The Town council of Masaku on 2<sup>nd</sup> October 1975 through Commissioner of Lands gave alternative plots to the persons whose plots were reallocated to the Ministry of Health. Rameshchandra Nathoo Shah was given an alternative plot, namely, LR. NO. 909/701 after surrendering the land parcel number L.R No. 909/536. Upon acquiring the land, the Government developed a house registered at the Ministry of Housing as Mach/House/HG.14. The house is presently classified as a 'pool house' which means that it can be rented to any public officer and it houses the Sub-County Police Commander.
21. Despite the foregoing, land parcel L.R No. 909/536 was illegally and irregularly was subdivided into 3 parcels, to wit; Land Parcel Number Machakos Municipality Block 1/622 approximately 0.3987 ha (Where the government house was constructed); Land Parcel Number Machakos Municipality Block 1/623 approximately 0.1602 ha (the suit property) (part of the compound of the Government house) and Land Parcel Number Machakos Municipality Block 1/624 approximately 0.1600 ha (part of the compound of the Government house)
22. Land Parcel Number Machakos Municipality Block 1/623 is now registered in the 2<sup>nd</sup> Defendant name for a term of 99 years with effect from 1<sup>st</sup> November 1993.
23. The 1<sup>st</sup> Defendant submitted that the suit against him is a violation of his rights guaranteed by Article 259 (c), 27, 47 and 50 and it ought to be struck out as it was instituted 16 years after he left office against him personally instead of the NLC which is currently in charge of all public land vide the [National Land Commission Act](#) No. 5 of 2012. That the process of alienation of land is a result of several stages and processes undertaken, vetted and approved by different officers in the then office of Commissioner of Lands. That the Commissioner of Lands issued the 2<sup>nd</sup> Defendant a grant on recommendations of the department of Physical Planning and Survey. That the officers who approved the various documents were not made parties to this suit and the Plaintiff selectively sued the 1<sup>st</sup> Defendant. That he cannot defend himself against the allegations as he only has access to evidence produced by the Plaintiff and not the documentary evidence in the custody of NLC and the Ministry of Lands. That the proceedings against him personally instead of the Attorney General are unprocedural null and void ab initio.
24. The 2<sup>nd</sup> Defendant submitted that he is the registered proprietor of the suit land Machakos Town Block 1/623. That the suit land was allocated to his father Peter Muia Ndunda as unsurveyed residential plot No. 3 Machakos. That his father acknowledged the allotment and paid the requisite fees which was acknowledged by the Land Commissioner and he produced the letters as exhibits. That the allotment was ratified by the defunct Masaku town Council in a meeting chaired by the District Commissioner and the minutes were produced as exhibit 16. That he holds a valid title and has been paying rates to the County Council of Machakos. That after occupation of the suit land for a number of years the 2<sup>nd</sup> Defendant applied for a loan from the 3<sup>rd</sup> Defendant to develop the property which was approved. That his development plans were approved by Machakos County Council. He then commenced





- construction on the suit land which was stopped by this court. That the suit property has never belonged to the Ministry of Housing under the National Government and if they now wish to acquire proprietary rights they should follow the procedure of compulsory acquisition.
25. The 3<sup>rd</sup> Defendant submitted that it was not involved in the process through which the 2<sup>nd</sup> Defendant acquired the certificate of title of the suit land. That its interest is limited to that of a charge. The 3<sup>rd</sup> Defendant is a holder of a duly registered legal charge over the suit property as security for the repayment of a loan advanced to the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Defendant filed the following documents to demonstrate the said charge over the said property; letter of offer dated 23<sup>rd</sup> February 2018; valuation report by Liaison Valuers Limited dated 28<sup>th</sup> March 2018, official search dated 17<sup>th</sup> April 2018 duly registered at the Machakos Land Registry and a copy of certificate of lease of the suit property. The 3<sup>rd</sup> Defendant submits that it carries out all the required due diligence over the charged property prior to charging it and at the date of registration the certificate of title was legally valid and there was no legal impediment to the registration of the charge.
26. The Third Party submitted that the land parcel number L.R. No. 909/536 having been allocated to the Ministry of Health for the institution staff housing and government house HG. 14 constructed on the land, it was duly reserved for public use and was not available for alienation to any private individual. That being public land it could not be lawfully be allocated, transferred., subdivided or converted for private use.
27. The court has considered the pleadings, evidence presented before it, submissions made as well as the authorities relied upon. The issues for determination are:
- a. Who is the lawful proprietor of the land parcel known as Machakos Municipality Block 1/623?
  - b. What orders should this court issue?
28. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows;
- “Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”
29. Section 26 (1) of the [Land Registration Act](#) states as follows;
- “The Certificate of Title issued by the Registrar upon registration ... 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... 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.”
30. Section 26 of the [Land Registration Act](#) which guarantees the concept of indefeasibility of title does not extend to any property that has been found to have been unlawfully acquired. The Court of Appeal



in Attorney General vs Torino Enterprises Limited (Civil Application 84 of 2012) (2022) KECA 78 (KLR) (4 February 2022) (Judgment) held that;

“We have considered the provisions of section 26 of the Land Registration Act (repealed) in light of the provisions of Article 40 of the Constitution which guarantees protection of right to property and it is our considered view that the concept of indefeasibility of title is subject to Article 40 (6) of the Constitution which states that: “The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.” Guided by the provisions of Article 40 (6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the suit land was unlawfully acquired. See Denis Noel Mukhulo & Another v. Elizabeth Murungari & Another [2018] eKLR.”

31. It is not in dispute that Land Reference number Machakos Municipality Block 1/623 the suit property is registered in the name of the 2<sup>nd</sup> Defendant as per the certificate of lease found in the Plaintiffs list of documents page 83 to 86.
32. PW1, Alfred Seroney an Investigator with the Plaintiff at the material time testified that the suit property was initially allocated to Rameshchadra Nathoo Shah on 22<sup>nd</sup> January 1968 by the Town Council of Masaku. Subsequently, the Land and nine other plots were allocated to the Ministry of Health for institutional housing. The parcels of land were thereby set aside for public Utility. The Town Council of Masaku on 2<sup>nd</sup> October 1975 through Commissioner of Lands gave alternative plots to the persons whose plots were reallocated to the Ministry of Health. Rameshchandra Nathoo Shah was given an alternative plot, namely, LR. NO. 909/701 after surrendering the land. The Government then developed a house registered at the Ministry of Housing as Mach/House/ HG.14. The house is presently classified as a ‘pool house’ which means that it can be rented to any public officer.
33. In 1993, letters of allotment were issued in respect of the part of the compound of the government house referred to a purported Part Development Plan (PDP) as plot number 3 and 4 in favour of Peter M. Ndunda (deceased) and Mutua Kilaka respectively. With respect to the letter of allotment in favour of Peter Ndunda, the same is dated 21<sup>st</sup> December, 1993 and required the allottee to accept the offer and make payments for stand premium, conveyancing and related charges totaling 18,040 within 30 days from the date of the letter failing which the offer shall lapse. The offer was accepted and requisite payments made on or about 23<sup>rd</sup> August 1994 long after the offer.
34. That investigations revealed that the Part Development Plan that purported to subdivide the land into the aforementioned three parcels of land and attached to the Letter of allotment to Peter Ndunda was not approved and does not exist in the records of the office of Physical Planning. The 2<sup>nd</sup> Defendant charged the suit property to the 3<sup>rd</sup> Defendant on 23<sup>rd</sup> March 2018 to secure a loan of Kenya shillings Eight Million. (Kshs. 8,000,000) and commenced construction. Mutua Kilaka who was allotted plot 3 being Block 1/624 surrendered the parcel of land acknowledging that it is part of the land set aside for public utility as Government Housing. The suit property, having been alienated for Public Utility, was not available for allocation and the purported alienation of the suit property by the 1<sup>st</sup> Defendant was illegal, fraudulent and ultra vires the statutory powers and functions of the 1<sup>st</sup> Defendant as the Commissioner of Lands and therefore null and void ab initio.
35. PW2 Julius Waweru Mwangi from the State Department of Housing and Urban Development testified that the Government developed a house registered at the Ministry of Housing as Mach/House/ HG.14. The house is presently classified as a ‘pool house’ which means that it can be rented to any public officer. He confirmed that the current tenant is the Sub-County Police Commander and he





pays rent directly to the State Department of Housing and Urban Development. He stated that the said house has not been deleted from the building register or the house inventory of the Department. That the land where the house is situated was illegally subdivided into three parcels No. 1/622, 1/623 and 1/624. PW3, Rameshchandra Nathoo Shah stated that he was given an alternative plot, namely, LR. NO. 909/701 after surrendering the suit land.

36. 1<sup>st</sup> and 3<sup>rd</sup> Defendants did not call any witnesses to testify. The 2<sup>nd</sup> Defendant Joseph Mutuku Muia stated that that he is registered as the lessee of Land Reference number Machakos Municipality Block 1/623 with Municipal Council of Machakos. That his father Peter Ndunda who was the Mayor at the material time, was lawfully and legally allotted land which was available for allocation. That after allotment of a Plot which is now registered as land reference number Machakos Municipality Block 1/623, the initial allottee, his father, complied with all the conditions set out in the allotment/offer. That his father transferred the suit land to him after purchase and he obtained the title. He later applied for then applied for a loan from the 3<sup>rd</sup> Defendant to develop the same to the tune of Ksh 8,000,000/= which was approved but has been unable to complete construction due to the Court cases.
37. In the alternative he seeks inter alia a mandatory order do issue ordering the Plaintiff to compensate the 2<sup>nd</sup> Defendant for the said parcel of land in the sum of Kshs. 28,000,000/= and Special damages of Kshs. 2,712,318/= being the cost of the Loan facility occasioned by the Plaintiff's prevention of completion of the warehouse on time.
38. Section 2 of the Government Land Act, Cap 286 Laws of Kenya (now repealed), defines un-alienated land as;
- “Un-alienated Government land” means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.”
39. Section 3 of the Physical Planning Act Cap 286 of the Laws of Kenya (now repealed) also defines un-alienated land in similar terms. The Section describes un-alienated Government Land as;
- “un-alienated Government land” means Government land which is not for the time being leased to any person, or in respect of which the Commissioner of Lands has not issued any letter of allotment or reservation.”
40. (Repealed), gave the power to make grants or dispositions in or over un-alienated Government land to the President. The act limited the delegation of the powers given to the President to the Commissioner on specified purposes only, being;
- “(a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;”
41. In the case of James Joram Nyaga & Another vs the Hon. Attorney General & Another (2007) eKLR, the court, in reference to Sections 3 and 7 of the Government Lands Act the court held that;
- “The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate un-alienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the



President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act, Cap 281 Laws of Kenya.”

42. I have perused the documentary evidence produced by both parties in great detail. The Plaintiff produced documentary evidence showing that the suit land was allocated to Rameshchandra Nathoo Shah on 22<sup>nd</sup> January 1968 by the Town Council of Masaku (then known as ‘Masaku Urban Council’), for a term of 33 years from 1<sup>st</sup> January 1968 pursuant to approval granted by the Commissioner of Lands on 4<sup>th</sup> May, 1967. I find that after surrender the Land and nine other plots were allocated to the Ministry of Health for institutional housing. The parcels of land were thereby set aside for public Utility. The Town Council of Masaku on 2<sup>nd</sup> October 1975 through Commissioner of Lands gave alternative plots to the persons whose plots were reallocated to the Ministry of Health. PW3 Rameshchandra Nathoo Shah confirmed that he was given an alternative plot, namely, LR. NO. 909/701 after surrendering the suit land. Correspondence of all the transactions of the original land LR. No. 909/536 Machakos Township were produced in the Plaintiffs list of documents page 1 to 25.
43. Evidence has been shown that the Government then developed a house registered at the Ministry of Housing as Mach/House/ HG.14 classified as a ‘pool house’. That the land where the house is situated was illegally subdivided into three parcels No. 1/622, 1/623 and 1/624 and in 1993, letters of allotment were issued in respect of the part of the compound of the Government House referred to in the purported Part Development Plan (PDP) as plot number 3 and 4 in favour of Peter M. Ndunda (deceased) and Mutua Kilaka respectively (Plaintiff’s list of documents page 26 to 38). The Part Development Plan that purported to subdivide the land into the aforementioned three parcels of land and attached to the Letter of allotment to Peter Ndunda was not approved and according to the Plaintiff does not exist in the records of the office of Physical Planning (Plaintiff’s list of documents page 75). It is in evidence that Mutua Kilaka surrendered back the plot allotted to him and Peter Ndunda transferred his plot to his son the 2<sup>nd</sup> Defendant. I find that the suit land which was later transferred to the 2<sup>nd</sup> Defendant by Peter Ndunda who was the Mayor at the material time, had acquired it unlawfully and illegally.
44. It is clear from the evidence adduced and exhibits produced before this Court that the Suit land and the house thereon was already alienated and formed part of Government land reserved for use by and to be held by the then Ministry of Health as a public utility and for a public purpose of housing the members of staff of the government. The plots were hived off the compound in which the house had been developed. I find that the suit property was public land with public property and therefore not available for allocation for private purposes. In the circumstances, I find that the alternative prayer by the 2<sup>nd</sup> Defendant on his counter claim of damages is not available. It follows then that any charge purported to have been placed on the suit land is null and void.
45. In the case of Lalitchandra Dugarshankar Padya & Another vs Saled Awale & Another, Mombasa HCCC No. 87 of 2001 the court held that;

“I am also satisfied and I find that at all material times the suit piece of land was to the knowledge of the Plaintiffs as it is clear from the letters EX 25 and 26, public land vested in the second Defendant (Kenya Railways) for its use as a marshaling yard. At no time did the second defendant surrender it to the Government. It was therefore by virtue of section 9 of the Government *Land Act*, not available for allocation by the Commissioner of Lands. Its allocation to the people who later transferred it to the Plaintiffs was therefore null and void.”



46. In the case of African line transport Co. Ltd vs the AG, Mombasa HCCC No. 276 of 2003 the court stated that;

“Finally, there is nothing on record to suggest that the site was ever surrendered back to the Government. Having been allotted to the NYS as a public utility, there was nothing left to be re-allocated to Mr. Omari and the subsequent grant to him was therefore irregular.”

47. In the case of H.H. DR. Syedna Mohammed Burhennuddin Saheb & Others vs Benja Properties Ltd, Nairobi HCCC NO. 73 of 2000, the court held as follows;

“In any event the letter of allotment purchased by the Defendant had expired, and was subject to a disclaimer. In any event, that letter was worthless because it purported to allot land under the Government *Land Act* that was not available for allotment.”

48. In the case of James Joram Nyaga & another vs The AG and Others, the court held as follows:

“We therefore hold that the suit land having been acquired for public purpose, that is construction of road, is held in trust of the public and could not have been allocated to the Applicants who are private individuals for their private use.”

49. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants argue that by virtue of Section 23 (1) of the Registration of Titles Act, Chapter 281 once a title is issued by Registrar to a purchaser upon a transfer the said title shall be taken by all courts to be conclusive evidence that the person named therein is the absolute and indefeasible owner and the said title shall not be subject to challenge except on the ground of fraud or error to which the registered proprietor is proved to be a party. I find that this is a clear case of fraud and land grabbing of public land and property. In the case of Kenya Guards Allied Workers Union vs Security Guards Services & 38 Others Nairobi HC Misc 1159 of 2003 the court stated as follows;

“How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title. Are the courts going to stay away and refuse to rise to the greater call of unraveling the indefeasibility by holding that such a title perhaps issued in order to grab a public plot such as a hospital by an individual violates the public or national interest and therefore a violation of *the constitution*. I venture to suggest that such titles ought to be nullified on this ground and thrown into the dustbins”.

50. In the case of Republic vs Minister for Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 (2006)1 KLR (E&L) 563 the court stated that;

“Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed...It is quite evident that should a constitutional challenge succeed either under the trust land provisions of *the Constitution* or under section 1 and 1A of *the Constitution* or under the doctrine of public trust a title would have to be nullified because *the Constitution* is supreme law and a party cannot plead the principle of indefeasibility which is a statutory concept. A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and spirit of section 1 and 1A of *the Constitution*.”



51. In the case of Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 (2006) 1 KLR 443 the court held that;

“Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual land rights supersede the communal land, catchments and forests? How for instance are the Courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of the indefeasibility of title? Are the Courts going to stay away and refuse to rise to the greater call of unravelling the indefeasibility by holding that such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates the public or national interest and therefore a violation of *the Constitution*. I venture to suggest that such titles ought to be nullified on this ground and, thrown into the dustbins.”.....In my view there could be other constitutional challenges to reckless and unaccountable alienation of public land and other public resources based on the principle or concept of what is necessary in a democratic society. Sections 1 and 1A of *the Constitution* captures the vision of a democratic society. Take for example the human rights jurisprudence, one of the permissible limitations to the fundamental rights is what is necessary in “a democratic society.” This phrase also appears in most of the fundamental rights and freedoms provisions in chapter 5. These words have received almost internationally accepted meaning in so far as the human rights area is concerned. To my mind, section 1 and 1A are wider and cover the concepts of good governance accountability and transparency...A democratic society holds public land and resources in trust for the needs of that society. Alienation of land that defeats the public interest goes against the letter and the spirit of s 1 and s 1A of *the Constitution* in my view...The doctrine of public trust as defined above is certainly a ready enemy of alienation of natural resources and land grabbing now and in the future and should serve as a perpetual protection to public land, forests, wetlands, riparian rights, riverbeds and “kayas” just to name a few. The doctrine shall constitute the cutting edge of any actual or threatened allocation of public resources including public land.”

52. In the case of Chemei Investments Limited vs The Attorney General & Others Nairobi Petition No. 94 of 2005 the court stated that;

“*The Constitution* protects a higher value, that of integrity and the rule of law. These values cannot be side stepped by imposing legal blinders based on indefeasibility. I therefore adopt the sentiments of the court in the case of Milan Kumar Shah & 2 Others vs. City Council of Nairobi & Another (supra) where the Court stated as follows, “We hold that the registration of title to land is absolute and indefeasible to the extent, firstly, that the creation of such title was in accordance with the applicable law and secondly, where it is demonstrated to a degree higher than the balance of probability that such registration was procured through persons or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest.”

53. The 1<sup>st</sup> Defendant avers that the present proceedings brought against him in his personal capacity more than twenty years after he ceased to hold office are in contravention of the clear provisions of Articles 25, 27, 47 and 50 of *the Constitution* of Kenya, 2010 and by dint of the provisions of Article 2(4) of *the Constitution* the same are a nullity ab initio and should be struck out. That he should not be held personally liable.



54. The issue of the Commissioner of Lands being capable of being sued in his/her personal capacity was settled in the case of Ethics and Anti-Corruption Commission vs Judith Marilyn Okungu & another, Court of Appeal at Nairobi, Civil Appeal No 183 of 2014 (2017) eKLR. In that matter, the Court of Appeal found that the person who held the office of Commissioner of Lands could be sued in his personal capacity. I am not aware of a contrary decision from the same court or the Supreme Court. However, in this suit, the Plaintiff did not seek any specific orders against the 1<sup>st</sup> Defendant, and save for costs, there is really no order that I need to make against the 1<sup>st</sup> Defendant.
55. In a nutshell, I find that the 2<sup>nd</sup> Defendant un-procedurally obtained title to the suit property as the same had been alienated as public land and is not available for conversion to private land. I find that the 2<sup>nd</sup> Defendant has failed to prove his counter claim on a balance of probabilities and it is dismissed with costs. I find the Plaintiff has proved their case on a balance of probabilities and I grant the following orders;
1. A declaration that the land parcel number Machakos Municipality Block 1/623 originally part of LR. No. 909/536 was set aside and/or reserved for public utility for government housing and therefore not available for alienation.
  2. A declaration that the alienation of land parcel number Machakos Municipality Block 1/623 to the 2<sup>nd</sup> Defendant is null and void ab initio and incapable of conferring any rights, interests or title.
  3. A declaration that the creation of a charge over land parcel number Machakos Municipality Block 1/623 in favour of the 3<sup>rd</sup> Defendant is null and void ab initio and incapable of conferring any rights, interests or title.
  4. An order of rectification of the register by the cancellation of all entries pursuant to the purported transfer Machakos Block 1/623 and restoration Machakos Municipality Block 1/623 to the Government.
  5. The registration of the 2<sup>nd</sup> Defendant as proprietor of Land parcel number Machakos Municipality Block 1/623 be and is hereby cancelled.
  6. The registration of the 3<sup>rd</sup> Defendant as chargee of land parcel number Machakos Municipality Block 1/623 be and is hereby cancelled.
  7. An order for a permanent injunction against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to restrain them by themselves, their agents, servants, or assigns from trespassing upon, selling, transferring, leasing, developing, wasting and/or dealing in any other manner with Machakos Municipality Block 1/623.
  8. Machakos Municipality Block 1/623 be registered in the name of Cabinet Secretary to Treasury in terms of Section 56C (2) of the *Anti-Corruption and Economic Crimes Act*.
  9. Costs of this suit to be borne by the Defendants.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 26<sup>TH</sup> DAY OF JANUARY 2026.**

**N.A. MATHEKA**

**JUDGE**

