

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT KAPSABET**

**ELCC NO. 135 OF 2021**

**ETHICS AND ANTI CORRUPTION  
COMMISSION.....PLAINTIFF**

**-VERSUS-**

**WILSON KIPLETING KOSACHEY.....1<sup>ST</sup>  
DEFENDANT**

**SAMSON KIPKEMBOI TOO.....2<sup>ND</sup>  
DEFENDANT**

**JUDITH MARILYN OKUNGU.....3<sup>RD</sup>  
DEFENDANT**

**DAVIS OMOLO ONONO.....4<sup>TH</sup>  
DEFENDANT**

**WYCLIFFE KWENDO OLONYI.....5<sup>TH</sup>  
DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. The instant dispute revolves on land parcel number NANDI/KAPSABET MUNICIPALITY/54 measuring approximately Zero Decimal Eleven Twenty-Four Hectares (0.1124 Ha) in area (The suit land herein) located within Kapsabet Municipality in Nandi County.
2. The plaintiff, a body corporate established under the Ethics and Anti-Corruption Commission Act No. 22 of 2011 (The EACC Act) to, inter alia, institute and conduct proceedings in court for purposes of the recovery or protection of public property, is represented by learned counsel Pius Nyoike.
3. The 1<sup>st</sup> defendant is represented by Rotuk and Company Advocates.
4. The 2<sup>nd</sup> defendant is represented by Cheruiyot Melly and Company Advocates but previously by Ms. Chelimo and Company Advocates.
5. The 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants are represented by Obura Mbeche and Company Advocates, Dr Linda Musumba and Company Advocates and Kipkosgei Choge and Company Advocates respectively.

6. Notably, my predecessor, Hon Justice M. N Mwanyale heard the testimonies of all the plaintiffs' witnesses as well as the defendants' witnesses before he proceeded on transfer. I took over this matter at the submissions stage.

## **B. THE GIST OF THE PLAINTIFF'S CASE**

7. By the plaint dated 8<sup>th</sup> October, 2021, the Plaintiff sued the defendants jointly and severally for;

- a) A declaration that the purported issuance of lease and registration of the suit land to the 1<sup>st</sup> Defendant and subsequent transfer to the 2<sup>nd</sup> Defendant is invalid, null and void to all intents and purposes for illegality and fraud and thus conferred no estate, interest or right on them.
- b) An order for vacant possession of the suit land against the 2<sup>nd</sup> Defendant.
- c) An order directing the Chief Land Registrar to cancel and expunge from the register the entry relating to the registration of the suit land in favour of the 1<sup>st</sup> Defendant and subsequent transfer to the 2<sup>nd</sup> Defendant.

- d) A permanent injunction restraining the 2<sup>nd</sup> Defendant by himself, his servants or agents from alienating, transferring, charging or in any other manner dealing with the suit land, otherwise than by way of transfer to the Government of Kenya.
- e) Mesne profits for loss of use from 22<sup>nd</sup> November 2004 to the date of surrender of vacant possession.
- f) General damages
- g) Costs of this suit
- h) Interest on (e) and (f) above at Court rates

8. The plaintiff's case is that in 1966, the suit land was zoned for a public institution namely Kenya National Trading Corporation (KNTC herein) for construction of a depot. That on 22<sup>nd</sup> November 2004, the suit land was dishonestly alienated by the collusion of the defendants and a certificate of lease issued to the 1<sup>st</sup> defendant who subsequently transferred the same to the 2<sup>nd</sup> defendant. Upon discovery of the said alleged fraudulent process, KNTC lodged a complaint with the plaintiff, investigation carried out and after completion of the same, this suit was instituted.

9. **PW1, Dr Philemon Kiptoo Bureti**, the County Executive Committee in charge of Lands, Environment, Natural Resources, Water and Climate Change, Nandi County, relied on his statement dated 27<sup>th</sup> September 2021 as part of his testimony. He stated that he discovered that fraud may have been committed in the process of registration of the suit land which had been set aside for KNTC for building of a depot based on the development plan 126/78 approved on 21<sup>st</sup> February 1981. On cross examination by Mr Mbeche learned counsel for the 3<sup>rd</sup> defendant, he stated in part, that titling of the suit land was done fraudulently and did not follow the requisite procedure.

10. **PW2, Barnabas Kiplimo Serem**, a Land Surveyor with the Ministry of Lands and Physical Planning, Nandi relied on his statement dated 28<sup>th</sup> September 2021 as part of his evidence. He told the court in part, that survey of the suit land was captured as LR No. 1181/234 Kapsabet Municipality and later, converted to the suit land as indicated in the Registry Index Map (RIM) appearing on survey plan marked as No. 132 in

the plaintiff's list of documents. That the new number is shown in RIM marked as BIO **(PExhibit 1)** and that there are no requests to survey the property for any other purpose.

11. **PW3, Veronicah Ndunge Musee**, a registered Physical Planner No. 171 with Physical Planners' Board working with Ministry of Lands, Housing, Public Works and Urban Development, a member of Kenya Institute of Planners, assistant Director and Coordinator North Rift Region pegged her evidence on her statement dated 29<sup>th</sup> January 2021. She testified in part, that Kapsabet Town Development plan number 126/65/1 was prepared in 1981. After she was recalled on 19<sup>th</sup> December 2022, she stated that the suit land was first planned in 1965 for workshop and residential use. That the plan was revised in 1981 by plan number R 126/17/1 Approval No. 21 which zoned it for KNTC depot and the plan is No. 4 in the supplementary list of documents (PExhibit 2). She therefore, stated that;

**“.....there has been no other replanning in respect of Kapsabet/Municipality/54.....”**

12. **PW4, Stephen Kalomit Yego** was stood down on 12<sup>th</sup> October 2022 as the report to be relied by him had not been filed herein. He thus, testified as PW10 hereinbelow.

13. **PW5, Solomon Mangira**, Chief Officer Lands, Environment and Natural Resources, Nandi County in his evidence relied on his statement dated 27<sup>th</sup> September 2021 giving brief history of the suit land including a letter dated 25<sup>th</sup> August 1980. That the Land Registrar would know the current status of the suit land. On cross examination, he told the court that there is neither letter of application for the suit land nor allotment letter thereof.

14. **PW6, Dr Francis Kipkemboi Sang**, the County Secretary Nandi County from 2017 to the time of adducing his evidence on 19<sup>th</sup> December 2022, relied on his statement dated 30<sup>th</sup> September 2021. He stated that it was the position of the County that the suit land

was set aside for KNTC. That a person had a lease to it (PExhibit 3) and that the suit land was irregularly allocated as it had been set aside for KNTC.

15. **PW7, Violet** Lamu Land Registrar from April 2019 to February 2021, relied on her statement dated 25<sup>th</sup> January 2021 and further statement dated 29<sup>th</sup> September 2021 as part of her testimony. She referred to an extract for 31<sup>st</sup> December 2008 (PExhibit 5) and stated that there were no documents for the suit land under the parcel file for it. She further referred on a copy of the lease dated 22<sup>nd</sup> November 2004 (PExhibit 8), a copy of green card (PExhibit 6) and white card (PExhibit 7).

16. PW8, was one **Isaiah Kiplagat Keter**, CEC in charge of inter alia, Administration and Public Service, Nandi County. He told the court that at the time of writing his statement dated 27<sup>th</sup> September 2021 which he relied upon as part of his testimony, he was Deputy Town Manager, Kapsabet Municipality. He produced in evidence, the manual register B45 (PExhibit 6) and

stated in part that there are no documents in regard to the suit land.

17. PW9, Matano Mbiti Ngati, County Coordinator National Land Commission, Nandi County relied on his statement dated 28<sup>th</sup> September 2021 as part of his evidence and stated that KNTC was legally allocated the suit land. That the allocation process was flawless done by the district plot allocation committee.

18. PW10, **Stephen Kalamit Yego**, a Document Forensic Examiner with the plaintiff pegged his evidence on his statement dated 14<sup>th</sup> December 2021. Further, he stated that he received exhibit memo form dated 7<sup>th</sup> June 2021 from Shadrack Mwenda (**PW13 Infra**) submitting lease document for the suit land, parcel registers (white and green cards thereof) as well as specimen signatures of the 3<sup>rd</sup> defendant, among other documents. That on examination of two sets of handwriting, he formed his opinion thereof and prepared a report containing the examination methodology and findings marked as B50 in the supplementary bundle of documents (PExhibit 10).

19. **Pancras Kariuki Muriuki**, Senior Principal Legal Officer, KNTC, referred to as PW10 in error (PW11 herein) relied to his statement dated 6<sup>th</sup> October 2021 as part of his testimony. He stated, inter alia, that the suit land had been allocated to KNTC and the same has not been disposed of. That documents were submitted to the plaintiff to investigate the matter.

20. **Judith Cherutich**, Land Registrar, Nandi County (PW12 herein) made reference to a copy of the lease in respect of the suit land (PExhibit 8). She stated that a letter and a map ordinarily accompany a lease. That the two documents are not in the parcel file. During cross examination, she stated;

**“....I realised that there were no other accompanying documents other than the lease.....”**

21. Another witness, **Shadrack K. Mwenda** (PW13 herein), an investigating officer of the plaintiff referred to his statement dated 8<sup>th</sup> October 2021 with the exception of paragraphs 9, 13 and 16 as part of his evidence. He stated that KNTC wrote a complaint to the

plaintiff to investigate on alleged alienation of the suit land to private entities. That he investigated and found out that in 1966, a Development Plan was revised superseding the initial plan and the suit land was zoned for KNTC for purpose of a depot. He obtained documents including minutes and parcel registers as well as subjected them to examination and a report produced. He relied upon statements and demand letters (PExhibit 12 (a) to (e)) as well as told the court that the issuance of lease to the 1<sup>st</sup> defendant was improper and unprocedural since the suit land based on the development plan, was already public land for purposes identified in the plan. That there was no documentation on change of user.

22. In the plaintiff's submissions dated 10th January 2025, description is given of the plaintiff and the KNTC, a State Corporation in the Ministry of Industry, Trade and Cooperatives which was incorporated in 1965. That in or about March 2018, the plaintiff received a complaint from KNTC That the suit land which had been set aside for construction of a trading depot, had been

irregularly alienated and registered in the name of private individuals. That the plaintiff commenced investigations which revealed that the suit land was not available for alienation hence, obtained interlocutory orders dated 8<sup>th</sup> October 2021 to preserve it. Counsel for the plaintiff identified issues for determination which include; whether the issuance and registration of the lease to the 1<sup>st</sup> defendant and its subsequent transfer to the 2<sup>nd</sup> defendant, was fraudulent.

23. It was the plaintiff's submission that the Government of Kenya through the County Government of Nandi is the lead lessor for the suit land and that no evidence was led by the 1<sup>st</sup> defendant on his allocation of the suit land by the said County Government. That the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants distanced themselves from the involvement in the alleged lease to the 1<sup>st</sup> defendant.

24. To fortify the submissions, the plaintiff's counsel cited **James Joram Nyaga & another -vs-The Attorney General & another (2007) eKLR**, which referred to **sections 5 and 7 of the Government Lands Act** that clearly limited the powers of the

Commissioner to execute leases or conveyances. That it was not enough that one waves a lease or a certificate thereof as held in **Kenya Anti-Corruption Commission -vs- Online Enterprises Limited & 4 others (2019) eKLR**. That courts have declined to recognize and protect title to land illegally or fraudulently obtained as held in **Chemey Investment Ltd -vs- Attorney General & 2 others (2018) eKLR**, **Munyu Maina-vs-Hiram Gathiha Maina (2013) eKLR**, **Flemish Investments Ltd-vs-Town Council of Mariakani (2016) eKLR** and **Arthi Highway Developers Limited -vs-West End Butchery Ltd & 6 others (2015) eKLR**. That the 1<sup>st</sup> defendant was not allocated the suit land which was set aside as a trading depot for KNTC hence, the same was not available for alienation to 1<sup>st</sup> defendant. That thus, judgment be entered for the plaintiff as sought in the plaint.

### **C. THE GIST OF THE DEFENDANTS' CASE**

25. By his statement of defence dated 10<sup>th</sup> June 2022, the 1<sup>st</sup> defendant refutes the plaintiff's allegations in

this suit and implores the court to dismiss the suit with costs. At paragraph 10 thereof, the 1<sup>st</sup> defendant has moved the court for the declaration that the transaction he entered into with the Government of Kenya was legitimate and that the suit land having been issued to him created a good title that would lawfully be transferred to a third party, among other things. At paragraphs 11 and 17 of the defence, he denies jurisdiction of the court to hear and determine the suit.

26. The 2<sup>nd</sup> defendant, denied the plaintiff's allegations by his statement of defence dated 29<sup>th</sup> November 2021. He termed himself an innocent purchaser for value without notice as he did due diligence that pointed to the 1<sup>st</sup> defendant's legal registration of the suit land. That the relevant authorities approved the subsequent transfer of the suit land to the 2<sup>nd</sup> defendant from the 1<sup>st</sup> defendant. Further, it was the 2<sup>nd</sup> defendant's contention that he was an honest and innocent purchaser of the suit land from the 1<sup>st</sup> defendant without any notice of defective title, if any and that he

was not privy to the transactions that lead to the acquisition of the 1<sup>st</sup> defendant's interests thereon.

27. In his statement of defence dated 2<sup>nd</sup> December 2021, the 3<sup>rd</sup> defendant through Obura Mbeche and Company Advocates, denied the plaintiff's claim and prays that it be dismissed with costs to her. She stated that she is a stranger to the particulars of fraud listed on the part of the 1<sup>st</sup> defendant, 2<sup>nd</sup> defendant and 5<sup>th</sup> defendant.

28. Initially, the 4<sup>th</sup> Defendant failed to file defence within the prescribed time. By the request for judgment dated 16<sup>th</sup> June 2022 under Order 10 Rule 10 of the Civil Procedure Rules 2010 by learned counsel for the plaintiff, interlocutory judgment was entered accordingly. Nonetheless, the interlocutory judgment was set aside on 11<sup>th</sup> October 2022 pursuant to the 4<sup>th</sup> defendant's application dated 6<sup>th</sup> October 2022. Therefore, his statement of defence dated 16<sup>th</sup> October 2021 is deemed properly filed.

29. In that regard, the 4<sup>th</sup> defendant denied the plaintiff's claim, and stated, inter alia, that sometimes in April

2021, an investigating officer from the office of the plaintiff showed him a copy of the lease purportedly bearing a signature that appeared like his and wanted to confirm whether it was his or not. That he wrote a statement and confirmed that the same was not his as it did not originate from a correspondence file at Ardhi house. That the entire plaint contains numerous misstatements calculated to mislead this court, untenable and that it be dismissed with costs.

30. By an 11-paragraphed statement of defence dated 2<sup>nd</sup> December 2021, the 5<sup>th</sup> defendant, denied the plaintiff's claim which he termed an abuse of the court process and ought to be dismissed with costs in his favour. He stated that he has never been privy to the circumstances leading to the allocation and registration of KNTC as the proprietor of the suit land or the registration of and transfer to the 1<sup>st</sup> defendant which only came to his attention after service of the pleadings in this suit. That from the register and white card that there were no reservation and or restriction that the suit land was committed Government land at the time

of alleged transfer by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant effected by the 5<sup>th</sup> defendant. That the register and the white card were not opened and or signed off by the 5<sup>th</sup> defendant.

31. In addition, the 5<sup>th</sup> defendant stated that the signature appearing as his in the register, is a clear forgery and unknown to him. That he is not and has never been in occupation, possession and or user of the suit land. That no declaratory prayer may attach as he is not the owner of the suit land and he has retired as a public officer hence, an injunction cannot obtain against him.

32. The 1<sup>st</sup> defendant, **Wilson Kipleting** (DW1) relied on his statement dated 23<sup>rd</sup> February 2022 as part of his evidence. He stated that whereas the suit land was formerly owned by the Government of Kenya, he made an application and was issued with an allotment letter and thereafter, a certificate of lease dated 22<sup>nd</sup> November 2004 (DExhibit 1) issued in his favour. That he took possession of it and fenced the same without any question. That he then sold the suit land to the 2<sup>nd</sup>

defendant to whom he handed over all the relevant documents.

33. DW2, **Judith Cherutich**, Land Registrar Nandi County testified pursuant to the summons dated 5<sup>th</sup> June 2024 making reference to the white card in regard to the suit land (DExhibit 2) and head lessor is the Government of Kenya and PExhibit 8/DExhibit 10 issued to DW1 on 22<sup>nd</sup> November 2004. That the first lessee was DW1 as per a lease certificate issued on 22<sup>nd</sup> November 20024 being entry number 2 of DExhibit 2. That a certificate of Lease was issued in the name of the 2<sup>nd</sup> defendant on 31<sup>st</sup> December 2008. That she was in charge of the Land Registry with many parcel files and some could miss from the strong room. That she had previously produced PExhibit 8 in the plaintiff's evidence. During cross examination, DW2 stated that the head lessor is the Government of Kenya and had not seen letter of allotment of the suit land to DW1. She could not tell who registered the transfer of the lease and that she did not have a parcel file in regard to the suit land.

34. DW3 was the 2<sup>nd</sup> defendant who adduced evidence by reliance on his statement dated 29<sup>th</sup> November 2021, among others. He told the court that he is the current registered owner of the suit land which he purchased from DW1 after he undertook searches dated 19<sup>th</sup> May 2008 and 31<sup>st</sup> December 2008 (DExhibits 3 and 4 respectively) and obtained the original lease dated 27<sup>th</sup> November 2004 (DExhibit 5), receipts for rates (DExhibit 6 a and b) and consent to transfer (DExhibit 6 (c) and application for consent (DExhibit 7, a letter dated 18<sup>th</sup> August 2011 to the Land Administration Officer (DExhibit 8), letter dated 12<sup>th</sup> August to the Town Clerk, Kapsabet Municipality ,registration fees payment receipt, an agreement for sale and an acknowledgment (DExhibits 7, 8, 9, 10, 11 and 12 respectively). That he was not aware of any transaction between DW1 and any other person.

35. The 3<sup>rd</sup> Defendant, **Okungu Marilyn Judith** (DW4), a retired Land Registrar, Chief Land Registrar, Deputy Commissioner of Lands, Commissioner of Lands and an

Advocate of the High Court of Kenya relied on his statement dated 22<sup>nd</sup> February 2022 as part of her testimony. She denied any collusion between the other officers and himself as alleged in the plaint. He stated that before any lease is signed, it goes through 13 stages including allotment letter, payment, conveyancing, typing confirmation and execution. That specialized people handled the 12 stages and the lease was forwarded to him as Commissioner from informed point. That his input as Commissioner was not required in preparation of the lease, the conditions and particulars thereof.

36. Under cross examination, DW4 stated that he did not know DW1, DW3 and 5<sup>th</sup> defendant but knew 4<sup>TH</sup> Defendant who was a Land registrar and worked with him for a long period at Head Quarters. That there was no collusion as alleged and he provided the detailed stages before lease is signed and that her input as Commissioner was not required in the preparation of the lease. That the lease in issue could have been

prepared elsewhere and he did not sign it as signature thereon is forged.

37. In his evidence, the 5<sup>th</sup> defendant, **Wycliffe Kwendo Olonyi**, a retired Assistant Land Registrar (DW5) stated that he worked in Kapsabet between 2006 and 2010 and that he did not know his co-defendants, the location and status of the suit land. He referred to DXehibit 2, green card and white card but stated that he neither prepared any documents for the parties nor opened the registers. On cross examination, told the court that there were three Land Registrar's at Kapsabet at the material period and that the other Registrars were Philip Sihuchi, Susan who was in charge. That he could not tell what happened with the registration of the suit land and whether the person who registered had the parcel file thereof. That the signature on the Document Examination Report (PExhibit 13) not his and that the same was forged several times. That DW1 did not sign the lease (DEXhibit 5) in the presence of the Registrar.

38. DW6, **Emmanuel Karisa Kenga**, a retired Commissioner of Police and Private Forensic Document

Examiner testified in part that further to a court order, he examined a lease dated 26<sup>th</sup> September 2024 marked as A and found no similarity on the questioned document as a lease marked A. That he then prepared the report dated 8<sup>th</sup> October 2024 (**PEXhibit 13**) being an opinion that upon examination and comparison of the questioned handwriting and signature on exhibit marked 'A2' with the specimen handwriting and signature on exhibits 'B3-B4' that the said handwriting and signature were written by a different authors. During cross examination, he stated that his findings confirm that the handwriting on the lease did not belong to DW4.

39. By the submissions dated 1<sup>st</sup> October 2025, learned counsel for the 1<sup>st</sup> defendant's set out the plaintiff's case including that the suit land belonged to the public and had been alienated to KNTC. That the process towards allotment and finally awarding of title to the 1<sup>st</sup> defendant, was tainted with fraud. That it was the 1<sup>st</sup> defendant's case that his acquisition of the suit land was open and beyond suspicion. That it became

apparent that KNTC had not made any application either for the allocation of the suit land through the Commissioner of Lands and or the District Allocation Committee.

40. Counsel identified four issues for determination inclusive of whether the 1<sup>st</sup> defendant passed on a good title regarding the suit land to the 2<sup>nd</sup> defendant were delineated in the submissions. In the analysis of the issues in favour of the 1<sup>st</sup> and 2<sup>nd</sup> defendants, reference was made to **section 26 of the Land Registration Act 2016 (2012), the case of Sehmi & another -vs- Tarabana Company Ltd & 5 others (2025) eKLR on the doctrine of innocent purchaser over part or the whole suit land , Kibos Distillers & 4 others-vs-Benson Ambuti Adega & 3 others (2020) eKLR, **section 23 of the Registration of Titles Act (Repealed)** on absolute ownership of leasehold interest as described in the certificate, **Articles 40 and 75 of the Constitution of Kenya 2010 (The Constitution herein), Republic-vs-Attorney General & 5 others Ex parte Kamlesh Pattini****

**(2013) eKLR** as regards the effects of laches. That the plaintiff's case has not been proved on a balance of probabilities thus, the same be dismissed with costs to the 1<sup>st</sup> defendant.

41. In the submissions dated 22<sup>nd</sup> July 2025, learned counsel for DW2 termed DW3 an innocent purchaser for value without notice as he did due diligence that pointed to the 1<sup>st</sup> defendant's legal registration of the suit land and that the authorities approved the transfer. Counsel referred to the parties' respective pleadings, the witnesses' evidence and identified three uncontested issues including that DW1 was the original registered owner of the suit land before it was transferred to DW3, the current registered owner who is in possession and occupation of the same. Counsel identified four issues relating to illegalities and or fraudulent acquisition of the suit land by the 1<sup>st</sup> defendant, that the 2<sup>nd</sup> defendant is a bona fide purchaser for value without notice of defective title, if any, the plaintiff's proof of the case on a balance of probabilities and the party to bear costs of the suit. It

was submitted that by sections 25 and 25 of the Land Registration Act (2016) (2012) alongside that the Lease Document was executed and attested by Commissioner of Land and Land Registrar respectively, there was no evidence led by the plaintiff to prove conspiracy to defraud or illegally obtain it as noted in **R.G Patel-vs-Lalji Makanji (1957) 314 and Ndolo-vs-Ndolo (2008) 1 KLR (G & F) 742.**

42. Also, counsel submitted that before the Constitution and 2012 amendments to the body of Land Laws in Kenya, disposition of Government land was governed by the Government Lands Act (Repealed) and referred to section 4 thereof on all conveyance, leases, licences of or for the occupation of Government Lands. That PW11 showed entries in the White Card establishing that he is the current registered owner and that DW3 produced DExhibits 11 and 12 being sale agreement and acknowledgment respectively. Reliance was made on Black's Law Dictionary 8<sup>th</sup> Edition in respect of 'bona fide purchaser' and its ingredients.

43. Further, counsel made reference to the decision in **Mistry Valji-vs-Janendra Raichand & 2 others (2016) KLR** as described in **Privy Council decision in Invergue Investments-vs-Hacketh (1995) 3 ALL ER 842 and Karanja Mbugua & another-vs-Marybin Holding Co. Ltd 92014) KLR, AG-vs-Halal Meat Products Ltd (2016) eKLR** that mesne profit must be strictly pleaded and actually proved which the plaintiff has not done in this suit. That the court cannot grant both mesne profits and damages where both are claimed as held in **Christine Nyanchama Oanda-vs-Catholic Diocese of Homa Bay Registered Trustees (2020) eKLR**. That costs follow every event and relied on **Republic-vs-Rosemary Wairimu Munene, Ex Parte Applicant-vs-Ihururu Dairy Farmers Cooperative Society Ltd Judicial Review Application No. 6 of 2014**. That therefore, the suit be disallowed for want of merit with each party to bear their own costs.

44. The 3<sup>rd</sup> defendant's counsel filed submissions dated 1<sup>st</sup> April 2025 making reference to the prayers in the

plaint, the 3<sup>rd</sup> defendant's statement of defence, the evidence including the expert report (DExhibit 13) produced by DW6. Reliance was made on the cases of **Dick Omondi Ndiewo T/A Ditch Engineering Service vs Cell Care Electronics (2005) eKLR and Jakto Transport Ltd vs Derek Hall 2005 E.W.C.A Civ 1327** on expert evidence and that Judges are at liberty to depart therefrom. Counsel framed three issues for determination inclusive of whether DW1 was allocated the suit land and whether the same was available for alienation to DW1 and subsequent transfer to DW3. That the evidence of DW6 supported by DExhibit 13 clearly absolved DW4 of any blame, association or active participation in the conveyance on the suit land as alleged by the plaintiff hence, the claim fails. That the plaintiff's case has not been proven on a balance of probabilities against DW4 hence, fails. Counsel the court to exercise discretion in the award of general damages and dismiss the plaintiff's claim against DW4 with costs to DW4 pursuant to the Supreme Court of Kenya decision in the case of **Jasbir**

**Singh Rai & others vs Tarlochan Rai & others**  
**(2014) eKLR.**

45. The 4<sup>th</sup> defendant did not testify and/or file submissions in this suit.

46. The 5<sup>th</sup> defendant's counsel filed submissions dated 15<sup>th</sup> January 2025 referring to the record and stating that there was no evidence led that DW5 was involved in fraudulent scheme as alleged. Counsel cited **Black's Law Dictionary** on the definition of fraud and that matters of fraud must be strictly and specifically pleaded as held in the cases of **John Kamunya & another vs John Nginyi Muchiri & 3 others (2015) eKLR, Vijay Morjaria-vs-Nansigh Madhusingh Darbar & another {2000} KECA 5 (KLR), Gladys Wanjiru Ngacha vs Treresia Chepsai & 4 others (2013) eKLR, among other authoritative pronouncements.** That this court has the discretionary power to award costs of the suit as held in the case of **Morgan Air Cargo Limited-vs-Everest Enterprises Limited (2014) eKLR and Halsbury's Laws of England.**

## **D. ISSUES FOR DETERMINATION**

47. **Order 15 of the Civil Procedure Rules 2010** on framing of issues and materials from which issues may be framed, is quite instructive. Moreover, it is trite law that the issues for determination in a suit generally arise out of either the pleadings or as framed by the parties for the court's determination; see **Galaxy Paints Company Ltd-vs-Falcon Guards Ltd. (1999)** **eKLR.**

48. The uncontested issues in this suit include that the DW1 got registered as the owner of the suit land before transferring the same to DW3 who is the current registered owner of the suit land. That DW3 is in actual possession, occupation and use of the suit land at the exclusion of KNTC on whose behalf the suit is instituted by the Plaintiff.

49. The plaintiff's proposed statement of agreed issues dated 23<sup>rd</sup> February 2022 inclusive of whether the suit land was originally Government land, whether the purported issuance of lease to the DW1 by DW4 and 4<sup>th</sup> defendant was fraudulent and ultra vires, whether the

lease issued to the DW1 was capable of passing a good title to DW3 and whether the plaintiff is entitled to the reliefs sought and judgment as prayed in the plaint.

50. In his submissions, learned counsel for DW3 proposed the following issues for determination by this Honourable Court;-

- a) Whether the acquisition of the suit land by DW3 was attended by illegalities and/or fraud, if so, was DW1 a party thereof?
- b) Whether DW3 is a bona fide purchaser for value without notice of defective title, if any.
- c) Whether the Plaintiff proved its case on a balance of probabilities to warrant the grant of the reliefs sought
- d) Who bears the costs of this suit?

51. Having considered the parties' respective pleadings, the evidence and the submissions inclusive of all the authoritative pronouncements cited therein, the issues for determination in this suit boil down to whether;

- a) This Honourable court has the jurisdiction to hear and determine the suit.

- b) Subject to issue (a) hereinabove, the suit land was public land.
- c) The plaintiff's claim against the defendants has been established to the requisite standards for grant of the orders sought at the foot of the plaint
- d) DW1 acquired and passed good title in respect of the suit land to DW3 who claims bona fide purchaser of the suit land and whether t
- e) The defendants deserve the prayers in their respective pleadings.

#### **E. DISCUSSION AND DISPOSAL: -**

52. On the first issue, DW1 objected to the jurisdiction of this court over this suit at paragraphs 11 and 17 of his statement of defence. At paragraph 9 of his statement of defence, DW3 reserved the right to raise a preliminary objection in this suit.

53. **The Black's Law Dictionary 12<sup>th</sup> Edition at page 980**, defines the term 'Jurisdiction' as follows;

*A court's power to decide a case or issue a decree.*

54. It is worth to note that the term 'Jurisdiction' would denote whether the adjudicatory body has the power to entertain the proceedings in issue; see **Benson Adega case** (supra)..

55. In the case of **Owners of the Motor Vessel 'Lillian S'-vs-Caltex Oil (Kenya) Ltd {1989} KECA 48 (KLR)**, the Court of Appeal emphatically stated;

**'A question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything. Without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.'**

56. Moreover, in the case of **Republic-vs- Karisa Chengo & 2 others {2017} KESC 15 (KLR)**, the Supreme Court of the Republic of Kenya held;

**‘.....Lack of jurisdiction thus renders a court’s decision void as opposed to it being merely voidable. When an act is void, it is a *nullity ab initio*.....’**

57. As the 1<sup>st</sup> defendant’s defence raised objection to the jurisdiction of this court to hear and dispose of the suit, I am guided by the case of **Mukisa Biscuits Manufacturing Co. Ltd-vs-West End Distributors Ltd {1969} E.A 696**, where **Law JA** observed;

**‘.....a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to jurisdiction of the court or a plea of limitation or a submission.....’**

58. Indeed, jurisdiction raised by DW1 is a pure point of law. Nonetheless, the same is blurred by factual details as discerned in the pleadings, evidence and submissions herein; see also **Oraro-vs-Mbaja (2005) eKLR 141.**

59. It is thus, my considered view that the present dispute pertains to title to the suit land. Therefore, this court has the jurisdiction over the suit pursuant to **Article 162 (2) (b) of the Constitution of Kenya 2010 and sections 4 and 13 of the Environment and Land Court 2015 (2011).** Nothing has been available by DW1 and DW3 herein to prove otherwise hence, the first issue is determined accordingly.

60. On the second issue, the plaintiff's standpoint is that the suit land had been reserved for KNTC to build a depot. On cross examination by Mr Kiprono learned counsel for DW3 concerning the suit land, PW1 maintained as follows;

**“.....so it was not available for allocation unless through public participation.....”**

61. Under cross examination by Mr Nyoike learned counsel for the plaintiff, DW1 stated;

**“.....I knew it was government land and that is why I applied for allocation. It belonged to the National Government.,,,,,,....**

**.....I was at one time a councillor for Siret-Mogobich ward. The ward was in County Council of Nandi. I did not effect a change of user.....”**

62. According to pleadings and submissions of DW3, the suit land was first of all Government of Kenya. During cross examination by Mr Nyoike learned counsel for the plaintiff, DW2 re-affirmed thus;

**“.....The head lessor is the Government of Kenya.....”**

63. It is worth to note that **Article 62 (1) of the Constitution** describes ‘Public land’ to include;

a) Land which at the effective date was unalienated government land as defined by an Act of Parliament.

- b) Land in respect of which no individual or community ownership can be established by any lawful process.
- c) Any land not classified as private or community land under the Constitution.
- d) Any other land declared to be public land by Act of Parliament. in force at the effective date, or enacted after the effective date

64. On that score, the suit land is public land under **Article 62 (2) (3) of the Constitution** which governs holding and vesting of public land. Moreover, **Article 62 (4) of the Constitution** reads;

*Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal or use*

65. Concerning the third issue, the evidence of PW1 was that the suit land had been reserved for construction of a public facility namely KNTC depot. He testified that titling of the suit land was done fraudulently and did not follow the required procedure. This testimony was fortified by PW6 and PW9 who stated that the suit land

was legally allocated for the construction of KNTC depot.

66. Further, PW 11 reinforced the testimonies of PW1, PW6 and PW9 by stating that the suit land had been allocated to KNTC and that the same has not been disposed of to third parties. PW13 stated that the suit land had been zoned for KNTC thus, affirmed the evidence of PW1, PW6, PW9 and PW11 on that aspect.

67. PW11 produced in evidence, PExhibit 8 in respect of the suit land which was transferred to DW3 by DW1 on 31<sup>st</sup> December 2008. Upon cross examination by Mbeche learned counsel for the 3<sup>rd</sup> defendant, PW1 stated that she only had PExhibit 8 being a photocopy of the lease regarding the suit land. During re-examination, she was stated that;

**“A photocopy of lease cannot be used to register the lease. Entry 3 and 4 are entered through transfer of lease and the same are supposed to be retained but the same were not in parcel file.....”**

68. The plaintiff alleged fraud against DW1 in the acquisition of the suit land by way of PExhibit 8. In **Black's Law Dictionary 10<sup>th</sup> Edition at page775**, the term 'Fraud' means;

**A knowing misrepresentation or knowing concealment of material fact made to induce another to act to his or her detriment.**

69. Similarly, the **Concise Oxford English Dictionary 12<sup>th</sup> Edition at 564** defines 'Fraud' thus;

*Wrongful or criminal deception intended to result in financial or personal gain; A person or thing intended to deceive.*

It is established law that any allegation of fraud must be distinctly pleaded and proved. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts; see **Vijay Morjaria-vs-Nansigh Madhusingh Darbar & another {2000} KECA 5 (KLR), Ndolo case (supra) and Kuria Kiarie & 2 others-vs-Sammy Magera {2018} KECA 467 (KLR).**

70. During cross examination, DW1 stated, inter alia, that he had no important documents namely a copy of application letter, an allotment letter duly signed, a receipt for payment for the survey, an allotment letter and a report from Nandi County Council pertaining to the suit land. That he was not aware of the district allocation committee minutes respecting it's allocation. That he did not know the whereabouts of the original lease and whether he signed it.

71. PW13 was emphatic that the issuance of lease to DW1 was unprocedural since the suit land was already public land for purposes identified and based upon the development plan. That there was no documentation on a change of user as affirmed by DW1.....In **Re Kisima Farm Ltd (1978) eKLR**, it was noted that land has to be used for the purpose for which it was acquired. That the use of land for any other purpose was illegal.

72. On cross examination, DW1 stated that he was not aware how DW1 acquired the suit land. That later, he learnt that DW1 had been a councillor in the area. That

he heavily relied on official search and that the suit land was vacant. That the lease was handed to him by DW1 and did not know the land registrar who signed it in 2004.

It must be noted that under cross examination by Nyoike learned counsel for the plaintiff, DW3 stated in part;

**“I was not aware how the 1<sup>st</sup> defendant acquired the suit property.....”**

73. Plainly, the plaintiff alleged fraud as distinctly pleaded at paragraph 12 of the plaint against the defendants and proven the same specifically against the 1<sup>st</sup> defendant only by the testimonies of PW1, PW6, PW9, PW11 and PW13 in consonant with **Kuria Kiarie, Morjaria and Ndolo cases** (supra). Thus, the allotment and subsequent award of title of the suit land to DW1, was tainted with fraud bearing in mind **sections 24, 25 and 26 Land Registration Act 2016 (2012)**.

74. As regards the fourth issue, DW1 testified that he applied for the suit land and was issued with certificate

of lease (D Exhibit 1) thereof. That he took possession of and paid requisite rates for it. That later, he sold the suit land which was Government land to DW3. That he handed over all the relevant documents to DW3 who raised the doctrine of 'bona fide purchaser for value' over the suit land.

75. In **Black's Law Dictionary 10<sup>th</sup> Edition at 1430**, the term **"bona fide purchaser'** means;

**"Some one who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."**

76. Further, this court is guided by the case of **Katende-vs-Haridar & Company Ltd (2008) 2 EA 173** applied in **Lawrence P. Mukiri Mungai, Attorney of Francis**

**Muroki Mwaura-vs-Attorney General & 4 others**

**(2017) KLR**, where the Court of Appeal in Uganda held;

**“.....It suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine,.....(he) must prove that;**

- a) He holds a certificate of title;**
- b) He purchased the property in good faith;**
- c) He had no knowledge of fraud;**
- d) He purchased for valuable consideration;**
- e) The vendors had apparent valid title;**
- f) He purchased without notice of any fraud;**
- g) He was not party to any fraud,”**

77. Furthermore, in the case of **Harcharan Singh Sehmi (supra)**, the Supreme Court of Kenya invalidated Tarabana’s title and reinstated the original lessees by terming the Bona fide purchaser doctrine thus;

**“It is a fundamental principle of the law of property in land that a purchaser of a legal estate for value without notice is an absolute, unqualified and unanswerable defence against the claims of any prior equitable owner or encumbrancer. The onus of proof however lies upon the person claiming to be a bona fide purchaser. Three main ingredients must be present for a claim to amount to a successful defence based on the doctrine. These are, innocence, purchase for value and without notice of a legal estate.”**

78. So, can the doctrine of bona fide purchaser for value protect a purchaser if the title in question stems from an illegal or fraudulent land allocation? The is in the negative. The Supreme Court of Kenya found in **Sehmi case** (supra) the 2009 allocation procedurally illegal, invalidated the 1<sup>st</sup> respondent’s title and that the appellant had a legitimate expectation of lease renewal. That the said doctrine cannot protect a purchaser of an

illegally or irregularly allocated title to public land. As I subscribe to the said finding, the doctrine cannot protect DW3 in the instant suit.

79. In examination in chief, DW1 told the court that he sold the suit land to DW3 but could not identify him in court. It must be remembered that DW1 confirmed that he had no crucial documents including a copy of application letter, an allotment letter duly signed, an acceptance letter, a receipt for payment for the survey and allotment letter from Nandi County Council. That he was not aware of, inter alia, the whereabouts of the original lease and whether he signed it. However, under cross examination by Kiprono for the 2<sup>nd</sup> defendant, DW1 stated that he gave the original lease to the 2<sup>nd</sup> defendant hence, his evidence was contradictory and not credible. Therefore, DW3 is not a bona fide purchaser as held in **Katende, Sehmi and Mukiri Mungai cases (supra)** in the instant circumstances.

80. The protection of right to property is founded upon **Article 40 of the Constitution and Sub Article 6** thereunder reads;

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

81. Moreover, it is settled law that when the origin of title is challenged, a registered owner cannot rely only on their deed, but must prove the legality of the initial acquisition; **see Dina Management Limited-vs-County Government of Mombasa & 3 others {2023} KESC 30 (KLR).**

82. I take into account sections 107 to 110 the Evidence Act (Cap 80 Laws of Kenya) herein. DW3 established most of the elements of the doctrine innocent purchaser for value as held in **Hardar case (supra)** but DW1 held an illegal title which will not lawfully pass to DW3 over the suit land which is public land as noted in **Shemi and Dina cases (supra).**

83. According to DW4, the evidence of DW6 who produced D Exhibit 13 exonerates her from the plaintiff's claim. Indeed, DW6 stated;

**‘.....According to my finding and confirm that the handwriting on the lease did not**

**belong to Judy.....There were so many differences in the signatures.....'**

84. DExhibit 13 is an expert opinion pursuant to sections 48 to 54 of the Evidence Act Chapter 80 Laws of Kenya. I apply the evidence of DW6 inclusive of DExhibit 13 against the plaintiff's evidence and I am of the considered opinion that it overweighs the latter.

85. It was the evidence of DW4 that the 4<sup>th</sup> defendant was one of her officers, However, no evidence was availed by the plaintiff to link him to the plaintiff's allegations being guided by the standard of proof on a balance of probabilities as stated in the case of **Karugi & another vs Kabiya & 3 others {1983} (KLR)**.

86. DW5 stated that he did not open the registers or prepare any documents for the parties relating to the suit land. That he did not sign (PExhibit 8 /DExhibit 5) and that the signature thereon is not his and same is forged. That at the material time, he was working with two other Land Registrars namely Philip Sihuchi and Susan. That the latter was in charge. That he reported incidents of such forgeries to the other registrars.

87. In the circumstances, it is my finding that DW5 was credible. So, his evidence displaces the plaintiff's claim against him.

88. It is therefore, my considered view that the Plaintiff's case has been proved to the requisite standards against the 1<sup>st</sup> and 2<sup>nd</sup> defendants who illegally obtained PExhibit 8/DExhibit 2 in respect of the suit land.

89. The declarations sought in the 1<sup>st</sup> defendant's statement of defence cannot hold as his claim is void ab initio, The same is hereby dismissed accordingly. The 2<sup>nd</sup> defendant's defence statement based on the doctrine of innocent purchase for value over public land substantially fails.

90. The plaintiff's claim against the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendants has not been proven to the requisite standards except their official capacities at the material time. However, the claim fails to hold against them as discussed above.

91. As regards the orders sought in the plaint, most of them are merited. For instance, since PExhibit 8/DExhibit 5 obtained illegally attracts cancellation of

registration of the suit land as provided for under section 80 of the Land Registration Act 2016 (2012) which reads;

**“ (1) 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.**

**(2) The register shall not be rectified to affect the title of a proprietor who is in possession and had acquired the land, lease or charge for valuation consideration, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”**

92. Pertaining to permanent injunctive relief, **under Section 13 (7) of the Environment and Land Court Act 2015 (2011)**, this court is empowered to grant

permanent preservation orders. The same include permanent injunctive orders sought in the plaint.

93. On 'Mesne Profits' relief, the term is defined under **section 2 of the Civil Procedure Act Chapter 21 Laws of Kenya** as follows;

**Mesne profits in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrong possession.**

94. This court subscribes to the decision of the Court of Appeal in the case of **Christine Nyanchama Oanda (supra)** where it was held that;

**“it is settled law that where a party claims for both mesne profits and damages for trespass, the Court can only grant one and not both. Mesne profits is defined as the profit of an estate received by a tenant in wrongful**

**possession between the dates when he entered the suit property and when he leaves (see Black Law Dictionary 9<sup>th</sup> edition). Mesne profits must be pleaded and proved.”**

95. Again, I subscribe to the decision in the case of **Rioki Co (1970) Ltd-vs-Kinuthia Njoroge {1977} KECA 12 (KLR)** where the Court of Appeal remarked;

**“.....It may well be that in a proper case mesne profits may be payable but I am not satisfied that this is such a case.....”**

96. Mesne profit, a form of compensation must be pleaded and proved as I endorse the decision in **Mistry** (supra) and **Nakuru Industries Ltd-vs-S.S Mehta & sons {2016} KEHC 981 (KLR)**. No specific sum was claimed in the plaint thus, the Plaintiff is not entitled to mesne profit relief.

97. The plaintiff mentioned only particulars of loss and damage at paragraph 17 of the plaint. No evidence was availed for assessment of the exact quantum of damages hence, the plaintiff is entitled to a minimum amount in general damages against the 1<sup>st</sup> defendant

only as I subscribe to the Court of Appeal decision in the case of **Eric Adome & another-vs-Pauline Kasumba Osebe & another {2014} KECA 417 (KLR)**. The same is assessed at Kenya shillings Ten Thousand (Kshs 10,000/=) only in favour of the plaintiff.

98. As regards costs of this suit, I am guided by the proviso to section 27 (1) of the Civil Procedure Act Chapter 21 Laws of Kenya that costs follow the event within the court's discretion. Furthermore, in setting out the legal principles that guide the grant of costs, the Supreme Court of Kenya in the case of **Jasbir Singh Rai & others vs Tarlochan Rai & others (2014) eKLR** stated;

**“.....in the classic common law style, the Courts have to proceed on a case-by-case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs...”** (*Emphasis added*)

99. Wherefore, this court renders the following final orders;

a) Judgment be and is hereby entered for the plaintiff against the 1<sup>st</sup> and 2<sup>nd</sup> defendants thus;

i. A declaration that the purported issuance of lease and registration of the suit land to the 1<sup>st</sup> Defendant and subsequent transfer to the 2<sup>nd</sup> Defendant is invalid, null and void to all intents and purposes for illegality and fraud and thus conferred no estate, interest or right on them.

ii. An order for vacant possession of the suit land against the 2<sup>nd</sup> Defendant. He shall remove his possessions including any structures on it and hand over vacant possession of the same within the next thirty days from this date failing which eviction order to issue; see **Muhiddin Mohammed Muhiddin (suing for and behalf of the Estate of Mohammed Muhiddin Mohammed Hatimy-Deceased)-vs-**

**Jackson Muthama & 168 others (2014)**

**eKLR.**

- iii. An order directing the Chief Land Registrar to cancel and expunge from the register the entry relating to the registration of the suit land in favour of the 1<sup>st</sup> Defendant and subsequent transfer to the 2<sup>nd</sup> Defendant.
  - iv. A permanent injunction restraining the 2<sup>nd</sup> Defendant by himself, his servants or agents from alienating, transferring, charging or in any other manner dealing with the suit land, otherwise than by way of transfer to the Government of Kenya.
  - v. General damages of the sum of Kenya Shillings Ten Thousand (Kshs 10,000/=) against the 1<sup>st</sup> defendant only.
- b) The plaintiff's claim against the 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> defendant substantially fails and the same is hereby dismissed.

c) Given the public interest character of this suit and circumstances, parties to bear their own costs of this suit.

d) Interest on general damages (v) above from this date at court rates.

100. It is important to note that this judgment was not delivered on 28<sup>th</sup> January 2026 as earlier scheduled since I was attending a training on Alternative Justice (AJS) and requisite notice issued to the parties accordingly.

101. It is so ordered.

**DATED** and **DELIVERED** at **KAPSABET** this **17<sup>th</sup>** day of **MARCH 2026**.

**HON. G M A ONGONDO**

**JUDGE**

**In the presence of;-**

1. Mr Mbaka learned counsel for the plaintiff
2. Mr Bitok learned counsel for the 1<sup>st</sup> defendant
3. Mr Mbeche learned counsel for the 3<sup>rd</sup> defendant

4. Mr Sang instructed by Mr Kiprono and Choge learned counsel for 2<sup>nd</sup> and 5<sup>th</sup> defendants respectively.
5. Walter, court assistant