



REPUBLIC OF KENYA



Ethics and Anti Corruption Commission v Bangra Limited & another (Environment and Land Case 28 of 2019) [2026] KEELC 606 (KLR) (5 February 2026) (Judgment)

Neutral citation: [2026] KEELC 606 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE 28 OF 2019**

**YM ANGIMA, J
FEBRUARY 5, 2026**

BETWEEN

ETHICS AND ANTI CORRUPTION COMMISSION PLAINTIFF

AND

BANGRA LIMITED 1ST DEFENDANT

SAMMY MWAITA 2ND DEFENDANT

JUDGMENT

A. Plaintiff's claim

1. By a plaint dated 20.08.2007 the plaintiff sued the 1st and 2nd defendants seeking the following reliefs against them;
 - a. A declaration that the lease dated 27.01.2003 and registered on 27.02.2003 in favour of the 1st defendant over the parcel of land described as Mombasa Island/Block XI/937 was issued ultra vires the 2nd defendant's statutory powers and is thus illegal, null and void ab initio.
 - b. An order directed to the Land Registrar, Mombasa District Registry, to rectify the register by cancellation of the entries relating to the issuance of the lease dated 27.01.2003 and registered on 20.02.2003 in favour of the 1st defendant over the parcel of land described as Mombasa Island/Block XI/937.
 - c. As against the 1st defendant, an order for vacant possession of the parcel of land described as Mombasa Island/Block XI/937.
 - d. As against the 1st defendant, an order for a permanent injunction to restraining it, its agents, servants, employees and/or assigns from trespassing upon, transferring, leasing, wasting and/or dealing in any manner whatsoever described with parcel of land described as Mombasa Island/Block XI/937, other than by way of a surrender to the Government of Kenya.



- e. As against the 2nd defendant, general damages.
 - f. Costs of and incidental to this suit.
 - g. Interest at court rates on (e) and (f) above.
2. The plaintiff pleaded that at all material times Tom Mboya Avenue (formerly Tudor Road) was a public road abutting Mombasa Island Block XI. It was pleaded that it was an unclassified road which was vested in the defunct Municipal Council of Mombasa (the Council)
 3. The plaintiff pleaded that on or about 27.02.2003 the 2nd defendant who was then serving as the Commissioner of Lands issued a long term lease for a portion of the said road measuring 0.03ha to the 1st defendant in purported exercise of his powers under the Government Lands Act (now repealed) which was in force at the material time.
 4. It was the plaintiff's case that the said portion of land which was registered as Mombasa Island/Block XI/937 (the suit property) was not legally available for alienation and that the issuance of the lease to the 1st defendant was illegal and fraudulent. As a consequence, the plaintiff enumerated the following particulars of fraud and illegality against the defendants;
 - i. The 2nd Defendant alienated in favour of the 1st Defendant the suit property excised from a road reserve vested in the Council for the use and benefit of the public;
 - ii. The 2nd Defendant excised and alienated the suit property to the 1st Defendant without any or any legal authority;
 - iii. The 2nd Defendant alienated the suit property to the 1st Defendant in breach of the express provisions of the Government Lands Act, Cap. 280;
 - iv. The 2nd Defendant granted a Lease over the suit property to the 1st Defendant with knowledge that it was excised from a road reserve;
 - v. The 2nd Defendant alienated the suit property to the 1st Defendant for residential purposes, in contravention of the Government Lands Act, Cap. 280;
 - vi. The 2nd Defendant alienated the suit property to the 1st Defendant with knowledge that it was a road reserve, that had not been closed or altered or its use changed in accordance with applicable legal requirements;
 - vii. The 1st Defendant accepted allotment of the suit property, excised from a road reserve, with knowledge that it had not made any application for allotment of the same;
 - viii. The 1st Defendant accepted a lease over the suit property for residential purposes, with notice that the 2nd Defendant did not have any legal or other powers to grant the same;
 - ix. The 1st Defendant accepted allocation of the suit property, with notice that it was a road reserve that had not been closed or altered or its use changed in accordance with applicable legal requirements.
 5. The plaintiff further pleaded that the 2nd defendant knowingly alienated the suit property without statutory authority and thus his conduct constituted misfeasance in public office. The plaintiff enumerated the following particulars of misfeasance in paragraph 9 of the plaint;
 - a. With malice and knowledge of want of authority, purporting to excise and alienate a portion of a road reserve;



- b. With malice and knowledge of want of authority, purporting to act in the name of the President of Kenya;
- c. With malice and knowledge of illegality of his actions, wilfully failing to comply with and/or ignoring the provisions of the Government Lands Act, Registration of Titles Act, the Local Government Act and other relevant statutes and regulations in the alienation of the suit property;
- d. With malice, acting ultra vires his powers under the Government Lands Act;
- e. With malice, alienating the suit property to the 1st Defendant in breach of the express provisions of the Government Lands Act, Cap. 280;
- f. With malice, acting with reckless indifference to the illegality of his act, knowing it to be illegal;
- g. With knowledge that his acts will in the ordinary course directly cause loss of a portion of the road reserve (forming the suit property) to the Council, the public and the Republic of Kenya, alienating the suit property to the 1st Defendant;

B. 1st Defendant's defence

- 6. The 1st defendant filed a statement of defence dated 18.09.2007 denying liability for the plaintiff's claim. It was pleaded that the plaintiff had no legal capacity under the law to file suit for recovery of the suit property. It was contended that, in any event, the suit property was still registered in the name of the government of Kenya as lessor hence there was not loss of public property.
- 7. The 1st defendant denied that the suit property formed part of Tom Mboya Avenue or that it was illegally or fraudulently alienated. The 1st defendant pleaded that the lease for the suit property was issued to it by the government of Kenya and not the 1st defendant.
- 8. It was the 1st defendant's case that the government of Kenya had legal authority through the Commissioner of Lands to alienate the suit property which was unalienated at the material time. It was also pleaded that in any event, the 1st defendant was not obliged in law to find out whether the suit property was excised from a road reserve.
- 9. The 1st defendant pleaded that it obtained a good and indefeasible lease which was duly registered under the Registered *Land Act* (now repealed) which was then in force. It was the 1st defendant's contention that the plaintiff's suit was a violation of its constitutional right to own property. As a result, it prayed for dismissal of the plaintiff's suit with costs.

C. 2nd defendant's defence

- 10. The 2nd defendant filed a statement of defence dated 16.09.2007 denying liability for the plaintiff's claim. He pleaded that he was improperly joined in the suit; that the plaintiff had no locus stadi to file suit; and that at all material times he was acting in an official capacity as an agent of a disclosed principal hence the government of Kenya should be held vicariously liable for any torts he may have committed while in office.
- 11. The 2nd defendant denied that the suit property was part of a public road or that it was alienated fraudulently and illegally. It was pleaded that the lease to the 1st defendant was issued lawfully and in good faith and that the alienation was done on the recommendation of other government officers or offices.



12. It was the 2nd defendant's case that the suit against him was brought in bad faith and was actuated by malice. As a result, he prayed for dismissal of the plaintiff's suit with costs.

D. Plaintiff's rejoinder

13. The plaintiff filed a reply dated 27.09.2007 in reply to the 1st defendant's statement of defence. It joined issue with the 1st defendant on its defence and reiterated the contents of the plaint. The plaintiff reiterated that it had legal capacity to file the suit. It was denied that the government of Kenya was liable for the actions of the 2nd defendant.
14. The plaintiff also filed another reply dated 27.09.2007 in reply to the 2nd defendant's statement of defence. The plaintiff reiterated that it had legal capacity to file the suit and that the 2nd defendant was properly joined in the suit. It was denied that the 2nd defendant was acting as an agent of the government of Kenya at the material time because his actions were illegal and fraudulent.

E. Trial of the action.

15. At the trial hereof, the plaintiff called 4 witnesses in support of its claim for recovery of the suit property. Among the plaintiff's witness were a land surveyor, a roads engineer, a physical planner and an investigation officer.
16. The 1st defendant called one witness at the trial who was a director of the company. He adopted the contents of his witness statement dated 16.06.2023 as his evidence in chief. He denied that the suit property was part of a road or road reserve. However, the 2nd defendant did not tender any evidence at the trial.

F. Issues for determination

17. The court has noted that the parties did not file an agreed statement of issues for determination in this matter. As such, the court shall frame the issues for determination as stipulated under Order 15 rule 2 of the Civil Procedure Rules.
18. Under the said rule, the court may frame issues from any of the following;
- a. the allegations made in the pleadings.
 - b. the allegations made on oath by or on behalf of the parties.
 - c. The contents of documents produced by the parties.
19. The court has perused the pleadings, evidence and documents in this matter. The court is of the view that the following key issues arise for determination herein;
- a. Whether the suit property was part of a public road prior to its alienation.
 - b. Whether the alienation of the suit property to 1st defendant was unlawful and fraudulent.
 - c. Whether the 1st defendant was an innocent lessee for value without notice of any defect in title.
 - d. Whether the 2nd defendant is personally for actions taken during his tenure in office.
 - e. Whether the plaintiff is entitled to the reliefs sought in the suit.
 - f. Who shall bear costs of the suit.



G. Analysis and determination

Whether the suit property was part of a public road prior to its alienation

20. The court has considered the material and submissions on record on this issue. The plaintiff submitted that there was both oral and documentary evidence to demonstrate that the suit property was part and parcel of Tom Mboya Avenue prior to its alienation. The plaintiff referred to survey plans and the Registry Index Map (RIM) for Mombasa Island Block XI in support of its claim.
21. The 1st defendant, on its part, submitted that there was no credible or sufficient evidence on record to demonstrate the plaintiff's allegation. In particular, it was contended that there was no official instrument such as a legal notice, gazette notice or survey map establishing the road. It was contended that the mere act of using a given space by the public, without more, could not make it a public road. It was thus submitted that the plaintiff had failed to establish the existence of the said Tom Mboya Avenue as a public road.
22. The court has considered the evidence before the court holistically. In particular, the court has taken note of the RIM for Block XI which shows the existence of the road known as "Tudor Road". The court has also taken note of the survey plan F/R No.318/167 which was prepared by PW1 who was a licensed land surveyor. It is clear from the RIM that Tudor Road is clearly marked thereon with uniform width all through except where the suit property and 9 other plots were created by PW1. It is also clear that the RIM was amended on 17.06.1997 to introduce or superimpose the suit property for the first time on Tudor Road. That is evident from Item No. 69 of the Legend.
23. In its submissions the 1st defendant contended that the width of the said road was only 15M wide and not 30M as claimed by the plaintiff. It was the 1st defendant's contention that the said width of 15M was still intact on the ground and that it had never been interfered with. The 1st defendant relied on the evidence of PW2 who was a road engineer from the County Government of Mombasa.
24. The court has examined the evidence of PW2 in that regard. In his evidence in chief he stated that;

“.....The road was designed to be 100 feet wide with a carriageway of about 7M. There are about 10 plots which have been hived off the road. Yes, I can see parcel 936. The plot falls within the original 100 feet road reserve. It has occupied part of the frontage of the road. I am not aware of any road closure and court records still show that the road is 30M wide. We have no records to demonstrate a closure and allocation of the road. If a road has to be closed, the county government has to be consulted before any such closure. The plots along the road were first created in 1997.”
25. The 1st defendant submitted that the following answers by PW2 during cross-examination supported its case;

“.....The original condition of the road has never been altered. The width of 100ft for the road is contained in the survey plan and the RIM. The condition of the road as it existed prior to 1997 can be determined by looking at the legend of the RIM.....”
26. The court does not find any form of contradiction between PW2's evidence in chief and his evidence during cross-examination by the 1st defendant. His evidence was absolutely consistent all through and such evidence did not in any way support the 1st defendant's position on either the existence or the width of the road. His reference to 100feet is absolutely consistent with a width of 30M at the conversion rate of 3.3 feet per metre.



27. For the foregoing reasons. The court is satisfied on a balance of probabilities on the existence of Tom Mboya Avenue (formerly Tudor Road) as a public road. The court is further satisfied that the width of the road was at all material times 100 feet (about 30M) and that it was the creation of the suit property that reduced its width to a mere 15M.

Whether the alienation of the suit property to the 1st defendant was unlawful and fraudulent

28. The court has already found that the suit property was part of the Tom Mboya Avenue which is a public road within Mombasa Island. There was no evidence to demonstrate that due process was followed in closure of part of the road and that the residents of Tudor or Mombasa Island were consulted. In fact, the evidence of PW1 who conducted the survey of 1997 testified that there was resistance by the residents of Tudor to the survey being undertaken.
29. Be that as it may, the court is of the view that a public road or a reserve was not available for allocation for private purposes because it was not “unalienated” within the meaning of the Government Lands Act (now repealed) which was in force at the material time.
30. The court thus satisfied that since the suit property was not available for alienation for reasons given before the purported alienation by the 2nd defendant was unlawful and fraudulent. It is really strange, nay perplexing, that a public officer could alienate part of a fully tarmacked road which was being used by vehicular and human traffic.

Whether the 1st defendant was an innocent lessee for value without notice of defect in title

31. The 1st defendant pleaded and submitted that it was an innocent lessee who paid valuable consideration to the government of Kenya for the 99-year lease without notice of any defect in title. There was no credible evidence on record to demonstrate that the 1st defendant undertook any form of due diligence. There is no evidence to show that the 1st defendant conducted even the most basic search at the land registry or the government survey record. Tellingly, no certificate of official search was produced at the trial.
32. The court is of the view that if the 1st defendant had taken time to peruse the survey records such as the RIM it would easily discovered that Tudor Road was a public road and that it was 30 metres wide hence there was no opportunity for excision of a business cum residential plot from it. However, the 1st defendant’s attitude at the time is clearly demonstrated in paragraph 9(d) of its defence thus;
- “ At all material times, the 1st defendant did not know and was not obliged in law to find to find out whether the suit premises were excised from a road reserve as alleged.”
33. The legal consequences of an unlawful alienation of public land were considered by the Supreme Court of Kenya in *DINA Management Limited vs County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021 [2021] KESC 30 (KLR) (Constitutional and Human Rights) (21 April 2023) (Judgment). In the said case, it was held, inter alia, that;
- “ 110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.



111. Article 40 of *the Constitution* entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

34. The court is thus satisfied that the 1st defendant has no valid or legitimate defence to the plaintiff’s claim. The suit property was acquired through unlawful means hence it cannot enjoy constitutional protection under Article 40 of *the Constitution* of Kenya.

Whether the 2nd defendant is personally liable for actions taken during his tenure in office

35. It is evident from the plaintiff’s pleadings and submissions that it sued the 2nd defendant in his personal capacity for actions he undertook while in office as Commissioner of Lands. The plaintiff contended that he knowingly and maliciously acted unlawfully and fraudulently in alienating a public road which was in use at the material time. The plaintiff contended that the 2nd defendant was guilty of misfeasance or malfeasance in public office and enumerated several particulars thereof in paragraph 9 of the plaint.

36. The tort of misfeasance in public office was considered in the case of *Jones vs Swansea City Council* [1990] 1 WLR 51 at page 71 as follows;

“The essence of the tort, as I understand it, is that someone that is holding public office has misconducted himself by purporting to exercise powers which were conferred on him not for his personal advantage but for the benefit of the public or a section of the public, either with intent to injure another or in the knowledge that he was acting ultra vires”

37. The tort of misfeasance was later on considered by the House of Lords in *Three Rivers District Council & Others vs Governor and Company of the Bank of England (No. 3)* [2001] UKHL 16 (22 March 2001) where it was held, inter alia, that the tort lies where a defendant makes a decision with knowledge that it is unlawful or in excess of his powers and that is likely to cause harm or injury to individuals.

38. The court is unable to agree with the 2nd defendant’s submission that he was at all material times acting as an agent of (and on behalf) the government of Kenya hence it should be held vicariously liable. As the court has found, the 2nd defendant acted unlawfully and fraudulently in alienating part of a public road. The court thus far from satisfied that in doing so he was acting on behalf of the government or the people of Kenya. The government and the people of Kenya were not beneficiaries of his actions but rather victims of his egregious crime.

39. In the case of *Kenya Anti- Corruption Commission vs Bernsoft Limited & 2 Others (Environment & Land Case 168 of 2009)* [2023] KEELC 16159 (KLR) (16 February 2023) (Judgment) Hon. Justice L. L. Naikuni considered the issue of personal liability of a public officer for misfeasance in public office as follows;

“ 54. In the instant case, the Court holds that the 3rd Defendant acted contrary to his statutory duties. The 3rd Defendant was personally liable to the loss of the suit property belonging to the Government of Kenya which other Defendants were likely to suffer in the event that the Court ordered that the title deed issued



to the 1st Defendant was a nullity. It was for this reason that the Plaintiff had sued the 3rd Defendant in his personal capacity and not the office he held. I fully concur with the Counsel for the Plaintiff while supporting her case on this point cited the cases of:

“Rhyl Urban Amusement Limited (1959) ALLER 257 where the Court stated:-

“If therefore, the Minister does something which is an ultra vires act, it is not the act of the Minister at all”

40. In the said case Hon. Justice Naikuni found Silas Komen Mwaita who had been sued therein as the 2nd defendant liable for misfeasance in public office and awarded general damages of Kshs. 5,000,000/= against him. The court has also considered an earlier decision in the case of Kenya Anti-Corruption Commission vs Abel Sangonde Momanyi & Another [2021] KEELC 331 (KLR) in which the court also found the 2nd defendant liable for misfeasance in public office for allocating land reserved for a community development centre and awarded general damages of Kshs. 1,000,000/= against him.
41. The court is of the opinion that the tort of misfeasance in public office has been adequately proved against the 2nd defendant. He acted with impunity and with utmost disregard of public interest in purporting to alienate part of Tom Mboya Avenue which was a tarmacked and operational public road in Mombasa Island. The court is of the view that the 2nd defendant should pay the Kshs. 2,000,000/= as general damages for misfeasance in public office.

Whether the plaintiff is entitled to the reliefs sought in the suit

42. The court has found that the suit property formed part and parcel of a road reserve prior to its purported alienation. The court has also found and held that the alienation was both unlawful and fraudulent. The court has also found that the 1st defendant is not entitled to any protection on account of the doctrine of innocent purchaser or lessee for value without notice of defect in title. It would thus follow that the plaintiff is entitled to the reliefs sought in the suit in so far as they relate to recovery of the suit property and to the extent specified hereafter.

Who shall bear the costs of the suit

43. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd [1967] EA 287. The court finds no good reason why the successful party should not be awarded costs of the action. As such, the plaintiff shall be awarded costs of the suit.

H. Conclusion and disposal orders

44. The upshot of the foregoing is that the court finds and holds that the plaintiff has proved its claim against the defendants to the required standard. As a consequence, the court makes the following orders for the disposal of the suit;
 - a. A declaration is hereby made that the lease dated 27.01.2003 and registered on 27.02.2003 in favour of the 1st defendant over Mombasa Island/Block XI/937 is null and void.
 - b. An order be and is hereby made for the Land Registrar Mombasa to rectify the register by cancelling the 1st defendant’s said lease for Mombasa Island/Block XI/937 forthwith.



- c. An order be and is hereby made directing the 1st defendant to hand vacant possession of the property known as Mombasa Island/Block XI/937 to the plaintiff forthwith.
- d. The 2nd defendant shall pay the plaintiff general damages of Kshs. 2,000,000/= for misfeasance in public office.
- e. The 1st and 2nd defendants shall bear costs of the suit jointly and severally.

It is so decided.

JUDGMENT DATED AND SIGNED AT MOMBASA AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS ON THIS 5TH DAY OF FEBRUARY 2026 IN THE PRESENCE OF THE PARTIES AS INDICATED BELOW.

.....

Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Abdulrahim for plaintiff

Mr. Rutto for the 2nd defendant

No appearance for the 1st defendant

