REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC NO. E008 OF 2025

ETHICS & ANTI-CORRUPTION COMMISSION----------PLAINTIFF

VERSUS

HALIMA CHELANGAT KOKITA *alias* HALIMA CHELAGAT KOKOTA----------1ST DEFENDANT

EDWIN KIPCHIRCHIR TUM
(Being sued as the Administrator of the Estate of
NATHANIEL KIPKORIR TUM----------2ND DEFENDANT

WILSON GACANJA----------3RD DEFENDANT

JUDGMENT

1. The plaintiff, through a plaint dated **4/3/2025**, seeks:

(a) A declaration that the alienation of the Kitale Municipality Block 12/152, the suit property, to the 1st defendant and the subsequent transfer to the 2nd defendant were irregular, fraudulent, illegal, and consequently null and void, and incapable of conferring any right, interest, or estate.

(b) A declaration that the 3rd defendant had no powers to alienate the suit property to the 1st defendant and that his conduct in doing

so was *ultra vires*, fraudulent, and in breach of his statutory and fiduciary duty.

(c) An order of rectification of the register directing the Registrar of Lands Kitale, to cancel the lease and Certificate of Lease and all other entries on the land register for Kitale Municipality Block 12/152.

(d) An order of registration directing the Registrar of Lands, Kitale, to register the suit parcel in favour of the Cabinet Secretary of the Treasury and National Planning in terms of Section 56 (C) of the Anti-Corruption and Economic Crimes Act.

(e) An order of mandatory injunction directing the 2nd defendant, his servants, agents, or assigns to vacate Kitale Municipality Block 12/152 forthwith, and to deliver vacant possession thereof to the County Government of Trans Nzoia.

(f) An order of permanent injunction restraining the defendants, their servants, agents, and/or assigns from alienating, selling, charging or further charging, leasing, transferring, wasting, disposing, developing, or in any other manner dealing with Kitale Municipality Block 12/152.

(g) *Mesne* profits against the 2nd defendant from 05/0/2/1996 to the date of surrender of vacant possession.

(h) General damages against the 3rd defendant for breach of statutory and fiduciary duty.

(i) General damages for trespass.

2. The plaintiff contends that pursuant to its mandate under **Sections 3, 11(1)(j), (1)(d)** and **13(2)(c)** of the Ethics and Anti-Corruption Commission Act **2011**, it conducted an inquiry into an allegation of the illegal alienation and allocation of public land alienated and reserved as an open space for the exclusive and private benefit of the 1st and 2nd defendants, to the detriment of the intended and subsisting public interest.

3. The plaintiff avers that the suit property was previously an alienated public land, formerly forming part of an area reserved for public purposes, to wit, open space, that was and remains an amenity reserved for public use, and therefore, was not available for alienation.

4. The plaintiff avers that the reservation as an open space followed the preparation or drawing and revision of the Development Plan herein after (DP) for Kitale Municipality in **1973**, at the time of which the suit property formed part of the larger Kitale School property, which, according to the records held by the Department of Urban and Rural Physical Planning, measured approximately **55 Ha**.

5. The plaintiff avers that for proper planning and utilisation, an area measuring **2.44 Ha** was excised from the **55 Ha** Kitale School, and was reserved and designated as an open space vide the Approved Development Plan **Ref. No. 10/72/7** dated **17/1/1974**, which entire parcel of land the Kitale School continued to utilise for agricultural purposes.

6. Further, the plaintiff avers that on or about **25/2/1994**, the 1st defendant, acting in concert with Nathaniel Kipkorir Tum (hereinafter the deceased), solicited for and was fraudulently and illegally allocated a portion of the open space.

7. The plaintiff avers that the allocation was based on a Part Development Plan (PDP) No. **KTL 10.93.56**, Approved Development Plan No. **190,** that was prepared by the Director of Physical Planning, under the behest of the Commissioner of Lands, in contravention of the laws applicable, to wit, the Physical Planning and the Government Lands Act, repealed, thereby fronting the suit property as unalienated land when in fact, the suit property was already alienated public land, reserved as an open space.

8. The plaintiff avers that the open space was subdivided vide Survey Plan **F/R No. 273/23**, creating the suit property, despite the 1st defendant accepting the allotment letter on **20/9/1984,** which was outside the timeline set out in the allotment letter.

9. The plaintiff avers that on **24/3/1995**, the 3rd defendant in the purported exercise of statutory powers conferred upon the then office of Commissioner of Lands, under the repealed Government Land Act, and or other written laws, caused to be issued a lease to the 1st defendant, which was registered on **5/2/1996.**

10. The plaintiff avers that as soon as a certificate of lease for the suit property was issued, the suit property was transferred to the deceased by a transfer registered on **5/2/1996**.

11. The plaintiff avers that the initial alienation and reservation of the suit property as an open space in **1974**, as per the Development Plan, had not and has never been vacated, and thus the suit property for all intents and purposes remains public land, meaning that the suit land was never available for

alienation to any person or entity, by any means whatsoever.

12. Therefore, the plaintiff avers that the issuance of title documents to the 1st defendant, and the subsequent transfer of the same to the deceased, was fraudulent, illegal, null and void, and incapable of conferring any good title, right, interest, or estate.

13. The plaintiff avers that the quick succession in which the suit property was transferred to the deceased from the 1st defendant, clearly demonstrate that the 1st defendant and the deceased had conspired, with the help of the 3rd defendant to acquire the suit property for and on behalf of the deceased to disguise the transaction as genuine, to avoid public scrutiny since the deceased had also already previously illegally acquired another portion which neighbours the suit property.

14. The particulars of the fraud and collusion on the part of the 1st defendant and the deceased, as pleaded by the plaintiff, were as follows: alienating the suit property with express knowledge that it was public land; representing the suit property as unalienated public land.

15. The plaintiff avers that the alienation was done when the defendants knew or ought to have known that it was alienated public land reserved as an open space; discreetly soliciting for allocation, making payment and procuring registration, yet it was reserved public land; alienating public property for private use and benefit to the detriment of the intended and subsisting public interest, causing the transfer to the deceased whereas it was public land.

16. Additionally the plaintiff blames the 1st defendant and the deceased for; contriving to alienate already alienated public land; trespassing on public land; using public land for private purposes, colluding to defeat public interest; disregarding the existing Approved Development Plan for Kitale Municipality; disregarding publicly available land records; executing a lease over the suit property, when the 3rd defendant knew or ought to have known it was alienated government land, acting in concert to convert the it, to the exclusive ownership; possession and use by the 1st defendant.

17. The plaintiff avers that the 3rd defendant also acted in breach of his statutory and fiduciary duty, abuse of office, and acted illegally in arbitrarily alienating

the suit land to the detriment of the intended and subsisting public interest; conniving to allocate the suit property to the 1st defendant without any legal authority and in abuse of the position of trust.

18. The plaintiff further blames the 3rd defendant for disregarding the public interest in the suit property in alienating it, engaging in systematic perversion of established procedures intended to protect public interest to divert a portion of public land for the unjust enrichment of the 1st defendant; alienating public land without regard to the Physical Planning Laws and Regulations.

19. The particulars of fraud and breach or abuse of office on the part of the 3rd defendant were set out as follows: purporting to re-plan the suit property from the existing public user to a private user in contravention of the laws governing planning processes, causing the preparation of the PDP No. **KTL 10.93.56**, contrary to the Approved Development Plan for Kitale Municipality, causing the survey and subdivision of alienated public land to create the suit property for private benefit; willfully failing to comply with and or ignore the provisions of the repealed Government Land Act, the

Government Financial and Procedures of Disposing of Government Property.

20. The plaintiff avers that due to the impugned conduct of all the defendants, the suit property has been illegally alienated for private use, for the benefit of the 2nd defendant, who has put the suit property to commercial use and businesses, rendering it unavailable for the intended public recreational purposes.

21. The suit is opposed by the 1st and 2nd defendants through a statement of defence dated **9/4/2025**. The 1st and 2nd defendants deny that the suit property was initially alienated as public land, as alleged by the plaintiff, or at all.

22. The 1st and 2nd defendants admit that the suit property was initially registered in the names of the 1st defendant, who had made an application to the Commissioner of Lands seeking to be allocated the land, which at the time had not been classified as 'open space', under the use of the Kitale Academy whom the plaintiff alleges was unlawfully deprived of the said property or had itself submitted a similar application for allocation of the suit property, which

if true, defeats the alleged fraud to acquire public land.

23. The 1st and 2nd defendants aver that if the suit property was indeed owned by Kitale School, as alleged or at all, then it beats logic why the very school was again seeking to be allocated the very suit property. The 1st and 2nd defendants aver that the suit property was not classified as public land intended for public utility, and therefore the Commissioner of Lands had the legal authority to allocate it to the 1st defendant.

24. The 1st and 2nd defendants insist that the alleged delineation of the suit property as hitherto an open space and its extent remains a mystery.

25. The 1st and 2nd defendants aver that before the Commissioner of Lands allocated the suit property to the 1st defendant, he had initiated made inquiries from all the relevant and or concerned government offices whether or not the application for allotment of the suit property should be accepted or not, and which process neither the 1st defendant nor the deceased had hand in, which offices did not raise any adverse comments of its no-availability due to

prior alienation, paving way for the allocation of the same to the 1st defendant.

26. The 1st and 2nd defendants aver that, as admitted by the plaintiff, a PDP was eventually prepared by the relevant officers for the suit property, which Plan could not have been issued without a confirmation from the relevant officers that the suit property was available for allocation. The 1st defendant avers that after she was issued with a letter of allotment, and upon accepting the offer, she cleared the relevant charges, such as the stamp duty, after which she was issued with a lease on **1/5/1994**.

27. The 1st defendant avers that throughout and after the above allocation process, none of the many concerned government departments ever raised any issue on the 1st defendant's allocation or challenged the process leading to the allocation of the suit property to her.

28. Again, the 1st defendant avers that after the lease was issued, she subsequently sold and executed a transfer form for the suit property in favour of the deceased, effectively divesting her interest in the property.

29. The 1st and 2nd defendants aver that a certificate of lease was subsequently issued in favour of the deceased, who took immediate possession of the suit property and has been in possession of the said parcel of land until his demise whereafter the beneficiaries in his estate have been in possession of the suit property to date, and have been paying land rates for the same, with no one, all this time claiming ownership of the land.

30. The 1st and 2nd defendants aver that the alleged claim that the suit property was reserved as an 'open space' is denied, given that:

(a) *At the time of the allocation, the suit property was not classified as public land intended for public use.*

(b) *The status of the suit property as per the custodian of land records at the Ministry of Land and Settlement at the time of allocation was noted as vacant government land, and therefore, the Commissioner of Lands had the legal authority to allocate it to the 1st defendant, having received the necessary approval from all the relevant officers in the absence of any objection.*

(c) *The 1st defendant made an application for allotment of the suit property, which was accepted, and a letter of allotment was issued upon obtaining the necessary approvals from all the relevant authorities.*

(d) *Kitale School or any other entity's interest had never been registered over the suit property, and nothing to that effect has been tabled by the plaintiff to support such assertions.*

(e) *No formal complaint or claim has been made, and or registered by either the Land Registrar, National Land Commission, or the Kitale School, over the suit property.*

(f) *The suit property was paid for, and the Director of Surveys amended the Registry Index Map (RIM).*

(g) *Stamp duty and all relevant dues were paid, and a lease was issued in favour of the 1st defendant.*

31. The 1st and 2nd defendants aver that paragraphs **13** and **14** of the plaint are merely sensational and cannot be used as a basis for cancellation of a validly acquired title, given that as at **5/2/1995,** the 1st defendant already had a lease registered in her favour, ruling out the alleged collusion in fraudulently acquiring and transferring the suit property to the deceased as alleged in paragraph **15** thereof.

32. The 1st defendant avers that the plaintiff has no reasonable cause of action against the 1st defendant, since she is no longer the registered owner of the suit property.

33. The 2nd defendant avers that the deceased was an innocent purchaser for value without notice of any defect in title and therefore acquired a good title which was indefeasible in law.

34. The 2nd defendant avers that the plaintiff has no reasonable cause of action against him as the allegation of fraud has been made against the deceased, which claim is in *personam* and cannot be sustained against him.

35. The 2nd defendant avers that the institution of the claim was orchestrated with malice, selfishness, and is a mere attempt to wrestle back the suit property in the guise that it is public land, to bypass the correct channel of compulsorily acquiring private land as set out in the law.

36. The 2nd defendant urges that this court should not allow such an abuse of court process, especially coming after **30** years, since the deceased acquired the land and conveniently, after his death, knowing very well that the 2nd defendant, as the administrator of the estate, as well as other beneficiaries of the estate, may not have the full historical background regarding the suit property.

The 2nd defendant terms the suit as time-barred and denies the jurisdiction of this court.

37. The 3rd defendant opposed the suit through a statement of defence dated **October 2025**. He denies the contents of the plaint generally and in particular paragraphs **5, 6, 7, 8, 9, 10, 11, 12, 12, 14, 15, 16, 19, 20, 21, 22**.

38. The 3rd defendant denies that, as the then Commissioner of Lands contravened any applicable laws as alleged in paragraph **9** of the plaint. To the contrary, the 3rd defendant avers that at all times, he discharged the functions of the office of the Commissioner of Land in strict adherence to the laid down laws and procedures.

39. The 3rd defendant avers that if at all, he was, as alleged in paragraphs **11 - 14** of the plaint, involved in the allocation of the suit property, subject to these proceedings, which is denied, then he acted on the strength of powers donated to him by statute and within the procedural confines of the law.

40. The 3rd defendant denies the contents of paragraph **16** of the plaint and insists that any action taken by him as the then Commissioner of Lands was done in the exercise of and on the strength of the powers

donated by the Government Land Act, Cap **250** (repealed), and or the President of the Republic of Kenya, vide Gazette Notice **No. 14 of 1965**, and or the relevant County Council.

41. The 3rd defendant avers that, having acted within the confines of the law and in an official capacity, he was therefore sheltered by the Government Land Act from any liability or proceedings arising out of any acts done as the Commissioner of Lands in exercise of his mandate.

42. The 3rd defendant avers that the process of land allocation was a lengthy one, that involved several other stakeholders within the then Ministry of Lands and Settlements, as well as other government departments such as the then provincial administration.

43. The 3rd defendant avers that at the time of the subject matter, there were three major ways of land allocation, among them, direct approval by the President, direct application to the Commissioner of Lands, through the field officers and the provincial administration, and lastly, through an application to the local offices of Land Adjudication and Lands.

44. The 3rd defendant avers that after receipt of the said applications seeking land allocation, the application would be forwarded to the scheduled officers to check the status of the land in question and its availability, and the Commissioner of Lands would then be advised by the relevant scheduled line officers and the concerned stakeholders to simply approve the commencement of the allocation process.

45. Further, the 3rd defendant avers that, beyond the foregoing process, the Commissioner of Lands was not involved in any of the other processes, which were mandatorily required before any allotment. The 3rd defendant avers that he had no control over the offices responsible, such as the Departments of Physical Planning, Valuation, Surveying, Boarding, issuance of the letter of allotment, and the preparation of leases and grants.

46. The 3rd defendant avers that once the PDPs, Leases, or Grants had been prepared by the relevant offices, the documents would be forwarded to the Commissioner of Lands, through all the relevant scheduled officers, for instance, Senior Land Officer,

District Commissioner, Assistant Commissioner of Lands, and the Deputy Commissioner of Lands.

47. The 3rd defendant avers that, accordingly, the mandate of the then Commissioner of Lands largely extended to appending his signature on the forwarded PDPs, Leases, and Grants, solely based on their approvals and the recommendations from other stakeholders, after which he would subsequently forward the documents to the Chief Lands Registrar, who would then authorise the processing and registration of the forwarded leases and grants.

48. The 3rd defendant denies the contents of paragraphs **19** and **20** of the plaint and reiterates the foregoing paragraphs, save to add that, if indeed he participated in any transaction about the suit property as alleged by the plaintiff, which is denied, then he did so based on the powers donated to him by the statute, or on instructions given to him by the President.

49. Further, the 3rd defendant avers that his mandate was heavily reliant on other stakeholders, whose recommendations he relied on to discharge his functions. The 3rd defendant avers that as such, by

individually singling him out from all the other officers who undertook the exercise, amounts to malice and was a calculated witch-hunt based on allegations he was a stranger to.

50. The 3rd defendant denies receiving any notice to sue from the plaintiff, terming the suit as disclosing no cause of action against him.

51. At the hearing, the plaintiff called five witnesses in support of its case, namely **Veronica Ndunge Musee, Elias Muthomi Kaburu, Wilson Kibichii, Naomi Chemutai Rop,** and **Leonard Njenga Mungai.**

52. **Veronica Ndunge Musee,** as **PW1**, relied on a witness statement dated **9/9/2024** as her evidence-in-chief. PW1 told the court that she was an Assistant Director of Physical Planning, currently in charge of the North Rift Region, covering Trans Nzoia County.

53. **PW1** listed her duties and responsibilities to include the preparation of National Physical and Land Use Development Plans, preparation of PDPs to alienate land, coordination of planning by counties and offering technical support and capacity building to the countries on matters of physical planning.

54. **PW1** said are other duties include ensuring quality and standard in matters of physical and land use planning in the region, offering technical support and advice on matters of building construction approvals, and any other role assigned to her by the Deputy Director of Physical Planning.

55. PW1 told the court that in connection with this matter, the Department of Physical Planning Head Office received letters dated **21/12/2020, 31/12/2020,** and **8/7/2024** from the plaintiff. According to PW1, the aforesaid letters were requesting relevant documents and information in relation to an investigation into allegations of irregular alienation and allocation of public land in Kitale Municipality near Kitale School.

56. PW1 told the court that in reply, the department wrote a letter dated **15/7/2004** providing the requested documents, after which she was nominated to record a witness statement. She said that she wrote a witness statement clarifying the physical planning technical details. PW1 said that a Development Plan is a plan for an entire town or city, and acts as a framework that designates various uses of land, such as residential,

commercial, industrial, educational, transportation, public utilities and services, public purposes, recreational areas, and reserves, which are provided in terms of zones.

57. PW1 told the court that an authentic development plan must be certified by the Director of Physical Planning vide a signature and an official stamp, and must be approved by the Commissioner of Lands vide a signature and a date. PW1 told the court that a Development Plan must also contain an Approved Development Plan Number, a Department Reference Number, and the name of the Planner preparing it.

58. PW1 told the court that the legal framework for drawing a Development Plan was initially governed by the repealed Land Planning Act, Cap **303**, covering the following issues:

(a) *The notice of intention to plan, issued at the time by the Town Council or Municipal Council to the Town Planner to do an area plan or town plan.*

(b) *Date collection and analysis by the planner, taking into account physical features.*

(c) *Open spaces.*

(d) *Plan proposals.*

(e) *Draft Plan.*

(f) *Final plan and report submission to the Commissioner of Lands by the Director.*

(g) *Approval of the Development Plan by the Commissioner of Lands.*

59. PW1 said that the procedure outlined above did not change with the coming into force of the Physical Planning Act, Cap **286** in **1996,** as per Part **1V** and the 1st, 2nd, and 3rd Schedules thereto. PW1 told the court that, on the other hand, a PDP is prepared for a section of a Development Plan, whose purpose is to facilitate alienation, issuance of a letter of allotment, and survey of that part, the ultimate purpose being eventual issuance of title or a certificate of lease.

60. PW1 said that the preparation of a PDP is done taking into account the compatibility of the proposed use of the land/site itself with other adjoining land users, and the conformity with the long-term plans of the area. PW1 said that in preparing a PDP, the planner is guided by the Development Plan since it is the master plan of a town or city.

61. PW1 said that the procedure of preparing a PDP includes:

(a) *If the land is an unalienated government land, the Commissioner of Land has to issue the authority to the Director of Physical Planning to prepare a PDP on a suitable site for allocation.*

(b) *If suitable, the Director of Physical Planning will proceed to prepare the PDP.*

(c) *Suitability according to PW1 means whether the use is compatible with the site, and in which case the Planner has to report to the Commissioner of Lands on the suitability.*

(d) *PW1 said that after a PDP is prepared, it has to be circulated to the relevant authorities/ institutions to give comments. PW1 said that the standard practice before* ***1996*** *and the Physical Land Use and Planning Act* ***2019*** *was to publish notices in the Kenya Gazette and through electronic media.*

62. PW1 said that comments from the relevant institutions, such as the District Commissioner, Town Clerk, Ministry of Education, Public Works, Survey Department, Registrar of Lands, and neighbouring institutions, would then be incorporated, and then the Director would certify the PDP and forward the same to the Commissioner of Lands for approval.

63. PW1 said that once the Commissioner of Lands approves a PDP, it is returned to the Director of Physical Planning, who then enters the PDP into the register and assigns it as an Approved Development Plan Number.

64. She said that there is a separate register for PDPs and DPs. PW1 said that the land titling process follows the approval from the physical planning, to which a letter of allotment is issued on the basis of an approved PDP, and then it will be attached to the letter of allotment. PW1 said that the contents of the letter of allotment, including the acreage of the part and the user is derived from the PDP. She said that a letter of allotment must contain a PDP number.

65. PW1 told the court that after the letter of allotment is prepared, survey works follow with the preparation of a deed plan or a survey plan by the Department of Surveys. After the deed or survey plan is prepared, PW1 said that what follows is the registration and issuance of the title or certificate of lease by the Land Registrar.

66. Regarding Kitale town, PW1 said that a plan was developed, culminating in a Development Plan of **1974,** Departmental Ref. No. **10/82/7**, which was approved by the then Commissioner of Land, J.A. Oloughlin, on **17/1/1974**. PW2, contrary to her earlier evidence that the standard practice before **1996** was to send notices and publish in the Kenya

Gazette, was silent on whether this particular DP was published and gazetted by her department.

67. PW1 said that according to the existing Development Plan of Kitale town, land parcels numbers **Kitale Municipality Block 12/152** and **Kitale Municipality Block 12/153** fall in an area designated as reserved for an open space.

68. PW1 said that her office records show that PDP **KTL 10.93.56** (whose approved development plan number is **190**) was prepared on **17/12/1993** and certified by the Director of Physical Planning and the Commissioner of Lands on **10/1/1994**.

69. PW1 said that the said PDP was used to allocate the suit property to the 1st defendant, measuring approximately **0.4 Ha,** after it was hived from the larger area reserved for an open space, as per the letter of allotment Ref. No. **20089/XXV11** dated **25/5/1994**, following her department's certification of a copy of the PDP, confirming its authenticity.

70. PW1 termed the allocation as irregular, since the suit property was not available in the first instance for allocation, given it had been previously reserved as an open space in the DP Number **10/72/7**, making it alienated land. PW2 did not explain why

her office did not raise those irregularities at the inception or until a complaint arose over **30** years later, yet her department was the custodian of the development plan.

71. PW1 said that the preparation of PDP and its approved number were irregular because the officers involved purported to facilitate the allocation of the open space as an unsurveyed residential plot, contrary to the reservation of the land in the general DP.

72. PW1 said that an open space refers to a public land reserved for recreational purposes in an urban area. She said that open spaces are critical for uses such as greening, outdoor recreation, beautification, and cooling the central business district, among other uses.

73. PW1 said that it was unprecedented for a PDP to be prepared to allocate public land that had been initially reserved for public purposes, in a DP.

74. PW1 said such a PDP should be rejected as it was irregular, null, and void, and any allocation of land based on it was void. In this instance, PW1 said that the land should revert to its public purpose for which it was reserved.

75. PW1 said that it was within her knowledge that by a letter dated **14/9/1973**, the Kitale Primary School had been requested by the Director of Urban Physical Planning to surrender part of the land for open space, marked as zone **(3),** falling between the school and **Mumias Highway**.

76. PW1 relied on exhibits, namely, the letter dated **14/9/1973 as P. Exhibit No. (1),** the Development Plan as **Exhibit No. (2),** allotment letter as **P. Exhibit No. 3(a).** PW1 was unable to explain if, before the PDP was prepared by her office, there had been a verification exercise by the Department to confirm the availability of the land for allocation generally and, in particular, if the use was aligning with any existing development plan, such as **P. Exhibit No. (2).**

77. PW1 was unable to explain if there were any adverse comments or objections to the allocation of the land from her office, and if not, why, before the PDP was approved.

78. Further, PW1 said that, if at all, the alienation violated the DP, was unable to explain why her office has yet to withdraw, recall, or cancel the PDP on account of her alleged irregularity or illegality in

the allocation of already reserved plot as an open space. PW1 did not produce a letter dated **21/12/2020**.

79. PW1 said that the disputed plot size was **0.4 Ha** out of the larger open space measuring **2.44 Ha**. She said that the custodian of the open space is the County Government of Trans Nzoia, which, from her inquiries, did not object to the allocation before and after the allocation. PW1 said that she was unable to retrieve her office file in relation to the allocation to ascertain if her department or any other government departments that were involved in the allocation had given adverse comments before the PDP circulated to them was signed and approved, or used in the allocation.

80. PW1 said that though **P. Exhibit No. (2)** talks of a revised short-term DP; according to her, a development plan ordinarily covers between **10** and **15 years**. PW2 said that **P. Exhibit No. (2)** was yet to be revised, and therefore, in the absence of another development plan, it was still valid for implementation, as per the repealed Town Planning Act.

81. PW1 said that initially, the school had been allocated **55 Ha** before it was asked to surrender **2.44 Ha** as per the letter dated **14/8/1973**. The witness produced no documentary evidence to support such an allocation. She said that the boundaries of the open space are captured in the development plan.

82. PW1 said that she could not confirm if the primary school had also applied for the same land alongside the 1st defendant, or had made an objection after what they had initially surrendered was put into a different use. PW1 said that public interest must supersede private interest. PW1 confirmed that in this instance, the physical planning department was central in land allocation, since planning comes first before allocation.

83. PW1 said that the DP master plan was in the custody of the Director of Physical Planning. She blamed the department for allegedly preparing the PDP, without counterchecking if there was an earlier alienation in the DP, and putting it in writing by way of adverse comments that the suit property had been reserved or alienated for public use.

84. PW1 said that it was upon her department to advise the Commissioner of Lands that the use of the land

for residential purposes was not compatible with the land and or was not available for alienation to the 1st defendant.

85. PW1 said that the PDP, which was prepared by her department and forwarded to the Commissioner of Lands, had no adverse comments. That notwithstanding, PW1 insisted that the allocation of the land was irregular *ab initio*. PW1 confirmed that between the years **1974** and **1994**, the Development Plan had not been revised.

86. PW1 said that the portion that was hived off as **2.44 Ha** from the open space was also converted to an access road. PW1 reiterated that the PDP that was prepared by her office was not in alignment with the Development Plan.

87. **Elias Muthomi Kaburu** testified as **PW2**. He relied on a written witness statement dated **9/7/2024** as his evidence-in-chief. PW1 told the court that he was an Assistant Director of Land Adjudication based at the Ministry of Lands, Public Works, Housing and Urban Development, and had been working in the Directorate of Land Administration since **2006**.

88. PW2 told the court his duties involve the preparation of leases and titles, extension of leases, change of user, subdivisions, liaison with various investigative agencies of government, court appearances, and other assigned duties.

89. PW2 told the court that his department received a letter dated **21/12/2020** from the plaintiff regarding an investigation into the alienation of government land. According to PW2, his department was asked to clarify the procedures of land alienation.

90. PW2 said that there are two types of how the government can issue and make grants for unalienated government land, namely, on its own motion or through an application seeking allocation.

91. PW2 said that in the 1st instance, there are eight steps, namely, advertising, shortlisting of the applicants, balloting, issuance of allotment letters, acceptance of offer, survey works on the allotted plot, preparation and issuance of a deed plan or RIM, preparation of a lease, its execution, stamping, and forwarding the same for registration.

92. Concerning the 2nd instance, PW2 told the court that it involves an application for a plot made to the Commissioner of Lands, receipt of the application,

confirmation of the availability of the plot as per attached plant or sketch map in the application, preparation of a PDP, submission and approval of the PDP by the Commissioner of Land, allocation of a Departmental Plan Ref, Number, and placement in the register, valuation of the land parcel to determine standard premium and annual rent.

93. Again, PW2 said the PDP would be forwarded through the Department of Land Administration to the Commissioner of Lands, followed by the issuance of a letter of allotment to the applicant.

94. PW2 said that after acceptance of the letter of offer and payment of the necessary payments, what follows is the survey of the plot to facilitate the necessary survey instrument, namely a Deed Plan or RIM, and lastly, lease preparation, its execution, stamping, and forwarding of the lease to the land registry for registration.

95. PW2 said that the Land Administration office has to examine the PDP before its approval, since it is the basis upon which the letter of allotment is issued. PW2 confirmed the vital role of the Director of Physical Planning and the Commissioner of Lands in the processing of a PDP to ensure its correctness.

96. With respect to the suit property, PW2 told the court that according to the correspondence file number **16033,** the parcel was allocated to the 1st defendant through a letter Ref. No. **20089/XXV11** dated **25/5/1994**. PW2 said that the allocation followed the Director of Physical Planning's preparation of **PDP No. KTL 10/93/56** and thereafter issuance of a letter of allotment requiring the 1st defendant to pay **Kshs. 41,230/=**, comprised of standard premium and annual rent, among other charges.

97. PW2 said that after the letter of allotment was accepted by the 1st defendant on **20/9/1994**, four months after the offer was made to her, she paid the requisite charges as per receipt No. **DO27105**. PW2 said that by a letter dated **28/9/1994**, the Commissioner of Lands notified the Director of Surveys about the acceptance of the offer, and sought that survey work be carried out. He said that the survey work was done and released by a letter dated **26/1/1995**, and allocated Survey Plan No**. F/R 272/23**.

98. Further, PW2 said that a form for Instructions to Prepare a Lease was filled out and finalised with the Commissioner of Lands approving the issuance of a

lease. He said that by a letter dated **31/7/1995**, the 1st defendant was instructed to pay **Kshs. 13,500/=,** being the rates for the period **1/5/1994** to **31/12/1995**. PW2 said that a lease for the suit property was eventually forwarded to the Land Registrar Kitale for registration, followed by payment of stamp duty by a letter dated **19/1/1996.**

99. PW2 said that the suit property forms part of a larger open space, hence allocation to a private individual was irregular, since the land was already reserved open space, making it unavailable for alienation. He did not produce any documentary evidence from his office confirming alienation or reservation as public land apart from relying on the DP.

100. PW2 told the court that whereas the former Commissioner of Lands had powers to allocate any available government land, he could only exercise those powers as long as the land was not planned, set apart for various other forms of use, or reserved for a specific use. Public use, according to PW2, meant land for public purposes only and not for private use. PW2 said that private use could include

residential, commercial, and industrial. He said that, looking at the Development Plan, the open space was reserved for recreational purposes.

101. PW2 relied on several exhibits, including: - the Development Plan as **P**. **Exhibit No. (1),** PDP as the letter of allotment dated **25/9/1994** as **P. Exhibit No. 3(a)** and the PDP as **P. Exhibit No. 3(b),** acceptance of the offer made on **20/9/1994**, as **P. Exhibit No. (4),** receipt for payments as **P. Exhibit No. (5),** letter dated **28/9/1994** to the Director of Surveys as **P. Exhibit No. (6),** letter dated **28/1/1995**, as **P. Exhibit No. (9),** lease data form approved by the 3rd defendant on **24/3/1995** as **P. Exhibit No. (10),** lease executed on **24/3/1995** as **P. Exhibit No. (15),** letter dated **19/1/1996** forwarding the lease to the Land Registrar, Kitale, **P. Exhibit No. (14),** bundle of receipts for payment of statutory fees and stamp duty as **P. Exhibit No. (11)** and **(12),** heading of the correspondence file as **P. Exhibit No. (13).**

102. PW2 said that the comments appearing in the correspondence file by the Senior Principal Records Office indicated that the suit land was part of what was initially reserved as the open space. PW2 said

that this was a clear confirmation that the allocation of the land was illegal and irregular, for there was no change of user made in the Development Plan to date.

103. PW2 said that it was his department that ought to have confirmed the availability of the plot before the allocation. He said that he had no documentary evidence confirming reservation or whether his office had custody of the same, whether it shared the same and or if the various other departments had provided such evidence that the land was not available for alienation. Similarly, PW2 said that from his inquiries, he did not come across any letter(s) of objection or evidence thereof from his department or elsewhere to the allocation on account of the land being an open space.

104. According to PW2, the only source of reservation or alienation of public land is when both P exb. 1 and 2, which confirms the irregularity in the allocation of what ought to remain open space for public use. PW2 said that through acts of omission and commission, the plot ended up being irregularly allocated to the 1st defendant.

105. PW2 said that his office only discovered the illegal alienation in 2024, long after the land had become registered in favour of the 2nd defendant.

106. According to PW2, it is from a Development Plan that confirms the use and the user. PW2 said that the 3rd defendant was the former head of his department. PW2 said that no correspondence with the Commissioner of Lands regarding the matter was available in the file produced before the court to ascertain the manner and the extent to which the 3rd defendant was involved in the transaction.

107. PW2 blamed his department for the omission to confirm that the land was not available for alienation until the belated comments of the Senior Principal Records Office. PW2 said that the primary document in this case, for reference on the status of the suit land, remains the Development Plan, which the Commissioner of Lands and the Director of Physical Planning were signatories to.

108. **Wilson Kibichi** testified as **PW3**. He relied on a witness statement dated **9/7/2024** as his evidence-in-chief. As a Senior Cartographer and Head of Survey Records, Ministry of Lands, Department of Survey, he told the court that he has been working

with the Department on the maintenance of cadastral survey records, supervision of staff at the survey records office, investigation of records, and provision of copies of records upon request.

109. PW3 said that his office received a letter dated **28/10/2020** and **20/12/2023** from the plaintiff, who was investigating alienation of government land, seeking clarification on the allocation of public land. PW3 told the court that in his witness statement, he had set out the processes.PW3 said that a land survey method or process may commence through a new grant, a subdivision, extension of lease, change of user, re-establishment, excision, amalgamation, or acquisition.

110. PW3 said that the survey process begins when a land surveyor receives a letter of allotment and a copy of a PDP, after which the office conducts a computation and submits a computation file with copies of allocation documents and a drawn survey plan, which documents are then forwarded to the Director of Surveys together with a covering letter.

111. PW3 said that once the copies are received, they are marked to the Survey Assistant Director of Surveys

for authorisation. Upon authorisation, PW3 said that the documents are then taken to the survey records office, where a computation Number or a Parcel Number and a Folio Register (FR) Number, for parcel land, is allocated.

112. PW3 said that a parcel number is a number to be used to prepare a title or lease, while an FR number is a number allocated for purposes of facilitating efficient filing as well as retrieval of files and or documents. PW3 said that after allocation of these numbers, the file is forwarded to the preliminary checking office, where quality control is done.

113. Once the file is ascertained as properly done, PW3 said that the file is forwarded to the final checking office, where the work of the preliminary checking office is assessed again to confirm if all the mentioned processes were followed. Thereafter, PW3 said that the file is forwarded to the authentication office, where the survey is approved, then charges for the survey work are determined and raised.

114. PW3 said that the licensed surveyor who had forwarded the work is notified of the approval of the survey through a letter, which is also copied to the

Commissioner of Land. PW3 said that the Commissioner of Lands or the Director of Land Administration requests, in writing, for a RIM to be amended reflecting the new final survey.

115. PW3 said that a RIM is the general map of a block and, therefore, once the letter requesting the RIM is received, it is taken to the Senior Assistant Director of Surveys for authority to amend the RIM.

116. PW3 said that to amend a RIM, records like the computation and survey maps are a condition precedent. PW3 said that once the Senior Assistant Director of Surveys received all the relevant documents, he would write to the officer in charge of the RIM office to make the amendments to reflect the new parcel of land in the RIM.

117. Upon the amendment, PW3 said that the officer produces two copies of the RIM, which are sealed and forwarded to the Commissioner of Lands or the Director of Land Administration with a covering letter, who retains one copy of the RIM and forwards the other to the relevant Land Registry.

118. Regarding **Kitale Municipality Block 12/152**, PW3 said that the survey works at his office were handled by one Timothy Wanjala, who, after he completed

the process on **28/12/1994**, forwarded the documents to the Survey of Kenya on **24/1/1995**.PW3 said that the survey documents were then processed and allocated **F/R No. 272/23** and computation No. **32968,** and were allocated **Parcel No. 152** within **Kitale Municipality Block X11**.

119. PW3 said that, upon conclusion of the survey works and approval based on the allotment Ref. No. **20089/XXV11** and the **PDP KTL.10/93/56,** vide a letter dated **26/1/1995**, the office informed the Commissioner of Lands that the survey works had been completed. He said that the RIM was also amended to reflect **Kitale Municipality Block 12/152**.

120. According to PW3, since the Development Plan had provided that a specific area or parcel within the municipality be reserved for a public purpose, namely an open space, the suit property should not have been allocated in the 1st instance.

121. PW3 produced **PMFI-No. (8)** as **P. Exhibit No. (8).** PW3 told the court that his office had no mechanism for knowing the existence of a reservation of public land, unless it was notified of the same by either the

Commissioner of Lands or the Department of Physical Planning. In this instance, PW3 absolved his office of any blame since nobody had communicated on the earlier alienation until the discovery, which only happened after the investigations were mounted by the plaintiff.

122. **Naomi Rop** testified as **PW4**. She relied on a witness statement dated **25/9/2024** as her evidence-in-chief. As a Land Registrar attached to Trans Nzoia Land Registry, PW4 told the court that she joined the registry in **2020**. PW4 stated that the process of registration of leases begins when the County Land Registry receives correspondence from the Directorate of Land Administration forwarding the leases in triplicate. PW4 said that the lessee would then come to the land registry with the original forwarding letter to pick up the lease.

123. PW4 said that the lease is taken for attestation by the lessee before it is returned to the Registry for registration. PW4 said that at the Lands Registry, they confirm the identity of the owner, and request a ground report on the parcel to be registered from the County Land Administrator.

124. Once the ground report is received and confirmed, PW4 said that the registration is done after also confirming the accuracy of the details in the RIM, including whether the parcel is noted in the RIM; whether the relevant amendments to reflect the parcel are captured in the RIM, and whether the RIM details produced in the lease are commensurate with the RIM in terms of size and location.

125. PW4 said that registration of a lease entails opening a green card and white card, then issuance of the certificate of lease. PW4 said that a green card is opened in the name of the lessor in the proprietorship section, who is always either the national or county government. PW4 said that an entry is then made in the encumbrance section with details of the lessee. Concerning the white card, PW4 said that it is opened in the name of the Lessee and shows the date when the lease is issued.

126. All these documents, according to PW4, necessitate the opening of a parcel file that contains the said documents. PW4 said that after the registration, other registrable transactions may take place, including charges, discharges, transfers, cautions,

restrictions, and succession. PW4 said that all other correspondence is also filed in the parcel file.

127. Concerning the suit property and its title, PW4 said that the plaintiff, through letters dated **26/1/2021, 18/12/2023**, and **18/12/2023**, had requested from her the relevant documents, which they provided vide a letter dated **19/12/2023**. After this, by a letter dated **24/9/2024**, PW4 was nominated to record a witness statement for the purposes of producing clarification on the said documents.

128. PW4 clarified that the certificate of lease in issue was executed by the 3rd defendant, the then Commissioner of Lands, and forwarded to the Land Registrar Kitale, vide a letter dated **19/1/1996**, and was then registered on **5/2/1996**, in the name of the 1st defendant with the Government of Kenya as the lessee for a period of **99** years, with effect from **1/5/1994**.PW4 said that she was not aware of a ground report for the same, prepared by the District Land Administration Officer, in the absence of which the registration would be irregular.

129. PW4 said that from her office records, the 1st defendant transferred the property to the deceased for a consideration of **Kshs. 250,000/=**, after a

consent to transfer was granted to the District Land Officer - **039641**, as per Serial No. **TN/C/12/00**. PW4 said that the Land Registrar confirmed the registration to the Commissioner of Lands through a letter dated **9/2/1994**.

130. PW4 said that if indeed the suit property was part of an area that had been reserved for an open space, then the registration of the lease ought not to have been done, this being public land already alienated for a public purpose. She said that a cursory glance at the Kitale Development Plan shows that the area was reserved as an open space. PW4 had nothing from her office to verify or ascertain any reservation, surrender, or earlier setting apart of the land or registration of the land prior to the **1993/94** allocation.

131. PW4 produced as exhibits the forwarding letter dated **19/1/1996** as **P. Exhibit No. (14)**, the lease as **P. Exhibit No. (15),** transfer of lease as **P. Exhibit No. (16),** letter of consent dated **5/2/1996** as **P. Exhibit No. (17)**, copy of letter dated **9/2/1996** as **P. Exhibit No. (18)**, green card as **P. Exhibit No. (19),** a copy of the white card as **P. Exhibit No. (20)**.

132. Shown **P. Exhibit Nos. (1), (2), 3(a)** and **(b**). PW4 confirmed that it appears that the plot was being hived from land already reserved as an open space. PW4 said that until the plaintiff's officers came to their office, it was not known from her office that the alienation was irregular, which parcel of land has been in the name of the 2nd plaintiff, since **5/2/1996**. PW4 said that she could not tell the name and particulars of the Land Registrar who signed and effected the transfer, since his stamp and an identity number are missing.

133. **Leonard Njenga Mungai** testified as **PW5**. He relied on a witness statement dated **28/2/2025** as his evidence-in-chief. PW5 told the court that he is an investigator with the plaintiff, attached to the North Rift Regional Office, whose duties, *inter alia,* include identifying and tracing corruptly acquired assets. PW5, in relation to the suit property, said that he was the land investigator in a complaint received and a file opened on **20/12/2023**, which was reinforced by the senate following an independent investigation by its Standing Committee on Land, Environment and Natural Resources.

134. PW5 said that the plaintiff, during its investigations, had requested and indeed received several documents, including the Development Plan, Part Development Plan, survey plan, computation file, correspondence file, white card, and other registration documents, and correspondence as produced before this court by PW1, PW2, PW3, and PW4.

135. PW5 said that after analysing the exhibits, he identified a person of interest, whom he interviewed for the purpose of obtaining their witness statements, and later on visited the subject matter for the purpose of appreciating its location and ground status.

136. PW5 said that during a previous investigation, Kitale School had also indicated to them that the land had initially been in use by the school for many years before it was acquired by the 2nd defendant. PW5 said that the stated site visit also involved a survey and a physical planning process with assistance from a team of experts from the Ministry of Lands.

137. PW5 said that the documentary exhibits and key witnesses' statements were key in finding out:

(i) *Whether the suit land was alienated public land.*

(ii) *Whether it was for public use.*

(iii) *Whether it was available for allocation to a private individual.*

(iv) *And whether the process of allocating, physical planning, survey, and registration was irregular.*

138. PW5 said that from the analysis of documentary exhibits, witness statements, and observation, he established several facts that :

(I) *From the DP prepared in 1**973**, the suit property initially formed part of approximately **55 Ha** located between the former Kitale, Webuye Road and Kitale Club that was reserved and in use by Kitale School.*

(II) *A triangle-shaped area bordering Kitale Club was excised from the said Kitale School and reserved as open space for better planning and use.*

(III) *Despite the excision of this parcel and reservation as open space, Kitale School continued to utilise the entire **55 Ha**, including the open space.*

(IV) *Kitale School made an official request to the Commissioner of Lands for allocation of the open space to itself through a letter dated **15/76/1985**.*

(V) *While Kitale School was waiting for a response, a portion of the open space creating the suit property was hiving off and initially allocated to the 1st defendant, who*

*transferred the same to the deceased at the initial stages of acquisition, as per attached letter dated **25/5/1994**, who accepted the offer on **20/9/1994**, and paid the requisite charges.*

(VI) *The acceptance was outside the period of **30 days** that had expired.*

(VII) *The Commissioner of Lands, and or with officials from the Department of Physical Planning, caused a PDP to be prepared as if the land was unalienated, when it was already reserved as an open space.*

(VIII) *In furtherance of the illegal alienation, the Commissioner of Lands instructed the Director of Surveys to conduct a survey of the site vide survey plan **F/R No. 273/23**.*

(IX) *A RIM was amended to reflect the suit property.*

(X) *Soon thereafter, the registration process commenced in favour of the 1st defendant, with the preparation and execution of the lease, which was eventually registered on **5/2/1996**, and a certificate of lease issued.*

139. PW5 said that the 1st defendant had transferred the suit property to the deceased, which exercise clearly indicated that the deceased had been involved in the scheme to defraud the public of its land from the very beginning. PW5 said that the 2nd defendant is currently in possession of the suit property, being the administrator of his late father's estate, without

authority, and had also ignored a demand written to him to surrender the suit property.

140. PW5 said that after the 1st defendant was asked to clarify how she obtained the allotment letter, she indicated in her statement that she did not conduct necessary due diligence to find out whether the land was available for allocation. Her witness statement was not produced as an exhibit.

141. PW5 said that the suit property had been listed as part of the free properties of the deceased in **Succession Cause No.471 of 2022.**

142. PW5 summarised his findings as follows:

(1) *The suit land forms part of the land reserved as an open space for public use.*

(2) *The drawing of the PDP, Departmental Approved No. 190, approved in **1994**, the issuance of the letter of allotment, and the registration of the lease were fraudulent, illegal, null, and void and incapable of conferring any interest or right over the suit property to the 1st defendant.*

143. PW5 told the court that the 2nd defendant has put the suit property to a commercial business generating income, which is incompatible with the intended use of an open space. PW5 urged the court to order the repossession of the parcel to revert to the use for which it was reserved, by cancelling the

entries in the register in favour of the 1st and 2nd defendants.

144. PW5 told the court that from his investigations, the land from **1929** up to **1973** or thereabout was in use by Kitale Academy, catering for Indian Settlers' children, then under the management of CMC Missionaries, later ACK, who eventually surrendered the land to the Independent Government in **1963**. Documentary evidence to support that history was not available.PW5 said that both the school and the land effectively became a public space, measuring about **110 acres**. Authentic and credible documentary evidence in support of those assertions was not tendered in court.

145. PW5 relied on the letter dated **14/9/1973** from the Department of Urban and Physical Planning, which had made a proposal that **2.44 Ha** be surrendered by the school to create an open space. PW5 said that the department of urban and physical planning had found it fit for an open space to be created, as well as an access road. According to PW5, this proposal was later implemented through the Development Plan, dated and approved on **17/1/1974** by the then Commissioner of Lands.

146. PW5 said that the Development Plan on its face indicates the open space was captured as bordering Kitale School, abbreviated as “OS”, lying in Zone No. **3.** PW5 said that the effect of the reservation of an open space was that the land became public property for the benefit of the general public, under the custody of the defunct municipal council of Kitale.

147. PW5 said that from his inquiries, he came across a letter dated **15/7/1985** from the school written by Mr. Rotich, seeking additional land to establish a secondary school, produced as **P. Exhibit No. (26)**. He said that the letter had attached a sketch map produced as **P. Exhibit No 26(a).**

148. PW5 said that the school's request was never processed for reallocation, only for the land to be alienated to the 1st defendant and later transferred to the 2nd defendant as per **P. Exhibit No. 3(b),** after it was approved by the 3rd defendant, contrary to the Development Plan, as per **P. Exhibit Nos. (5), (6), (7), 3(a), (8), (9), (10), (11), (12),** and **(14).**

149. PW5 said that **3** days before the lease could be registered, ownership of the land changed hands

from the 1st to the 2nd defendant by a transfer dated **2/1/1996**. PW5 said that the principle of *nemo dat* applies to the 1st defendant, who could not transfer what she did not own until **5/2/1996**.

150. PW5 said that the 1st and the 2nd defendants used a Land Control Board consent and transfer dated **5/2/1996**, produced as **P. Exhibit No. (16)** and **(17),** even before a ground status report was available to confirm the status of the land.

151. PW5 said that he never came across the ground status report, terming the transfer irregular. PW5 said that thereafter, **P. Exhibit No (1)** and **(20)** show that the 2nd defendant became the new leaseholder as per Entry No. **(2)**, as appearing in the green and white card, which entries happened on the same date, a clear case of collusion.

152. Further, PW5 said that from the foregoing, the 2nd defendant's late father cannot be an innocent purchaser as alleged in paragraph **19** of the statement of defence dated **9/4/2025**, for his fingerprints are all over the registration process.

153. PW5 said that given the fact that the deceased, for many years, was the chairman of the PTA Kitale School, as pleaded in paragraph **3** of the plaint, and

in view of the letter dated **15/7/1985**, seeking the land by Mr. Rotich, it clearly demonstrates the relationship between the deceased and the suit property, even before the land became registered in the 1st defendant's name. PW5 said that the survey of the land at the request of the plaintiff was undertaken as per the report dated **24/2/2022,** produced by him as **P. Exhibit No. (22)** covering the entire area. The makers of the report were not called to testify or produce the same.

154. According to PW5, this survey has recommended the rectification of the anomalies on the land, which are contrary to the Development Plan. PW5 also relied on a Senate Report dated **20/8/2021,** as **P. Exhibit No. (21)**, whose recommendations were that the open space revert to the school. Again, the makers of the report were not summoned to come and produce the same.

155. PW5 produced the certificate of confirmation of the grant as **P. Exhibit No. (23),** Gazette Notice as **P. Exhibit No. (24),** demand letter dated **25/11/2024, 20/1/2025, 25/11/2024, and 21/1/2025,** as **P. Exhibit Nos. 25(a), (b), (c),** and **(d).**

156. In cross-examination, PW5 said that the investigations by the plaintiff were prompted by an earlier investigation relating to parcel No. **236,** as part of the statutory duties of the Ethics and Anti-Corruption Commission (EACC) under the Act. PW5 said that its file to investigate was opened on **20/12/2023** before the deceased passed on in **2024.**

157. **PW5** said that the deceased in **2020/2021** was invited but declined to show up during the preliminary investigations. PW5 said that at the time, the investigators were not aware of the existence of parcel No. **152**, alongside parcels No**. 236, 229,** and **136**, following the school complaint over the encroachment of its land.

158. PW5 said that the School has occupied the **55 Ha** since **1922**.PW5 said that the school had no title deed or survey maps to show how much land it was occupying at the time. PW5 said that he had no documentary evidence to show that the request for surrender of **2.44 Ha** by the School was accepted by its board of management, save to add that the Development Plan seems to have implemented the surrender.

159. PW5 insisted that his investigations did not yield any and was not in possession of any formally executed instrument of surrender of the **2.44 Ha** as open space, duly executed by the school, the defunct municipal council of Kitale, which was the beneficiary and custodian of the surrendered **2.44 Ha**. PW5 said that according to his investigations, it is the Development Plan that implemented the surrender proposal.

160. According to PW5, the information he has is that the defunct municipal council of Kitale, and its successor in title, have never complained over encroachment of the open space or the alleged illegal allocation of its land.

161. PW5 said that there was no dispute that several other departments apart from the 3rd defendant were involved in the initial allocation and registration of the suit property out of the open space, who in this suit have not been sued. PW5 said that this is a land recovery claim due to the illegal and irregular alienation of public land.

162. PW5 said that the plaintiff had yet to commence, initiate, undertake, or lodge any criminal claims against all the perpetrators, including those officers

and officials who took part in the transaction. PW5 said that apart from the documents retrieved from the Director of Surveys, land administration, and the Physical Planning Department on the reservation, the open space had not been surveyed and registered under any legal regime, or a title deed over the same issued to any entity, apart from certificates of title for parcels **No. 152** and **153**.

163. PW5 solely blamed the 3rd defendant for the irregular allocation, issuance of the letter of allocation, lease, and registration of the same in favour of the 1st defendant, despite the existence of a reservation as open space through the Development Plan. PW5 said that he has no evidence that the 3rd defendant unduly influenced any of the officers who took part in the entire transaction.

164. Concerning the deceased, PW5 said that he was the PTA chair of the school, going by **P. Exhibit No. (26),** though he was not the one who had applied for additional land in favour of the school. PW5 said that there was nothing wrong with the deceased as a public officer serving as a PTA chair of the Kitale school at the time.

165. PW5 said that the school was still complaining about its acreage and encroachment, going by **P. Exhibit No. (21).** He said that EACC was not a party to the Senate investigation. PW5 said that there are glaring and incurable irregularities in the manner and dates in which the lease was registered, the land being transferred, and a certificate thereof issued to the name of the 2nd defendant at a breakneck speed.

166. Asked about **P. Exhibit No. (21),** and the National Land Commission position, PW5 said that the surveyors were recommending a re-planning of the open space.

167. PW5 said that he never involved the National Land Commission in his investigations since he was able to retrieve all the information relevant from the Ministry of Land, Housing and Urban Planning, and Public Works.

168. PW5 said that he was not aware whether the National Land Commission had lodged a complaint about the irregular allocation of the suit property, other than its active participation before the Senate. PW5 said that during the investigation, he had disclosed the intention of the EACC to the

defendants, including offering the parties an option for Alternative Dispute Resolution.

169. PW5 said that looking at the green and white card, the restriction or caution was lodged against the title registers, which was done over **30 years** after the title registers were created. PW5 said that the EACC did not involve defendants when they lodged the restrictions over the title registers. PW5 said that during the survey exercise, all neighbours to the suit land were invited as per the report appearing on page **229** of the trial bundle.

170. PW5 confirmed that by **14/6/2010**, the school had been issued with a title deed for **41.28 Ha**, as per page **252** of the trial bundle. PW5 said that the survey exercise that generated a report was a fact-finding exercise, aimed at confirming the acreage, beacons, and boundaries of the open space, following its preliminary investigations on **15/3/2021**.

171. PW5 said that he was unable to take any witness statement from the 3rd defendant during his investigations. PW5 said that his investigations did not establish if the 3rd defendant had a personal relationship with the 1st and 2nd defendants.

172. Further, PW5 insisted that the 3rd defendant was part and parcel of the process of allegedly alienating the public land as per **P. Exhibit No 3(a), (b),** and **(15).** PW5 said that he had no direct evidence that the 3rd defendant expressly influenced the preparation of the allocation documents.

173. PW5 said that he did not investigate or ascertain whether the signatures appended to most of the transaction documents actually belonged to the 3rd defendant, including the PDP and the letter of allotment. PW5 said that he did not ascertain or establish the name of the Land Registrar who signed the lease, transfer form, and or finalised the registration of the same, in the absence of the ground report.

174. PW5 said that it was not necessary to join in this suit; all the other persons of interest who actively participated in the alienation. PW5 insisted that it was the 3rd defendant who breached various laws and regulations in the alienation process.

175. PW5 testimony was that the Senate report contains several annexures, among them minutes, proceedings, and documents used by the key

participants in the proceedings, including the deceased, particularly **131** thereof.

176. **Edwin K. Tum** testified as **DW1.** He relied on a witness statement dated **5/6/2025** as his evidence-in-chief. DW1 told the court that he was an administrator of the estate of his late father, and the registered owner of the suit land with effect from **17/1/1995** until his death on **22/2/2022**. DW1 told the court that the deceased bought for value the suit land from the 1st defendant in **January 1995,** and upon the fulfilment of all his obligations under the sale agreement, a transfer was executed in his favour.

177. DW1 said that before the transfer, the deceased had conducted due diligence confirming that the said parcel of land was uninhabited, free of any encumbrances, and that the 1st defendant had a good title on account of the documents she had. DW1 said that the deceased eventually took immediate possession of the suit land and was in possession of the same until he passed on, whereafter, his beneficiaries have been in possession to date, and have been paying land rates for the said parcel to the relevant authorities.

178. DW1 said that his late father was an innocent purchaser for value without any notice and or information on any defect and or irregularity and obtained the title to the land following due process. DW1 said that the claim that the deceased illegally acquired the land is malicious and highly suspect, coming after his demise on **22/2/2022**, yet all along, there was no claim by the faceless person whom the plaintiff claims instigated the investigations challenging the acquisition of the suit property.

179. Further, DW1 said that what is even more ironic is the fact that the plaintiff has not sued all the relevant officers or offices, who approved the allocation of the suit property and opted to sieve out without giving the criteria of whom to pursue.

180. DW1 said that the plaintiff's mandate stems from reclaiming or protecting a parcel of land acquired through fraud or corrupt dealings, but strangely, the evidence presented so far by it points to nothing relating to corrupt dealings or fraud perpetuated by the deceased in acquiring the land.

181. DW1 said that it was not true that at the time of acquisition the suit property was classified as public

land intended for public use, otherwise, its status as per the custodian of land records had noted the same as vacant government land, which the Commissioner of Lands had authority to alienate to the 1st defendant after receiving the necessary approvals from all the relevant offices in the absence of any objection.

182. DW1 said that the 1st defendant had made an application for allotment of the suit property, which was accepted, and a letter of allotment was issued upon obtaining the necessary approvals from all relevant authorities. DW1 denied that the suit property was classified as an open space or unlawfully obtained to deprive Kitale Academy of the same, for it had a separate title.

183. DW1 said that the plaintiff has been unable to produce any official land records showing that Kitale School or any other entity's interests had ever been registered, reserved, alienated, and or surrendered over the said property as public land.

184. DW1 said that his late father followed due process to obtain the title, and nothing has been tendered to show the extent and or delineation of the alleged reserved open space.

185. DW1 termed the suit as malicious, selfish, and merely brought to wrestle back the suit property upon them in the guise that it is public land to bypass the correct channel of compulsory acquisition of private land, **30 years** after it was acquired by his late father, when the estate may not have had full historical backing of the same.

186. DW1 produced as exhibits, a death on a death certificate issued on **4/3/2022**, certificate of lease dated **5/2/1996**, lease registered on **5/2/1995,** letter of allotment dated **25/5/1994**, letter dated **26/1/1995**, standard form instructions to prepare a lease dated **26/1/1995**, letter dated **31/1/1995**, certificate of stamp duty for **38101,** letter dated **19/1/1996**, transfer form dated **2/2/1996**, and rates payment receipts issued on **28/3/1994** as **D. Exhibit Nos. (1) - 14(a), (b),** and **(c),** respectively.

187. DW1 said that his late father was not known to the 3rd defendant on a personal level. DW1 admitted that he had not come across any other Development Plan apart from what the plaintiff produced before this court.

188. DW1 confirmed that the lease was issued and signed by the 1st defendant on **24/3/1994**, and thereafter registered on **5/4/1995**, while the letter of allotment is dated **25/3/1994**. DW1 said that the transfer of the land to his late father is dated **2/2/1996**. He did not produce either a sale agreement or proof of the payment of the consideration.

189. DW1 insisted that his late father had done enough due diligence to conclude that the 1st defendant had a good title; otherwise, there was nothing to show that the land had been reserved as an open space.

190. DW1 said that the letter of allotment was copied to various relevant departments and officers, where none returned an objection that the land was unavailable for alienation.

191. The plaintiff relies on written submissions dated **13/4/2026,** isolating six issues for the court's determination. On the jurisdiction, it is submitted that this court under **Article 162(2)** of the Constitution, and **Section 13** of the Environment and Land Court Act, has the jurisdiction to hear this suit filed for recovery and protection of illegally alienated public land as an open space, based on

the plaintiff's statutory mandate on investigation under **Section 11(1), (d)** and **(j), 13(2) (c)** of the EACC Act **2011**.

192. The plaintiff submits that the claim is not limited due to the exemption under **Sections 41(1)(d), 42, 43** of the Limitation of Actions Act, Cap **22** Laws of Kenya. Reliance is placed on ***Ethics and Anti-Corruption Commission -vs- Ebsons Construction Company Limited & 3 others [2023] KEELC 107 (KLR) (18 January 2023) (Ruling)*** and ***Ethics and Anti-Corruption Commission -vs- Anyega & 4 others (Environment & Land Case 249 of 2018) [2024] KEELC 613 (KLR) (14 February 2024)(Ruling)***.

193. On whether the suit land was alienated land reserved for a public purpose and thus unavailable for allocation and alienation, the plaintiff submits that its witnesses have provided uncontroverted evidence that, through the Development Plan, it delineated the suit properties which abut Kitale School and Kitale Golf Club, for recreational purposes under Zone **(3)** and specifically described it as "O.S.", which PW1 clarified that it is an abbreviation standing for Open Space.

194. The plaintiff submits that before the reservation, the suit property formed part of the Kitale School, a public institution, as evidenced by a letter dated **14/9/1973**, produced as **P. Exhibit No. (1)**, which the department in charge had sought for a surrender measuring **2.44 Ha** for purposes of an open space and a road, later enforced through the Development Plan, though leaving the school to continue using it as an open space, and later on applied for as **P. Exhibit No. (26).**

195. The plaintiff submits that it is to be noted that **P. Exhibit No. (1)** is the only existing Development Plan for Kitale Municipality from the time it was approved and even after the suit property was created and registered in favour of the 1st defendant, which has never been revised or amended, which the defendants have failed to provide contrary evidence, and which is a superior document in relation to planning of Kitale Municipality, compared to any other including the PDP and other survey plans.

196. The plaintiff submits that the Development Plan, being a public document, is properly produced in court as admissible evidence in compliance with

Sections 68(2)(c), 80, and **83(1)(c)** of the Evidence Act. The plaintiff submits that the master plan of Kitale Municipality was prepared and properly certified by the Department of Physical Planning and assigned Departmental Ref. **No. 10/72/7,** as approved by the Commissioner of Lands, under the repealed The Land Planning Act (Repealed) Cap **303** and Cap **286**, Registration **11(3)** of the Development and Use of Land (Planning) Regulations, **1961**, had defined public purpose as any non-profit making purpose, to include intended public open spaces and car parks.

197. The plaintiff submits that **Section 16** of Cap **286** of **1996** had indicated various uses for which a Development Plan provided, including recreational areas such as open spaces and reserves. **Section 21** thereof, according to the plaintiff, also provided that once approved, no development could take place unless it conformed with the approved plan, and that under **Section 29** thereof, local authorities were given the mandate to maintain areas reserved for, among others, open spaces.

198. The plaintiff submits that, through a perusal of the above legislation, had not defined what an open

space is, the concept is not new and appears to have been borrowed from the English. Reliance is placed on ***The Queen on the Application of the Friends of Finsbury Park & Haringey London Borough Council & Festival Republic Limited, Live Nation (Music) UK Ltd & The Open Spaces Society [2017] EWCA Civ. 1831, Case No. C1/2016/2662*** to submit that an open space is a garden or is used for purposes of recreation.

199. The plaintiff submits that open spaces are an important area that ensures access to recreational facilities where the need for development is high due to dense population, which imposes a heavy burden on already scarce land, and without planning for spaces allowing for green areas, these may lead to catastrophic effects on the environment or public health.

200. Further, the plaintiff relies on the Hong Kong Planning Standards & Guidelines. At **Chapter 4** on Recreation, defining;

> **"Pressure for land is extreme in Hong Kong, and it must be recognised that there are competing demands for land. However, the government acknowledges that recreation stems from a basic human need for activities that are essential to the**

mental and physical well-being of the individual and the community as a whole. It therefore encourages participation in recreational pursuits and seeks to ensure that appropriate opportunities are available to meet the needs of the people of Hong Kong. Recreation is accepted as an essential activity for which land must be allocated. However, it is also recognised that much active recreation can be provided for without the need to set aside exclusive land areas. For example, sports centres are already being provided in multi-use buildings, and greater use is being made of the marine area.

Apart from recreation use, open space also allows the penetration of sunlight and air movement, as well as planting areas for visual relief. It is also an essential land use element in urban design. These functions are particularly important in a high-density, high-rise built environment like Hong Kong."

201. Therefore, based on the quote, the plaintiff submits that open spaces are tools for the well-being of the public and the environment, serving a role in the actualization of **Article 42** of the Constitution on the environment and **Article 43** on Economic and Social Rights as a key element for individual and social well-being.

202. The plaintiff submits that open spaces are inherently public in nature, and this connotes that the

ownership and management of an open space must be for public benefit and cannot therefore be placed in the hands of private persons.

203. The plaintiff submits that it follows then that open spaces, undisputedly, fall within the category of alienated public land and as such, public utility to be used for public benefit. The plaintiff submits that the law applicable at the relevant period sought to distinguish unalienated government land and alienated government land, under **Section 2** of the Government Land Act (repealed), and **Section 3** of the Physical Planning Act **286** (repealed), which is land not leased to anyone, or reserved.

204. The plaintiff submits that reserved land for public purpose is effectively alienated public land, lack of registration or allotment notwithstanding, since it is not the act of registration that gives such land its public purpose identity, for it assumes that identity upon the reservation. Reliance is placed on ***Kenya Anti-Corruption Commission -vs- Frann Investments [2020] eKLR***, as affirmed in ***Frann Investments Ltd -vs- Kenya Anti-Corruption Commission & Others Civil Appeal No. E038 of 2021 and Sunshine Villas Ltd -vs- County***

Government of Kisumu & Another EACC (IP) [2023] KEELC 2160 [KLR].

205. In this case, the plaintiff submits that the suit property, having been reserved as an open space forming part of a public utility for the benefit of the public, as found also by the Senate Committee, produced as **P. Exhibit No. (14),** it was not available for alienation and or be used for any other purpose, as held in ***Dina Management -vs- County Government of Mombasa [2023] KESC***. Reliance is placed on ***Association of Vasanth Apartments' Owners -vs- Gopinath & Others, Indian Civil Appeal No. 1890-91 of 2010***.

206. On whether the alienation to the 1st and 2nd defendants was in accordance with the law. The plaintiff submits that, though the President had powers under **Section 3(a)** of the Government Land Act (repealed), that power was subject to any other written law and the Land Planning Act Cap **303, 1961,** and regulations made thereunder. In this case, the plaintiff submits that the creation and the reservation of the open space under Cap **303** rendered it alienated and thus unavailable to the President for alienation under **Section 3** of the

Government Land Act, whose powers could be delegated to the Commissioner of Lands under **Section 7** of the Government Land Act, but only in relation to unalienated public land, and not under **Section 3(a)** thereof, as held in ***James Joram Nyaga & Another -vs- Attorney General & another [2007] eKLR***.

207. The plaintiff submits that any alienation of property preserved as open space for private purpose to the 1st defendant was illegal, fraudulent, null and void, to the even if the Commissioner of Land had such powers, the plaintiff submits that the process of alienating unalienated government land was not followed under **Sections 9, 12, (Parts III, IV,** and **V)** of the Government Land Act (repealed). Reliance is placed on ***Nelson Kazungu Chai & Others -vs- Pwani University [2014] eKLR***, and ***Dina Management Ltd*** *(supra).*

208. On whether the 1st defendant acquired a good title capable of transfer to the 2nd defendant, the plaintiff submitted that owing to the public reservation of the suit property, rendering it unavailable for allocation, no good title, interest or right accrued to the 1st defendant of being transferred to the 2nd defendant.

209. The plaintiff submits that this is further compounded by the illegalities and procedural or irregularities in the allocation process contrary to **Sections 9** and **12** of the Government Land Act (repealed), as demonstrated in the evidence of PW2. Reliance is placed on ***Kipsirgoi Investments Ltd -vs- Kenya Anti-Corruption Commission Civil Appeal No. 288 of 2010,*** citing with approval ***Kenya Anti-Corruption Commission -vs- Ahmed Karama Said & 2 Others [2011] KEHC 3564 (KLR), Karen Roses Ltd -vs- Attorney General & Others [2010] eKLR***.

210. The plaintiff submits that the evidence of DW1 was full of inconsistencies, jeopardizing his assertion of a good title. The plaintiff submits that the failure of the 1st defendant to testify, whose absence was not explained, makes the court infer that she had no evidence to give to controvert what the plaintiff has said. The plaintiff submitted that the assertion by DW1 that his late father was an innocent purchaser for value without notice was not substantiated by the evidence to show that due diligence he undertook before purchasing the land.

211. The plaintiff submits that the transfer of the lease as per **D. Exhibit No. (13)** executed on **2/2/1996** before the 1st defendant acquired title as per **D. Exhibit No. (3)** and **(17)** on consent to transfer appear perplexing and bizarre, as the said **D. Exhibit No. (3)** was executed on **24/3/1994** before the letter of allotment. **D. Exhibit No. (4)** and **P. Exhibit No. 3(a)** and her acceptance on **20/9/1994** as per **D. Exhibit No. (5)** and **P. Exhibit No. 3(a).**

212. The plaintiff submits that a further puzzle is that the lease was registered on **5/2/1995** despite it having been received for registration on **5/2/1995** and before the issuance of the letter of allotment and the execution of the lease by the 1st defendant and the 3rd defendant.

213. The plaintiff submits that it was incumbent upon the 2nd defendant to establish what this "O.S" meant, visit the site, which was next to Kitale School, and most probably with a high likelihood of it being equally a public land. The plaintiff submits that the 2nd defendant was also unable to produce the sale agreements or proof of payment. Reliance is placed on ***Chemey Investments Ltd -vs- Attorney General & Others Civil Appeal No. 349 of 2012***.

214. The plaintiff submits that, through the 2nd defendant, who was not present during the sale, as the administrator of the purchaser's estate, he must assume liability and responsibility, and in this instance, he has been unable to demonstrate the legality of the title.

215. On whether the particulars of illegality, fraud, abuse of office, and breach of statutory and fiduciary duty have been established against the 3rd defendant, the plaintiff submits that all the particulars of the same are pleaded in paragraph **15. 16**, and **18** of the plaint have been proved through the evidence on record.

216. Regarding the 3rd defendant, the plaintiff submits that as the Commissioner of Lands, he allocated the land despite its reservation and setting apart as an open space vide the Development Plan (**P. Exhibit No. 2**), a document approved and in possession of his office, hence cannot feign ignorance of the public nature of the suit property.

217. The plaintiff submits that the allocation was in excess of the powers of the 3rd defendant as limited by **Section 7** of the Government Land Act (repealed), for he failed to make inquiries before

allocation to establish the public nature of the suit property, and also going ahead to approve the PDP, contradicting the public use in the Development Plan and thereafter attempting to amend the reservation of the suit property.

218. The plaintiff submits that the 3rd defendant also proceeded to sign and issue a lease, causing the property to be perceived as private property rather than public property, defeating the public interest. The plaintiff submits that the 3rd defendant failed in his core responsibility of safeguarding the legitimacy of the land processes in Kenya, a personal responsibility not subject to delegation, to ensure that the law and applicable procedures were followed before signing the lease.

219. Further, the plaintiff submits that fraud and illegality have been established against the 1st and 2nd defendants, out of the glaring inconsistencies and discrepancies in the documents that they relied on and impeached the process leading to their title, especially **D. Exhibit No. (3)** which does not tally with the dates on the lease contained in the copy of the green card and white card. The plaintiff submits that the failure in both leases to disclose the name

and number of the Registrar who registered it is an unmistakable sign of fraud and illegality.

220. The plaintiff submits that the quick succession in which the 2nd defendant sought the property and the transfer signed in his favour, even before registration, draws the inference that the 2nd defendant was present throughout the impugned process and he was aware of the fraud and illegality since the issuance of the letters of allotment. The plaintiff urges the court to allow the suit with costs guided by the case law of ***Rai -vs- Rai [2014] eKLR***.

221. The 1st and 2nd defendants rely on written submissions dated **26/3/2026**, isolating eight issues for the court's determination. On whether the suit property is part of public property alienated and or reserved for public purpose, to wit, an open space, the 1st and 2nd defendants submit that no evidence was led to support the assertion that the suit property was part of public property alienated or reserved for public purposes, namely an open space, other than **P. Exhibit No. (1)** dated **14/9/1973**, which letter in law cannot be deemed as evidence of title to property.

222. The 1st and 2nd defendants submit that **P. Exhibit No. (1)** lacks any description of property and was in fact addressed to Kitale Primary School, an entity different from Kitale School. The 1st and 2nd defendants submit that the said letter and the plan proposal were seeking to reserve an area for a new and better junction between the school and Mumias Highway, with the assumption that the area will be used as a road and an open space.

223. The 1st and 2nd defendants submit that no evidence was tendered to show that there was either a response to the letter or an acceptance of the proposal, or a surrender of the **2.44 Ha** for public use by the Kitale Primary School.

224. Further, the 1st and 2nd defendants submit that there is no evidence tendered by the plaintiff or its witnesses that the suit property was alienated either as a road or as an open space, or evidence that the land was compulsorily acquired for Kitale Primary School, for purposes of recreation of an open space.

225. The 1st and 2nd defendants submit that there was also no evidence of any conversion of the suit land, or allegedly allocated for education purposes, or set aside as an open space.

226. The 1st and 2nd defendants submit that the acreage allegedly surrendered by Kitale Primary School for allocation as an open space was also never clarified by any of the plaintiff's witnesses, considering that **P. Exhibit No. (2)** talked **of 2.44 Ha** for surrender for public use, both as a road and open space.

227. The 1st and 2nd defendants submit that no representative of Kitale School or Kitale Primary School was called as a witness by the plaintiff to shed light on this alleged surrender of **2.44 Ha,** to support the plaintiff's claim that the subject land was part of public land surrendered by Kitale Primary School, for public use as an open space. The 1st and 2nd defendants submit that the reason is singular that Kitale Primary School never surrendered any portion to be reserved as an open space, looking critically at what it submitted and was captured in the Senate Report (**P. Exhibit No. 21**).

228. The 1st and 2nd defendants submit that from the Senate report, it clearly shows that Kitale Primary School was still claiming **55 Ha** when it presented its case before the Senate, as per paragraph **22** of

the minutes at page **139,** where it only acknowledged surrendering **2 acres** to KeNHA.

229. Regarding **P. Exhibit No. (2)**, the 1st and 2nd defendants submit that the plaintiff failed to give the sequence of events supported by documentary evidence to the preparation or drawing and revision of the Development Plan, culminating in the creation of an open space as pleaded in paragraph **7** of the plaint.

230. The 1st and 2nd defendants submit that, other than PW1's elaboration on the procedure of creating a Development Plan, no documents were produced to confirm whether that process was followed in the creation of **P. Exhibit No. (2)**, generally and in particular, the inclusion of the open space as part of the Development Plan, keeping in mind that the area allegedly allocated as open space was originally allocated for educational purposes.

231. The 1st and 2nd defendants submit that whereas PW1 indicated that the Development Plan in question was a short-term Development Plan to cover **10 years** only, meaning it could only exist until **1989,** or **1994**, assuming it could last up to **15 years,** and whereas PW1 said that it was still operational even if

the period of **10** or **15** years had lapsed, the law allowing that extension was not mentioned.

232. The 1st and 2nd defendants submit that whereas PW1 and PW2 alleged the letters (O.S) stand for Open Space, and as per **P. Exhibit No. (2)** fell in **Zone (3),** which stood for recreation areas; nowhere does the Development Plan give a key that the abbreviation (O.S) stood for Open Space. Similarly, it is submitted that the area indicated as O.S did not contain the prefix **(3)** to place the area in the category of a recreation zone.

233. The 1st and 2nd defendants submit that going by the evidence of PW1, if the Directorate of Physical Planning is the custodian of the Development Plan, and noting that no adverse comments were made objecting to the preparation, approval and signing of the PDP, when it was circulated before approval to state that the suit property was un available for allocation, and if the PDP, to date, has never been revoked or queries raised by the office of PW1, that subject property is public land, reserved as an open space, then it means that the plaintiff has established their claim. Reliance is placed on ***Agalo***

-vs- County Government of Trans Nzoia & Others [2025] KEELC 4482 [KLR].

234. On whether the suit property was available for alienation or allocation to the 1st defendant or any other person, the 1st and 2nd defendants submit that the definition and allocation of unalienated government land is governed by **Section 2 Part 111**, **IV, V,** and **V1** of the Government Land Act (repealed). In this instance, the 1st and 2nd defendants submit **P. Exhibit No. (1)** dated **14/9/1973** was a mere proposal, and not a letter of allotment, while the Development Plan dated **17/1/1974** was a short-term development plan whose creation was not supported by any document and whose lifespan in any event could not transcend beyond **15 years**.

235. 1st and 2nd defendants submit that at the time of the allocation, the suit land was described by the custodian of land records as vacant government land, unalienated, and so is the reason that the PDP was approved by the various departments, when it was circulated for comments, leading to the letter of allotment to the 1st defendant, since the PDP used has not been recalled, cancelled or withdrawn to

date by the Department of Physical Planning and the Municipal Council of Kitale, the alleged custodian of the open space.

236. The 1st and 2nd defendants urge the court to find the authority of ***Nelson Kazungu Chai & Others -vs- Pwani University [2014] eKLR***, distinguishable, for the plaintiff is relying on a short-term development plan which had lapsed by the time the land was being alienated to the 1st defendant and the deceased.

237. The 1st and 2nd defendants also submit that the court has not been given any evidence on how the open space was created, from land allegedly belonging to Kitale Academy or Kitale Primary School, unlike in ***Nelson Kazungu Chai*** *(supra)*, where the numerous had tendered evidence on the history of their acquisition of the property, and where none of the offices involved including the Ministry of Land and Settlement and the National Land Commission had to date ever sought cancellation of the title in favour of the deceased, and where the process highlighted in ***Nelson Kazungu Chai*** *(supra)* was followed in the allocation.

238. As to ***Chemey Investment Ltd*** *(supra),* the 1st and 2nd defendants submit that the case is also distinguishable, for there was a connection between the directors of the first allottees and those to whom the property was transferred, hence defeating the doctrine of bona fide purchaser. The 1st and 2nd defendants submit that evidence of relation or connivance between the 1st and 2nd defendants is missing.

239. The 1st and 2nd defendants submit that the errors on the dates of the transfer cannot defeat the 2nd defendant's defence of a *bona fide* purchase, as the lease was only pending the last step, with all indications that a lease was going to be registered in the name of the 1st defendant.

240. The 1st and 2nd defendants further submit that the green and white cards are clear that the lease in favour of the 1st defendant was registered before the transfer in favour of the deceased. Therefore, the 1st and 2nd defendants submit that the alienation was in line with ***Torino Enterprises Ltd -vs- Attorney General [2023] KESC 79 [KLR]***.

241. Again, the 1st and 2nd defendants submit that the caselaw of ***Dina Management Ltd*** *(supra)* is

distinguishable for the allocation was found unprocedural, in that there was no approved PDP by the Director of Physical Planning, and that the land had been allocated as a freehold instead of a leasehold title, yet it was a town plot.

242. Similarly, the 1st and 2nd defendants distinguish the case of ***Sehmi & Another -vs- Tarabana Co. Ltd & Others [2025] KESC 21 [KLR]***, whose facts was on the parties' interest after expiry of a lease, with the land having reverted to the government, meaning that any subsequent allocation had to follow due process, rendering the allocation in favour of the 2nd respondent without a letter of allotment and due process being followed irregular.

243. On whether the 1st defendant acquired a good title, right, interest, or estate capable of being transferred to the 2nd defendant, the 1st and 2nd defendants submit that the 1st defendant acquired a good title, right, interest, or estate capable of being transferred to the 2nd defendant. Further, the 1st and 2nd defendants submit that the 1st defendant acquired a good title capable of being transferred, given that the registration of the subject property was

preceded by a valid process of inquiry, from all the relevant departments of the government.

244. The 1st and 2nd defendants submit that since the relevant departments did not raise any objection to the allocation in the first instance or at all, and that the status of the subject land as per the custodian of land records, the Ministry of Land and Settlement at the time of allocation had noted it as vacant government land, where after the parcel of land was paid for, a RIM amended by the Director of Surveys, as per P**. Exhibit No. (7)** and **(8)**, stamp duty was paid and a lease issued as per **P. Exhibit No. (12)** and **(15),** it means that the lease issued to the 1st defendant made her the absolute owner of the suit property, whose title is protected by the repealed Constitution and **Section 23(1)** of the Registration of Titles Act (repealed).

245. The 1st and 2nd defendants submit that, if there were no restrictions or encumbrances in existence to inhibit the 1st defendant from transferring the property, the transfer to the deceased was valid, and had so remained unchallenged by the offices that issued it until the filing of this suit. Reliance was placed on ***Kibos Distillers Ltd & Others -vs-***

Benson Ambuti Adega & Others [2020] KECA 875 [KLR].

246. On whether the plaintiffs have established fraud and illegality, it is submitted that the plaintiff did not bring any credible or believable evidence to demonstrate that the 1st defendant or the deceased had any express knowledge that the suit land was public.

247. The 1st and 2nd defendants submit that the decision whether to allocate or not to allocate rested with the various relevant officers who had to approve the allocation of the land before the allotment was issued, and in particular, the Physical Planning Department, which was to inform the Commissioner of Lands that the land was not available for allocation.

248. The 1st and 2nd defendants submit that the evidence of PW1 was clear that other departments of government had various roles to play, and no other adverse report was availed by her department or the other departments to the Commissioner of Lands against signing the PDP, issuance of the letter of allotment, or lease to the 1st defendant.

249. The 1st and 2nd defendants submit that PW2 also confirmed that it is the Department of Land Administration that had the duty to confirm whether or not the land was available for alienation, but gave no such contrary communication, meaning that the role of the 1st defendant was minimal in that internal process.

250. The 1st and 2nd defendants, therefore, submit that the plaintiff was unable to show in what way the deceased participated in the allocation of the land to the 1st defendant, or knew or misrepresented or discreetly solicited for the suit property as public land to be allocated or alienated, and to which officer(s) or offices such representing were made.

251. Further, the 1st and 2nd defendants submit that the evidence to the contrary shows that the process was open, public, and involved a string of personnel who gave their approval every step of the way.

252. As to acceptance and payment, the 1st and 2nd defendants submit that there was no evidence offered that the offer was cancelled. To the contrary, the 1st and 2nd defendants submit that the very act of acceptance of the payment confirms as much and in any event, paragraph **2** of the allotment letter

talks of payment within **30** days of the post mark and since the plaintiff has not produced evidence of when the letter of offer was posted, to the 1st defendant, it is impossible to ascertain when the time began running and that the payment was time barred.

253. As to the alleged alienation of public land to private use by the deceased, the 1st and 2nd defendants submit that the process leading to the acquisition of the subject matter to the 1st defendant went through various stages and none of the offices where PW1, PW2, PW3, and PW4 work objected to the allocation of the subject property or the creation and regulation of the subject lad as residential plot, and that there is no evidence that the deceased or the 1st defendant breached the terms of the documents contained thereof.

254. The 1st and 2nd defendants submit that there is no evidence that the deceased caused the transfer of public land to himself, for at the time of the transfer, the land had already been registered in favour of the 1st defendant as private property as per **P. Exhibit No. (13).**

255. **The 1st and 2nd** defendants submit that there was nothing to suggest the suit property was initially public land, until the said allegation crop up form an unidentified person according to the plaintiff on **9/8/2021**, which is three decades later, yet none of the offices of Physical Planning Department, the Director of Land Administration, the Office of Director of Surveys, where PW1, PW2, PW3, and PW4 work, had ever recalled the lease, letter of allotment, PDP or the approvals that had been issued to facilitate the registration in favour of the 1st and 2nd defendants, on account of public land. Therefore, the 1st and 2nd defendants submit that the burden to prove fraud was not discharged.

256. The 1st and 2nd defendants submit that in an attempt to prop its fraud claim, the plaintiff, while advancing its argument under this head, not only tendered evidence but also shifted its submissions to facts on issues that were not pleaded and do not support these particulars of fraud which are contained in the plaint.

257. The 1st and 2nd defendants submit that parties are bound by their pleadings, and the requirements for

a claim based on fraud are that it must be pleaded and strictly proved.

258. In this case, it is submitted that though the plaintiff pleaded fraud, it did not strictly prove fraud through evidence, and whatever is now raised is a written submission hinged on no particulars of fraud. Reliance is placed on ***Eldoret Express Limited -vs- Tawai Limited; National Land Commission(IP) [2019] eKLR and Wilson Masila Muema -vs- County Government of Machakos [2020] eKLR***.

259. On whether the alienation and or allocation of the suit property by the 3rd defendant to the 1st defendant was illegal, fraudulent, or in breach of statutory and fiduciary duty, or is an abuse of its powers as the then Commissioner of Land, the 1st and 2nd defendants submit that **Section3(1)** of the Government Land Act (repealed), and its regulations allowed the 3rd defendant delegated powers to make grants or dispositions of any estates, interests, or rights in or over unalienated government land, making the claim on that end by the plaintiff misplaced.

260. On sustaining the case against the 2nd defendant, it is submitted that the same is time-barred under **Section 7** Cap **22** for being brought **29** years after the deceased obtained a certificate of lease.

261. The 2nd defendant submits that **P. Exhibit No. (22)**, shows that as early as **2020**, the registration in favour of the deceased was known to the plaintiff, only to await until **2025**, to claim the land as public, while in fact it is private property, to which **Section 42** of the **Limitation of Actions Act** Cap **22** does not apply.

262. The 1st and 2nd defendants submit that the undisclosed party to whom the plaintiff acts for did not see it fit to challenge the title or give a reason why the claim had to wait until the deceased passed or had to make the claim against the legal administrator, knowing too well that he may not have the historical backings, which is a claim in personam and cannot be sustained against him.

263. The 1st and 2nd defendants submit that there is nothing to show that the deceased was not an innocent purchaser or that a notice had been issued on the alleged defects to the title, which he ignored

or overlooked. Reliance is placed on ***Zebak Ltd -vs- Nadem Enterprises Ltd [2016] eKLR***.

264. In view of the foregoing, the 1st and 2nd defendants submit that the plaintiff does not deserve the reliefs sought, more so when it has not tendered evidence to support prayers **(a), (b), (c), (d), (e),** and **(f).**

265. Regarding prayer **(g),** is it the government officers whom the plaintiff has deliberately chosen not to sue or to invite their evidence as to the registration of the 1st defendant and the deceased as owners of the suit property, yet they benefited from the amount demanded to facilitate the process of registration of titles, including payments of land rent and rates to date?

266. Therefore, the 1st and 2nd defendants submit that the plaintiff cannot turn and seek general damages for acts that were committed by known government entities right from the issuance of the allotment letter to the titles issued on the strength of which the deceased was registered as the proprietor.

267. The 1st and 2nd defendants submit that no quantification of loss of use or evidence was tendered at all as a basis of a claim for general

damages. The 1st and 2nd defendants urge that the suit be dismissed with costs to them.

268. The 3rd defendant relies on written submissions dated **14/4/2025**, which were filed outside the timelines set. It is submitted that the evidence tendered regarding fraud, ultra-vires, and abuse of office was below the threshold set in ***Arthi Highway Developers Ltd -vs- West End Butchery Ltd & Others [2015] eKLR***, especially considering that pursuant to Cap **280** (repealed), and Gazette Notice **No. 14 of 1965**, the office of the Commissioner of Lands exercised delegated powers to allocate land. Reliance is also placed on ***Wanyororo Farmers Co. Ltd -vs- Nakuru Kiamunyeki Co. Ltd [2017] eKLR, Vijay Morjaria -vs- Nasingh Madhusingh Darbar & another (2000) eKLR & Another [2000] eKLR***, and **Section 107(1)** of the Evidence Act on failure to discharge the burden on asserted facts of fraud.

269. The 3rd defendant submits that PW1's evidence was clear that from the outset, the alienation process involved other stakeholders outside the 3rd defendant, and on whose information he relied.

270. The 3rd defendant submits that since the Development Plan and the PDP were under the custody of the Physical Planning Department, which owed the obligation to inform the Commissioner of Lands in the event of the land being unavailable for alienation, but failed to do so.

271. Further, the case being that the plaintiff has not produced a single shred of evidence to indicate that the 3rd defendant caused the PDP to be prepared fraudulently outside his mandate, or if he was given advice by the relevant departments and ignored it by proceeding with the transaction, the suit by the plaintiff must fail.

272. The 3rd defendant submits that the plaintiff is mistaken by assuming that the Commissioner of Lands was individually supposed to match the ground or the relevant registry to check whether any land was available for alienation.

273. It is submitted that the Commissioner of Lands, in his capacity, used to deal with a myriad of applications and transactions and therefore, primarily relied on the information given to him by his junior officers, other departments, and schedule officers.

274. It is submitted that without information from other departments or stakeholders, the 3rd defendant could not reasonably be expected to know otherwise.

275. The 3rd defendant submits that the rule in issuance of the letters of allotment to alienate the suit property was preceded by a PDP, and as confirmed by PW1 and PW2, there is no evidence that he received adverse comments or communication of non-availability of the land, which he ignored, to be said to have acted outside or in excess of his mandate.

276. The 3rd defendant submits that even PW5, in his testimony, was unable to show how the 3rd defendant ignored the relevant information or advice or used his influence to allocate the land.

277. The 3rd defendant submits that it cannot be just to punish a senior citizen for failing to get the relevant information, who left the office over **20** years ago, and that as confirmed by PW3, no inquiries were made from his former office or is not capable after **20** years in his personal capacity to produce any documents with respect to the same, where he had

no vested interest in, and was done in discharge of his mandate.

278. The 3rd defendant submits that the onus was on the plaintiff to join the National Land Commission, the successor of the office of the Commissioner of Land, even as an interested party, to assist the court, those failure was not only a calculated extremely prejudicial to him as the National Land Commission is now the custodian of all documents about the alienation of land for it to produce the requisite file or documents about this specific transaction. Reliance is placed on ***Kenya Akiba Micro Finance Ltd -vs- Ezekiel Chebii & Others [2024] KEELC 14488***.

279. The issues calling for my determination are:

(1) If the plaintiff has pleaded and proved that Kitale Academy or Kitale School surrendered 2.44 ha out of its 55 ha of land to create an open space, which eventually became public land.

(2) If the plaintiff has proved that the issuance of a letter of allotment, preparation of a PDP, the issuance, registration, and transfer of a lease, to the 1st defendant by the 3rd defendant, was irregular, fraudulent, illegal, and unprocedural.

(3) If the plaintiff has proved that the sale, transfer, and registration of the suit

property between the 1st and 2nd defendants was irregular, unprocedural, and fraudulent.

(4) If the plaintiff has proved that the 3rd defendant participated in any fraudulent, illegal, and or unprocedural alienation of the suit property to the 1st defendant.

(5) If the plaintiff has proved that the 3rd defendant, during his tenure as the Commissioner of Lands, acted illegally and fraudulently in alienating the suit property, whereas the same was not available for alienation, and or acted ultra vires, hence should be held individually and personally accountable for the said action.

(6) If the plaintiff's failure to join other officers or departments who actively participated in the transaction and instead sued the 3rd defendant individually was malicious, or fatal to the suit.

(7) If the plaintiff is entitled to the reliefs sought.

(8) What is the order as to costs?

280. The plaintiff's case is that the suit property was and remains public land after it was allegedly surrendered by the school upon request, which request was later implemented or reserved as an open space, making the open space unavailable for

alienation for private use due to its protection by the law.

281. According to the plaintiff's witnesses, the suit property, being part of a reserved open space, following surrender as per the letter of its request, its status was confirmed through implementation in the Development Plan of **1974**, removing it from any disposal to a private person or entity, least of all by the 3rd defendant, who was the Commissioner of Lands and party to the Development Plan and its implementation in the first instance.

282. The starting point is to define what in law is an open space, its characteristics, features, and purposes. Open spaces, as ably submitted by the plaintiff from a Hong Kong perspective, serve many purposes in society, beyond leisure and recreation, as traditional primary roles. Closer home, Prof. Collins Odote, in his seminal piece "Protecting Uhuru Park as a public pen Space: Options and Implications", accessed *at https://uonjournals.uonbi.ac.ke › article › download*. Professor Odote says that during the Covid-19 pandemic, human beings appreciated open spaces much more, and the absence of sufficient open spaces creates a problem for planners; its existence

helps break monotony and enhance the aesthetic appeal of the entire city, making it livable.

283. Prof. Odote says open spaces serve environmental functions, create better environmental and prevent congestion, conserve natural resources, and scenic features of the land, help prevent soil erosion and floods, mitigate air and water pollution, and some are environmentally sensitive, such as wetlands, forests, watersheds, shorelands, marshes, and floodplains.

284. Pro. Odote opines that maintaining open spaces ensures their conservation and constitutes provisions of the environmental goods and services, which could otherwise be converted to other uses.

285. Prof. Odote goes on to say that open spaces are also avenues of free speech, for preachers, youth groups, or even politicians ***(Hague -vs- CIO US 496(515) 1939).*** Prof. Odote says that open spaces should be preserved as natural resources because of their availability for general use by the public for numerous public purposes and their importance in enhancing the quality of life in the cities.

286. Further, Prof. Odote cites Goal No. **11** of the Sustainable Development Goals that the existence

and preservation of open spaces is an important aspect of sustainable urbanisation and therefore protecting open spaces supports that quest, in the context of the public trust doctrine that natural resources belong to the whole public and private owners may not deprive the public access.

287. Prof. Odote goes on to say that in discussing protection of public open spaces, regard must be had on constitutional directives on infusing sustainable development in all aspects of governance and as part of national values. He further says that the Ndungu Report, at page **73**, categorised open spaces in urban areas as public land.

288. Prof. Odote says that though the Constitution does not expressly mention whether recreational parks constitute public land as open space or not, what qualifies as public land includes, interaction speciously, protected areas or what is declared so by an Act of Parliament.

289. Prof. Odote therefore opines that there is no single piece of legislation or policy guiding public open spaces, their meaning, creation, use, and mechanism for their protection in Kenya, save for

scattered mentions across several statutes and policies dealing with land, environment, planning, forestry, and wildlife, whose consequence is legislative gaps, institutional overlaps, and policy incoherence.

290. Further, Prof. Odote says that the existence and protection of open space is significantly linked to the planning process, which not only guarantees certain areas are reserved as open space, but also reconciles different uses in society, and whose greatest threat remains incompatible land uses.

291. **Article 60** of the Constitution captures the principles of the land policy. Part **2** places county parks, beaches, and recreational facilities, county planning and development, land survey, and mapping as devolved functions of the counties.

292. The Physical and Land Use Planning Act (PLUPA), **2019**, which replaced the Physical Planning Act **1998**, sought to, amongst other things, make provisions for the planning, use, regulations, and developments of land and align the country's planning processes to the constitutional dictates.

293. **Section 56(8)** of the Act explicitly mentions open spaces and empowers the county governments to

reserve and maintain all land reserved for open spaces, parks, urban forests, and green belts in accordance with the approved physical and land use development plans, the Urban Areas and Cities Act, and the County Government Act.

294. Therefore, the creation and maintenance of open spaces is explicitly part of the constitutional responsibility of county planning as per the 4th Schedule of the Constitution and under **Section 103** of the County Governments Act.

295. Open spaces are also defined under the National Museums and Heritage Act as areas not built upon in any urban or peri-urban area, whether in a municipality or not, to which the public has access. The Land Act defines public purpose to include land used for public parks, playgrounds, gardens, sports facilities, and centers.

296. **Section 37(4)** of the Environmental Management and Coordination Act also provides every county government to establish and maintain open green spaces, either as green zones or recreational parks, where residents can have access for recreation and leisure.

297. Similarly, under **Section 37(a)** of the Forest Conservation and Management Act, the Kenya Forest Service is mandated to offer technical assistance to counties in establishing and maintaining those open spaces.

298. An open space is also referred to in the Survey Act, Land Registration Act, and Wildlife Conservation and Management Act. **Sections 2, 55(2), and 55** of the PLUPA, Regulation **10(3)** of Physical and Land Use Planning (General Development Permission and Control) Regulations, **2021**.

299. With this constitutional and statutory framework in mind, the plaintiff seeks this court to hold and find that the suit property was public land upon its surrender by the Kitale School as per **P. Exhibit No. (1) and (2),** implemented through the Development Plan, hence became unavailable for conversion to private property by the 3rd defendant in favour of the 1st defendant. The court is asked to find and hold that the sale, transfer, and registration in favour of the 2nd defendant was illegal, unprocedural, irregular, unlawful, and fraudulent.

300. In ***Kepha Maobe & Others -vs- Benson Mwangi & Others [2015] eKLR***, the court said that the

development plan that had been approved by the Government had a provision for public spaces for public purposes as defined under the Land Planning Act, Cap **303**, Regulation **11(2) (c).** The court held that there was no open space that had no particular purpose.

301. The plaintiff challenges the title deed held by the 2nd defendant on the basis that the statutory trust of the open space, held in favour of the public, could not be extinguished by its appropriation for residential purposes, through the documents held or used by the 1st and 2nd defendants, which it terms as illegal, null, void, and incapable of conferring a good title. The defendants, on the other hand, urge the court to find that Plaintiff exhibits. 1 and 2 are incapable of granting any known legal status to land ownership rights as alleged or at all in law or otherwise.

302. It is trite law that parties are bound by their pleadings and issues for the court's determination flow from those pleadings. See ***Electoral & Boundaries Commission & another -vs- Stephen Mutinda Mule & 3 others [2014] eKLR.*** The burden in law is on he who asserts the

existence of certain facts to be entitled to any legal rights. Paragraphs **6, 7, 8,** and **9** of the plaint state that land parcel No. **Kitale Municipality Block 12/152** was alienated public land forming part of an area reserved for public purpose, to wit, an open space, following the preparation or drawing and revision of the Development Plan for Kitale Municipality on or about **1973**.

303. According to PW5, the star witness for the plaintiff, the suit land initially formed part of public land owned by Kitale School property, said to have been **55 Ha** since **1929** or thereabouts, in the hands of CMS, later ACK church, who allegedly surrendered the school to the independent government.

304. The plaintiff relies on a letter dated **14/9/1973** written by the Director of Urban and Accrual Planning. Evidence on when it was received, acknowledged, approved, and an acknowledgement letter forwarded confirming acceptance of the request, accompanied by a deed of surrender, is missing.

305. The proposal was that Kitale Primary School surrender **2.44 Ha** to the then Municipality of Kitale for the land to be used as a road and an open space.

The 1st and 2nd defendants have termed the letter as lacking a legal basis as evidence on the ownership of land. On the other hand, the plaintiff takes the view that the letter was subsequently implemented through the Development Plan **1972-1977**, which the then Commissioner of Lands also approved.

306. The plaintiff has not seen fit to call as part of their witnesses the school management and or the successor to the defunct municipal council of Kitale, whose evidence would have been critical to produce historical data to clarify whether school, in the first instance, owned **55 Ha** out of which it yielded and confirm that out of it the **2.44 Ha** were actually surrendered and lawfully handed over to the defunct council as the recipient and the custodian of the open space as alluded in the cited law.

307. Starting with the legality of the DP, PW1, 2, 3, 4, and 5 have tried to explain the procedures leading to the enactment of the development plan and its legality. The operative law on planning in Kenya in **1970** was the Land Planning Act, Cap **303**. It provided that the Development and Use of Land (Planning) Regulations, **1961,** should continue to operate as if enacted under the Act. It established the Central

Authority with the power to determine applications in any particular class of case.

308. The Commissioner of Lands was the chairman of the Central Authority. The Development and Use of Land (Planning) Regulations **1961,** Rev. (**1970**), define a town plan as a plan for the area, or part thereof, of a municipality, township, prepared in accordance with Part **111** of the Regulations.

309. Unalienated land is defined under the Regulations as government land in respect of which no title had been issued or a letter of allotment had been accepted.

310. Part **111** provided that a Development Plan, after consultation, be prepared and submitted to the Minister for his approval, defining the existing developments, proposed roads, the different use and density zones, and area (if) any in which no subdivisions are permitted for the time being.

311. Regulations **6(3)** and **(8)** state that, before submitting the development plan, the local authority must sensitize land owners affected by the plan, and if any comments or objections are made by such land owners, be included. The local authority, upon approval of the plan by the minister, was supposed

to publish a notice, notify land owners of its approval, and provide it for their inspection. Out of the development plan, any person conducting any development on or subdividing the area had to seek and obtain consent from the Central authority.

312. Regulation **10(3)** defined public purpose as any not-for-profit making purpose as may be declared by the Minister, and would include educational, medical, religious, public open spaces and car parks, government, and local government purposes.

313. Regulation **16(3)** provided that the Central Authority shall not request the surrender of additional land for public purposes if, having regard to the nature and amount of the development proposed in the application, the land surrendered for such purposes represents an appropriate contribution of the total land required for public purposes to serve the area as a whole.

314. The Central Authority was not supposed to disapprove an application for development if the owner surrenders an area for a public purpose equal to **20%** or more of the area included in the application.

315. Regulation **16(2)(ii)** provided that land surrendered for the public purpose specified under Regulation **11(2)** shall be freely surrendered to the government and subject to the approval of the Minister. The land surrendered was supposed to be made available for public purposes in the area, generally as and when required.

316. Regulation **16(2) (iv)** provided that where it was shown to the satisfaction of the Minister that other more suitable land is required for a public purpose, the Minister, with the consent of the President in consultation with the Central Authority, shall specify or dispose of the surrendered land and use the proceeds for the purpose of purchasing such other land.

317. Regulation **16(3) (vi)** provided that in case of land obtained for public purpose before the Rules comes into force, where it is shown to the satisfaction of the Minister that government, may with the consent of the President, dispose of such land for purposes of obtaining the new land for public purposes, and the government was not bound by any condition in paragraph (d) of the Regulations.

318. Regulation **21** thereof sets, *inter alia*, the dispute mechanism of any aggrieved party to the Minister, whose decision was final.

319. Historically, the Town Planning Act (TPA), Cap **134,** was applicable in urban centres. Subsequently, the Land Planning Act Cap **303** was enacted to address land use conflicts at the three-mile peri-urban strip and **400** ft from the centre of trunk roads, where development had created ribbon land use patterns. The Act was being operated by a Central Authority Committee under the Commissioner of Lands.

320. **Section 166** of the Local Government Act also gave local authorities the power to control the development and use of land within their jurisdiction in the interest of the proper and orderly development of their area. The deficiency and inefficiency in the TPA and Land Planning Act (LPA) are what led to the Physical Planning Act in **1996**. It came into operation in **1998**.

321. The Physical Planning Act that gave autonomy and powers to the Director of Physical Planning to guide land use management. The Act became the main law guiding land use management in place of TPA and LPA. The Director of Physical Planning

henceforth became the chief government advisor in matters pertaining to land use management. The Act also clarified the ambiguity in land use management, which hitherto occurred because of the powers of the Commissioner of Lands and the local authorities under the Government Land Act and the Local Government Act.

322. The Director of Physical Planning (DPP) in the Ministry of Land and Settlement was thereafter assigned the role of preparing all Regional and Local Physical Planning Development Plans. The Ministry in charge of Physical Planning was assigned the role of approving all planning prepared by the DPP. The power of the Commissioner of Lands to approve physical development plans under the Government Land Act and the Town Planning Act was therefore transferred to the Minister in charge of Physical Planning.

323. The Act was also applicable in all areas of the country, irrespective of jurisdiction and land tenure. The Act henceforth required land to be advertised before allocation to allow everybody to apply for the land and reduce the skewed land allocation hitherto in place. See *Professor Peter M. Ngau and Dr.*

*Jeremiah Njabuti Ayonga, Working Paper 3, Field Survey **2010**.*

324. The Physical Planning Act, Cap **286, 1996**, which became operative on **25/5/1996**, defines a short-term plan as one not exceeding **10** years. Unalienated land was defined under it as one where the Commissioner of Lands had not issued a letter of allotment. **Section 4** thereof defined the powers of the Director of Physical Planning.

325. **Section 16** relates to the requirement for the physical planning department to include open spaces in its plan. **Section 19** relates to the publication of a development as a gazette for inspection by members of the public. **Sections 20** and **21** relate to its approval by the Minister and publication of its approval in a Kenya Gazette, and its taking effect in the area it relates to on any land.

326. **Sections 24-28** relate to the preparation of a local physical development plan, long-term or short-term. Its objection and approval by the Minister and publication in the Kenya Gazette.

327. The mandate of local authorities on the use and development of land within their area was governed by **Section 29** of the Act, to include, to reserve and

maintaining all the land planned for open spaces, parks, urban forests, and green belts in accordance with the approved physical development plan.

328. The plaintiff's case is that there was a surrender of the **2.44 Ha** as public space, which was perfected and implemented through the Development Plan of **1974**. The plaintiff urges the court to find that the public interest in this case, as delegated to the 3rd defendant, did not authorise the allocation, and that it acted contrary to law. The burden in law is on he who alleges the existence of certain facts to be granted a legal right or remedy.

329. The burden was on the plaintiff to establish through evidence not only the legality of the alleged surrender letter of **2.44 Ha** in the first instance to the government by Kitale School, and secondly, the legality of the development plan. Starting with the DP, evidence of its legality by way of gazettement and approval by the minister was not confirmed by PW1 and PW5.

330. Surrender of land was discussed in ***Fanikiwa Limited -vs- Sirikwa Squatters Group & 20 others (Petition 32 (E036) & 35 (E038) of 2022) [2023] KESC 58 (KLR)***. **Article 62(2)** of

the Constitution provides that surrendered land shall be held by a county government in trust and shall be administered on its behalf by the National Land Commission.

331. **Paragraph 10** of the PLUPA Physical and Land Use Planning (General Development Permission and Control) Regulations, **2021,** provides that surrendered land shall be registered in the name of the county government or the Cabinet Ministry responsible for matters relating to finance in accordance with the Land Registration Act.

332. **Sections 102** to **105** of the County Government Act outline the county rules in planning and development, including the management of public spaces and utilities on surrendered land. The Regulations require the county government to notify the National Land Commission of the surrender for purposes of allocation.

333. Surrendered land before **1988** was governed by the Town Planning Act, Cap **134**, the Land Planning Act, Cap **303,** and the Development and Use of Land (Planning) Regulations (**1961**). Acquisition of title cannot be construed as a result. The court in ***Daudi Kiptugen -vs- Commissioner of Lands & Others***

[2015] eKLR, held that the process of acquisition is material. In this suit, the Kitale School is said to have been the initial owner of the **2.44 Ha**. So, the argument by the plaintiff is that Kitale School, which was a public school, surrendered to the government what ideally was public land for public use as an open space and for a road of access.

334. It is trite that one cannot give what one does not own in the first instance. The burden was on the plaintiff to call Kitale School to shed light if it indeed surrendered land for public use, the date of the surrender, the terms and conditions of surrender, deed of the surrender, date of acceptance of the surrender and if they initially owned the land, whether there was handing over of the land and setting up of new boundaries through beacons to show the six, features, and delineation of the same, from the large land measuring **55 Ha**.

335. In ***Fanikiwa*** *(supra),* the court cited ***Kiluwa Ltd & Another -vs Business Liaison Co. Ltd [2022] KESC 37 [KLR]***, that public land only came into the fore under the **2010** Constitution. **Article 62** thereof consolidated and identified all land thereby falling under public tenure, which the retired

Constitution referred to as government land, and that unalienated government land remained public until it was privatised through allocation to individuals or other entities.

336. The court cited ***Torino Enterprises Ltd -vs- Hon. Attorney General [2023] KESC 79 [KLR]***, where the court held that once an individual or entity acquires any unalienated government land, or other land for that matter, consequent upon registration of title in accordance with the provisions of the applicable laws, such land transmutes from public to private land.

337. Fraud consists of deceitful practice or willful device resorted to with intent to deprive another of his right or to do him an injury. The plaintiff pleads that the acts of the defendants were aimed at depriving the public of the enjoyment of an open space, which is a public good, in favour of private interest.

338. The premise by the plaintiff is that Kitale School, with **55 Ha** of land**,** was requested and indeed did surrender **2.44 ha** in **1973** for public use, part of which was an open space, but continued to use it until **1994/96,** when it was illegally and fraudulently

alienated for private use, in favour of the 1st and 2nd defendants by the 3rd defendant.

339. The burden was on the plaintiff to prove that there was a lawful surrender and a lawful reservation of the land as an open space, which had defined coordinates or beacons. The burden was also on the plaintiff to prove whether, after the surrender, a physical planner and land surveyors visited the surrendered land to mark on the ground the new boundaries of the open space from the point of reference of its neighbours. Further, the burden was on the plaintiff to prove that, despite a lawful surrender and reservation as open space, the defendants fraudulently and illegally dwelt on the land to defeat its public purpose.

340. Fraud cannot be inferred. As held in ***Eldoret Express Ltd -vs- Tawai Ltd, NLC (IP) [2015]***, fraud is a serious thing to allege. In ***R.G. Patel -vs- Lalji Makanji [1957] EA 314***, the court held that the degree of proof must be such as to create a moral certainty, though it need not reach the criminal standard of proof beyond a reasonable doubt. The court cited ***Le Lievre -vs- Gould [1893] 1 QB 491***, that a charge of fraud is so

terrible that to bring against a man that it cannot be maintained in any court unless it is shown that he had a wicked mind. Satisfactory and solid evidence is what the plaintiff has to bring.

341. In ***Wilson Masila Muema -vs- County Government of Machakos [2020] eKLR***, the court cited ***Bruce Joseph Bockle -vs- Coquero Ltd [2014] eKLR***, where the court held that general allegations of fraud are not sufficient to infer liability on the part of those who are said to have committed it. In ***Fanikiwa*** *(supra),* the court cited **Section 44** of the Registered Land Act as the then legal regime for surrender of leases. The court cited ***Mwinyi Hamisi Ali -vs- Attorney General [1997] eKLR***, that since the land in question was governed by the Registration of Titles Act, **Section 44** required that the surrender of the land by the government, to a person be registered to terminate the interest of the lessee.

342. The court held that registration of such surrender was evidence of surrender. In ***Chief Land Registrar & Others -vs- Nathan Tirop Koech & Others [2018] eKLR***, the court held that a surrender of a grant or instrument of title is different

from compulsory acquisition. In *Black's Law Dictionary, 7th Edition, 1458*, surrender is a return of an estate to the person who has a reversion or remainder, to merge the estate in a larger estate. The court in ***Fanikiwa*** *(supra)* cited ***Barrett & Ors -vs- Morgan [2000] 2 AC 264*** that a surrender is ineffective unless the landlord consents to accept it, and therefore, it is consensual in the full sense of the term. The court said that the essence of **Section 44** of the Registration of Titles Act is that the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof.

343. Flowing from the cited case law and by parity of reasoning, the plaintiff should have called evidence from the surrenderor and the surrenderee, as well as the beneficiary, the defunct municipal council of Kitale, who were going to be the custodian of the open space, to, confirm the act of surrender, vesting of the same to it and to verify and establish the size, uses, delineation, beacons, boundaries and its locality. The instruments of surrender, if any, were the best evidence apart from **P. Exhibit No. (1)** and **(2).**

344. The evidence of PW1, PW2, PW3, and PW4 without the documents of surrender and reservation, or alienation from the root of the mother title and its initial owner, the school would in my view be against **Section 97 (1)** of the Evidence Act, that when the terms of a contract, or of a grant, or any other disposition of property have been reduced into writing, no parole evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself or secondary evidence which is admissible.

345. None of PW1, PW2, PW3, PW4, and PW5 was a party or witness to the surrender in the first instance or its implementation, either through the development plan or otherwise. The offices to which the witnesses appeared were not party to the terms and conditions of the surrender. The best evidence rule requires the court to be furnished with the historical data as to the root of title of the school land measuring **55 Ha**, and its reduction by **2.44 Ha**. The current entry in the records, survey maps, and deed plans shows that what was surrendered by the

school as an open space ended up in the hands of the 1st and 2nd defendants as the suit property.

346. The court has not been furnished with any documentary evidence to show that, legally, upon the execution of surrender instruments by both the Kitale Primary School Board and the government department(s) that witnessed the land surrender, the school's initial land acreage was formally, regularly, procedurally, and lawfully reduced by **2.44 Ha** on both paper and on the ground. Such land was reverted as government land under any known land registration regime or system, and the defunct Municipal Council of Kitale became vested with or assumed custody of the land in public interest, took possession henceforth, and was therefore under its power to regulate its use to achieve public good.

347. Fraud includes any activity that relies on deception in order to achieve a gain. It is also a knowing misrepresentation of the truth. In ***Ethics and Anti-Corruption Commission -vs- Bangra Limited& Another [2026] KEELC 606 (2nd February 2026) (Judgement)***, the court cited ***Three Rivers District Council & Others -vs- Governor and***

Company of the Bank of England (No. 3) [2001] UKHL 16 (22 March 2001), that the tort of misfeasance lies where a defendant decides with knowledge that it is unlawful or in excess of his powers and that it is likely to cause harm or injury to individual.

348. In this suit, the 1st and 2nd defendants are said to have been aware that the suit property was an open space and incapable of being alienated for private use.

349. Availability of such evidence, which the 1st, 2nd, and 3rd defendant overlooked, must be tangible and cogent, credible, reliable, and direct. PW1, PW2, PW3, and PW4 were clear before the court that their departments and offices did not possess or provide the 3rd defendant or his office with any adverse comments to the effect that the suit property had been alienated for public use.

350. The office of the Director of Physical Planning has not told the court through PW1 what else they looked at or should have looked at, if not the DP, before they prepared and approved the PDP, and escalated it to the Commissioner of Lands for final approval, before he ventured forward and issued a

letter of allotment, accompanied by a PDP whose author was the Director of Physical Planning.

351. The letter of allotment is not personally signed by the 3rd defendant. The signatory was not called to testify to explain whether any influence or pressure came from the 3rd defendant to initiate, complete, and implement an irregular allocation process.

352. None of the makers of the many documents that were used in the allocation and registration process was called to testify that the 3rd defendant exerted undue pressure on them to prepare the documents against their free will and expertise.

353. A PDP is a critical document in the alienation of public land, insofar as it is through it that one can confirm the availability or otherwise of a piece of land. Assigning a plan number to a PDP is what authenticates its veracity. Without a plan number, a Commissioner of Lands cannot issue a letter of allotment, since a plan number signifies that the parcel is available for such allocation.

354. The plaintiff relied on a survey report as **P. Exhibit No. (22)** from officers, who were never called to produce it and verify its authenticity, veracity, and credibility in relation to the open space, given that

the 1st and 2nd defendants allege that they were not party to the visit, the preparation of the said report, and its far-reaching recommendations. The court has also looked at the findings and the recommendations in the said report. In ***David Musyimi Ndetei -vs- Daima Bank Ltd (In Liquidation) [2008] KEHC 1356 (KLR)***, the court held that expert reports are not binding but should only be rejected if there is a proper and cogent basis for rejecting them.

355. Authentication of ownership, as well as expert reports or documents, is key in any court proceedings.

356. In ***Caroget Investment Limited -vs- Aster Holdings Limited & 4 others [2019] KECA 79 (KLR)***, the court held that where parties are competing on proprietary interests on the same piece of land, each must produce authentic documents in support of their claim. See ***James Henry Mundia t/a Kabarak Development Services -vs- Tradewheel (K) Ltd [1987] eKLR*** and ***Munyu Maina -vs- Hiram Gathiha Maina [2013] KECA 94 (KLR)***

357. In ***Noor (Suing as the legal representative of the Estate of Hussein Noor Haji) & another -vs- Abkula (Civil Appeal E068 of 2021) [2026] KECA 356 (KLR),*** the court cited ***Ndolo -vs- Ndolo [1996] eKLR***, that expert evidence must be considered alongside all other available evidence and it's the duty of the trial court to decide whether or not it believes the expert and give reasons for such decision.

358. In this suit, the key issue is whether there is credible, relevant and direct evidence on the identification of the open space on the ground, its tracing history, the positive ascertainment of its boundaries, beacons, acreage, and completeness of the same both on paper and on the ground. In ***Titus Musya Musee -vs- Francis Ichamui M'mwenda [2020] KEELC 2349 (KLR),*** the court held that physical development plans, also commonly known as PDPs, are planning tools used for general purposes of determining land use and the particular area of the city, municipality, or council.

359. The court also said that PDPs cannot be solely used to confer or determine rights in land. The court held that the land ought to have been surveyed to

generate survey maps such that the specific portion of the land for each claimant is discernible from the map and on the ground.

360. In the ***County Council of Meru & 2 others -vs- P.C.E.A thro' the Registered Trustees [2020] KEELC 1712 (KLR)***, the court said that minutes alone do not confer proprietary interest in land since they are only an expression of an intention to actualize the intention to allocate land which would be followed by the issuance of a letter of allotment, demarcation of the parcel through the process of survey.

361. In ***Caroline Awinja Ochieng & another -vs- Jane Anne Mbithe Gitau & 2 others [2015] eKLR***, the court held that ownership of unregistered land and the ascertainment of its confirmation thereof involves the intricate journey of wading through documentary chain of history, whereby the court has to perform a delicate task of ascertaining that the document availed by the parties are not only genuine, but also lead to a good root of title without a break in the chain.

362. The court held that it is the discovery of a deed or document that assists in proving not only the

dominion of unregistered land but also ownership. The court held that a very good compilation of the documents or deeds relating to the property and concerning the claimant, as well as any previous owners leading to the title paramount, certainly proves ownership and that such documents, which are basically the essential indicia of title to unregistered land, as held in ***Sen -vs- Headley [1991] Ch. 425***.

363. Planning precedes allocation. As held in ***Nelson Kazungu Chai*** *(supra)* under the Government Land Act (repealed), a PDP must be drawn and approved before alienation of unalienated government land, after which an allotment letter based on the PDP is issued, accompanied by a defined number. The evidence tendered by PW1, PW2, PW3, and PW4 is that all the requisite processes in an allocation were followed to the letter. The only issue raised is that, unfortunately, the land being alienated was unavailable due to its earlier reservation.

364. What the plaintiff, by way of evidence, has to establish on a balance of probabilities is whether the allocating authorities acted mistakenly, knowingly, and or fraudulently. To apportion liability against the

3rd defendant has to be shown that he single-handedly bears the responsibility.

365. The burden was on the plaintiff to establish the legality of the development plan and, secondly, if it had been published, approved by the minister, and gazetted as per the Regulations **1961** alluded to above. PW1 was silent on all these issues, and so was PW5. He who alleges must prove. It is the plaintiff who alleges the legality of the Development Plan and the surrender request. Without evidence that the Development Plan was published, approved by the minister, and gazetted, the court finds that the allocation cannot be said to have gone against an illegal development plan.

366. In ***Frann Investments Ltd*** *(supra),* there was clear evidence of setting aside the land for the customs department if the survey plan and a map indicating the reservation of a customs house on the land, and a letter of search was available. A witness from the Customs Department, Kenya Revenue Authority, was available. There was evidence that the land was owned or held by a government department, statutory bodies, or agencies. Evidence of the land as already surveyed, planned, and reserved for use,

as a customhouse at the time of allocation, was glaring and direct.

367. Further, in ***Dina Management*** *(supra),* the issue was whether as an open space, rendering it a public utility. **Section 9** of the Government Land Act provided that the Commissioner of Lands could cause a portion of a township which is not required for public purposes to be divided into plots suitable for inter alia residential purposes and to dispose of in the prescribed manner.

368. The plaintiff admits that all the relevant departments and offices were notified of the intended alienation, but none returned adverse comments to object to the alienation. The 3rd defendant is faulted for ignoring the **P. Exhibit No. (1)** and **P. Exhibit No (2).** He is blamed for participating in an illegal alienation of an open space.

369. In this suit, PW1 told the court that in the absence of a revised Development Plan, the **P. Exhibit No. (1)** was still valid and governing the suit property. Her evidence was that the subject parcel still falls under land use zoned for recreational purposes.

370. In the ***Claire Kubochi Anami & Others -vs- CECM Built Environment and Urban Planning, Nairobi City County & 20 Others, Civil Appeal No. E160 of 2025 Civil Appeal No. E160 of 2025,*** the court held that the new zoning authority under the **2010** Constitution is vested in the County Assemblies to come up with a duly adopted policy or plan and gazette a local physical and land use development and zoning plan or policy.

371. In this suit, the plaintiffs have been unable to tender evidence of the compliance of the Development Plan with the referenced laws other than relying on the signatory to it by the former Commissioner of Lands and the Director of Physical Planning. It is not the 3rd defendant who personally approved the development plan in **1973**. Publication and gazettement of the development plan and depositing it with the key government departments are critical.

372. Blaming the 3rd defendant for ignoring a critical planning tool, whose legality is suspect, though said to have implemented an alleged surrender of land by Kitale School for public use, required the plaintiff to tender evidence pointing to the personal

knowledge of the development plan by the 3rd defendant.

373. In ***Kepha Maobe*** *(supra)*, the gravamen of the dispute was the assertion by the appellants that the entire parcel of land was granted by the government to the council for a housing development scheme, which includes open spaces reserved and left undeveloped for the service and enjoyment of the residential units, hence the same were not available for alienation to any other party without their consent or knowledge.

374. A survey report on physical planning issues had been prepared, a change of user had been passed by the town planning committee, and the Director of Planning had hoodwinked the Commissioner of Lands that it was unused open space and not a special purpose report. A County Engineer and a Planner under the Director of City Planning were called to testify. Evidence of tampering with the original planning maps to overlook the reservation was evident. Original grant, original approved plan, and maps were not produced by the town planning committee.

375. On appeal, the court asked itself the purpose for which the original grant was made to the council; its terms and whether the reallocation could occur without cancellation, and if the buyer had a valid title. The court said that the original grant was specific to the use and nature of development, whose plan was drawn up and submitted to the Commissioner of Lands for approval. The court said that the failure or reluctance of the council to produce the original grant from the government and the approved survey plan in their possession left an irresistible presumption that if they were produced, they would have been prejudicial to its case.

376. The court said that public land was not a birthday cake for mere chopping up and distribution to favoured allottees. The court said that public land was a rare commodity, which is ring-priced by constitutional and statutory provisions and regulations to ensure environmental sustainability and intergenerational equity. The court said that the acquisition of the land in issue was for a specific purpose of developing a Kimathi Estate, and hence it did not give the council *carte blanche* to use it as it wished.

377. The court said that a residential estate choked with buildings and does not have such facilities opens the residents to an unhealthy environment.

378. The court said that the appellant had rights over the special-purpose plot and other open undeveloped spaces by way of easement, both positive and negative. What the plaintiff is alleging is fraudulent alienation of public land. Fraud consists of deceitful practice or willful devise with the intent to deprive another of his right or to do some manner of injury.

379. In ***Ruto & Others -vs- Tesot & Others Civil Appeal No. 82 of 2020 [2026] KECA 321 [KLR] (25th February 2026) (Judgment)***, the court cited ***Kinyanjui Kamau -vs- George Kamau [2015] eKLR***, where the court held that it is not simply enough to infer the same from the facts and in the instant case with pleadings and proving by demonstrating that those documents were obtained by means of fraud, the suit had failed.

380. In the ***Board of Trustees, NSSF vs Keiyo Teachers Co-op. Sacco [2026] KECA 327 [KLR] (27th February 20206) (Judgment)***, the suit land was alienated and had been gazetted as prison land. The court held that until gazetted, all attempts to

convert the same to private land, subdividing it, issuing titles, and selling them were nullities. The court said that the gazetted prison land was protected land and unavailable for private allocation.

381. In this suit, there is evidence from PW1, PW2, PW3, and PW4 that all the documents used by the 3rd defendant for alienation of the suit land to the 1st defendant followed the procedures set in law and were all approved and endorsed by the line departments whose views, comments, and approvals were in law condition precedents before the 3rd defendant could issue an allotment letter and a lease to the 1st defendant. The court takes note that not all the documents produced by PW1, PW2, PW3, and PW4 were personally signed by the 3rd defendant.

382. Undue influence means improper influence that deprives a person of freedom of choice. It means supplanting free will or judgment of another. Without the evidence of the signatory of the letter of allotment or that of the other signatories to the supporting documents in the chain of alienation, the court cannot find that the 3rd defendant used his

power or authority to unfairly influence the decisions leading to the allocation, while ignoring **P. Exhibit No. (1)** and **(2).**

383. Facts and circumstances leading to the alleged fraud and fraudulent conduct on the part of the defendants must be distinctly pleaded and proved. Allegations of fraud require proof beyond a reasonable doubt, which in ***R.G. Patel -vs- Lalji Makanji [1957] EA 314***, was said to be something more than a mere balance of probabilities.

384. Pleadings are not evidence. Evidence as held in ***CMC Aviation Ltd -vs- Kenya Airways Ltd [1978] eKLR***, is usually given under oaths. Dealing with land belonging to the local authority was governed by **Section 144** of the repealed Local Governments Act. The plaintiff contends that the land in issue was public land falling under the custody of the defunct local municipal council of Kitale. It was upon the plaintiff to satisfy the court that the 3rd defendant personally was involved in conceiving and solely alienating public land falling under either the local authority under **Section 144** of Cap **265** or **Section 2** of the Government Land Act (repealed).

385. Alongside this theory, the plaintiff has taken the view that the suit land initially was part of Kitale Primary School or Academy. PW5, in trying to trace the same, told the court that the school used to cater for "Indian" children since **1929** or thereabouts under the CMS, before it later became ACK, which handed over the same after independence. Unfortunately, all this oral evidence was not supported by any historical data at all or documentation.

386. In the ***Catholic Diocese of Mombasa, Registered Trustees -vs- Pereira & Others suing as Registered Trustees of Goan Community & Another Civil Appeal E070 of 2023[2026] KECA 295 [KLR] (20th February 2026) (Judgment)***, the appellant argued that the management had been vested in the government before **1997**. One of the issues was the status of the school.

387. The trial court undertook a detailed examination of the historical evolution of education law in Kenya, beginning with the Education Ordinance of **1952**, the Education Act of **1968**, and later the Basic Education Act of **2013**.

388. The court found that although the Sacred Heart Schools had been referred to and registered at various stages of time as public schools, their designation did not necessarily count as good ownership. Under the earlier legal regimes, schools could be classified as public, aided, assisted, or maintained schools, even though they were established by private or voluntary bodies. The court described it as a misnomer to equate the term public school with government ownership and held that, notwithstanding government involvement, the Goan community remained the owners of the school by virtue of its ownership of the land.

389. The plaintiff's case is that the acts of the defendants were aimed at defeating the intention of the surrender of the land to the government to act as an open space, which is a public good or interest, which the 3rd defendant, under his then position, failed to protect.

390. Courts, as held in ***Fidelity Commercial Bank Ltd -vs- Kenya Grange Vehicle Industries Ltd [2017] eKLR***, adopt the objective theory of contract interpretation and process to have an overriding view sometimes called the four corners of an

instrument rule, which insists that a document itself, without reference to anything outside the document, extrinsic evidence should be excluded.

391. The court said that the rule of exclusion of negotiations before an entry of contract, as well as the parole evidence rule, has exceptions, such as evidence of surrounding circumstances to assist in the interpretation of the contract if the language is ambiguous or susceptible to more than one meaning.

392. In the ***Catholic Diocese of Mombasa*** *(supra),* there was a clear handover against setting out the intent and purpose of how to hand over the management of the premises to the appellant. The Court of Appeal confirmed and held that the government's involvement in schools in the earlier regime, through such support as grants, teachers, or supervision, was intended to ensure educational standards and access, but not to divest private properties of their proprietary rights.

393. The court said that under the current Basic Education Act, the presence of a Board of Management and Teachers Service Commission does not, of itself, vest ownership of land or building

in the state. The court said that the Act expressly recognises sponsors and proprietors, including religious bodies and community bodies, alongside government oversight.

394. The court said management structures under the Act are regulatory and supervisory, though they do not extinguish proprietary interests. The court said that evidence established beyond dispute who the registered owner was, with no other evidence to show compulsory acquisition, surrender, or statutory vesting of that land in the government. The court affirmed the principle that, in law, classification of the school as public did not displace the respondent's ownership of the land. The court said that government participation in education, however extensive, does not of itself convert privately owned land into public property, or nullify contractual agreements lawfully entered into by the registered owners.

395. Turning to this suit, the duty as held in ***Charterhouse Bank Ltd (Under Statutory Management) -vs- Kamau [2016] KECA 153 (KLR)***, was on the plaintiff to adduce some credible and believable evidence; in

the absence of rebuttable evidence, the defence cannot stand. It is the plaintiff who is alleging that the open space was claimed from the larger parcel of land allegedly initially belonging to Kitale School. **P. Exhibit No. (1),** dated **14/9/1973,** is the only document on the basis under which the plaintiff relies and wants the court to find as the legal basis that there was a surrender, reservation, and creation of an open space. The maker of the letter was the Director of Urban and Accrual Planning.

396. Surrender and conversion of land and compulsory acquisition are governed by different pieces of legislation, as discussed in this judgment. It is unbelievable that the plaintiff did not call the maker of the letter. Whereas PW1 testified generally on the law relating to physical planning, procedure of preparing a development plan and a part development plan, she was scant on any information specific to the legal framework as of **1973** governing surrender, conversion, and implementation of an instrument of surrender.

397. Ownership of land is through a title deed, a certificate of title, or a lease granted by the Land Registrar upon registration. In ***Kikopi & Another -***

vs- Mkalla Civil Appeal E037 of 2022 [2025] KECA 751 [KLR] (19th May 2025) (Judgment), the court cited *Kevin Gray and Susan Francis Gray on Element of Land Law 5th Edition* not "Evidence of title to an unregistered estate in land usually exists only in the form of a chain of documentary records (or title deeds) which detail successive transactions with that land over the course of time". These historic documents of title (or deed bundles) are privately controlled, and the plaintiff has been unable to prove them.

398. The court cited ***Odinga & Another -vs- Independent Electoral and Boundaries Commission [2017] KESC 39 [KLR]***, that though the legal and evidential burden of establishing the facts and contents which will support a party's case is static and remains constant through a trial, with the plaintiff. However, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting, and its position at any time is determined by answering the question as to who will lose if no further evidence were introduced.

399. The court cited ***Mariam Fadhili -vs- Samson Maricho Otweyo & Others [2016] KECA 249 [KLR]***, that in the absence of registration, to determine the rightful proprietor of the suit land, the matter was left in the law of contract, and some of these are competing interests. It was for each party to prove the validity and priority of their title.

400. The plaintiff is challenging the proprietary interest in the title held by the 1st and 2nd defendants, based on fraud and illegality. In ***Elijah Makeri Nyang'ara -vs- Stephen Mungai Njuguna & Another [2013] eKLR***, the court held that only where the registered proprietor is shown to have been party to such conduce can the title be impeached. The only way the plaintiff can show that the suit property in the first instance was public land with effect from **1973** to **1996**, before it was allegedly alienated.

401. PW1, PW2, PW3, and PW4 were categorical that they never knew, and nobody had raised an objection to the alienation on account of either fraud or illegality until it was brought to their attention in **2021** by the plaintiff.

402. Title to land, as held in ***Joseph Arap Ng'ok -vs- Justice Moijjo ole Keiwua & Others [1997]***

eKLR, is acquired only through registration. From the plaintiff's view, the land was reserved after surrender as an open space following the requirement through **P. Exhibit No. (1)** and its implementation as per **P. Exhibit No. (2)**. According to the plaintiff, the two exhibits are enough evidence of the reservation of the land. Reliable and verifiable documentation that indeed there was surrender in the first instance, and secondly, whoever was surrendering had ownership of the same, is what the plaintiff has not addressed.

403. The mandate to manage and administer public land, as outlined under **Section 8** of the Land Act, falls within the National Land Commission. It is the National Land Commission that identifies public land, keeps a database of all of it, shares the data, and maps the same. This was reiterated in ***Advisory Opinion No. 2 of 2014 by the Supreme Court of Kenya***. The burden to prove irregularities and illegalities of the alienation falls on the plaintiff.

404. Reservation of public land currently under the National Land Commission under **Article 66(1)** of the Constitution, **Section 5** and **15** of the National

Land Commission Act. PW5, in his evidence, has told the court that during the course of his investigations, he never sought an explanation or witness statements or sourced any documents from the National Land Commission, regarding the suit property and its title.

405. Equally, the PW1 told the court that he did not seek for witness statements from all he offices and officers who were part and parcel of the transactions starting from the processing of the application for allotment, the letter of allotment, maker of the PDP, prepares of the allotment letter, issuer of the lease, and the specific Land Registrar who registered the transfer and issued the certificate of lease to the 1st defendant and the deceased, without a ground report.

406. The 1st and 2nd defendants rely on the doctrine of presumption of regularity as discussed in ***Kibos Distillers Ltd*** *(supra)*. In ***Chief Land Registrar & Others -vs- Nathan Tirop Koech & Others [2018] eKLR***, the court said that there is a presumption that all acts done by a public official have lawfully been done and that all the procedures have been duly followed. The court said that the

regularity doctrine presumes that executive officials have properly discharged their official duties.

Under this doctrine, any party claiming otherwise has the burden of disproving the presumption of regularity.

407. The plaintiff alleges irregularities in the alienation and allocation of the suit land under paragraphs **6, 7, 8**, and **9** of the plaint. PW1, PW2, PW3, and PW4 took the court through the process of land allocation and registration generally, while PW5 summarised her facts and findings that the defendants were involved in an illegal transaction to convert public land reserved as an open space for private use to defeat public interest. In ***Dina Management Ltd*** *(supra),* the court held that the title or lease is an end product of a process; and if the process that was followed before issuance of the title did not comply with the law, then such title cannot be held as indefeasible.

408. The 1st and 2nd defendants plead that they were innocent registered owners. The 2nd defendant, on the other hand, pleaded the doctrine of innocent purchaser for value without notice of any defect in the title held by the 1st defendant. In ***Sehmi*** *(supra),*

the court said that the first allocation, having been irregularly obtained, the title being an end product, and as a result of an irregular process, could not be held as indefeasible. The court set out three elements of an innocent purchaser for value.

409. On innocence, the court said it means that the purchaser must act in good faith, his conduct must not raise any doubt as to whether indeed he did not have any notice or knowledge of the fraud. In ***Florence Wairimu Mbugua -vs- Triple Eight Properties Ltd & Others Civil Appeal No. 612 of 2017***, a judgment delivered on **25/3/2026**, the dispute concerned a land previously held by the appellant's late husband under a **99**-year lease, which expired in **2001**. The appellant had argued that she was entitled to renewal of a lease and challenged the subsequent alleged fraudulent and unprocedural allocation of the same to the respondent and its transfer to a third party.

410. The court held that former leaseholders have no automatic right to renewal, though they should be allocated priority consideration. The court said the doctrine of bona fide purchaser for value does not protect purchasers of illegal titles. The court

emphasised that the allocation had generally complied with the repealed Government Land Act, including allocation through a transparent, procedural, lawful, and valid process. On due diligence, the court emphasised that visible occupation imposes a duty of enhanced due diligence and that the failure to investigate occupation undermines claims of good faith acquisition.

411. The 1st and 2nd defendants plead that the suit property was available for allocation and that the 1st defendant procedurally obtained a letter of allocation, followed all the requisite processes for issuance of a lease, became a duly registered leaseholder without objection from the relevant authorities, and subsequently transferred a good title to the 2nd defendant who says on his part that he took immediate possession and has been on the land without any complaint until **2021** when the plaintiff allegedly started claiming illegality and irregularity.

412. Courts have held that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership

but must go beyond the instrument of title and prove the legality of how he acquired title and show that the acquisition was legal, formal and free of any encumbrances, including any and all interests which need not be noted on the register. See ***Munyu Maina*** *(supra) and* ***Samuel Kamere -vs- Land Registrar Kajiado [2015] eKLR***.

413. The 2nd defendant has provided documentary evidence on the process by which the predecessors in title, and he, followed, to acquire the lease. There is no evidence tendered by the plaintiff to dislodge the extensive documentary evidence adduced by the 2nd defendant that he bought the suit property after conducting due diligence on the register and also on the ground. See ***Tenai -vs- Sidhu & Others Civil Appeal No. 106 of 2019 [2025] KECA 105 [KLR] (21st January 2025) (Judgment)***.

414. The 2nd defendant has testified that the deceased's father, after obtaining title, has been on the land for close to 30 years before the plaintiff came complaining. The plaintiff counters that by saying that limitation of the claim based on the fraudulent

acquisition of public land is inapplicable by dint of **Section 41** of the Limitation of Actions Act.

415. A court of law can only weigh up the proven facts without concerning itself with speculation on evidence that was never adduced or which does not follow by reasonable inference from proven facts. In ***Kimweli -vs- Kimweli Civil Appeal No. 660 of 2019 [2022] KECA 1294 [KLR] (16th December 2022) (Judgment),*** the court cited ***Caswell -vs- Powell Duffryn Associated Collieries Ltd. (1939), [1940] A.C. 152 (H.L.)*** that,

> **"There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases, the other facts can be inferred with as much practical certainty as if they could be actually observed. In other cases, the inference does not go beyond reasonable probability. But if there are no positive proven facts from which inference can be made, the method of inference fails, and what is left is mere speculation."**

416. In this suit, the plaintiff, on the other hand, insists that the suit property was created from what was public land and hence a nullity is a nullity, an illegality is an illegality, and what the 2nd defendant holds is a product of an unlawful allocation. The

defendants, on the other hand, insist that the suit land was never public property in the first instance; otherwise, **P. Exhibit No. (1)** and **(2)** do not have enough documentary evidence of ownership of property.

417. The duty of this court is to evaluate the completely conflicting factual positions and arrive at the correct finding. In ***Stellenbosch Farmers' Winery Group Ltd & Another -vs- Martell & Kie SA & Others 2003 (1) SA 11 (SCA),*** at paragraph **5**, the court explained how to resolve factual differences and ascertain as far as possible where the truth lies in between the two conflicting factual contestations by making findings on the credibility of various factual witnesses based on their reliability, and lastly, the probability or improbability of each party's version on each of the disputed issues.

418. To do so, the court is supposed to weigh up and test the plaintiff's allegations against two general probabilities, and accept the version that is probably true. See ***Kingara & Another -vs- Njonge & Another Civil Appeal No. 77 of 2019***.

419. To start with, the plaintiff narrated how a development plan and a PDP would be created. In

this case, according to her, **P. Exhibit No. (1)** was implemented through a development plan in **1973**, making the suit land reserved public land, as an open space. PW2 and PW3 similarly took the court through their departments' procedures of alienation of public land. None of the witnesses was personally involved in the transactions in **1994-1996**. Strangely, also none of the witnesses was able to tell the court why their departments, if at all, knew the land was reserved land, failed to flag off the land as unavailable for re-allocation to a private individual, since it was public land. All of them only pointed fingers at the 3rd defendant, who was the then Commissioner of Lands, yet it is a shared responsibility.

420. Kenya, at the time of the alleged alienation, had two registration systems: registration of deeds and registration of titles. The administration of the registration system fell under the Ministry of Land and Settlement. Its other departments include the Department of Survey, Department of Physical Planning. The Department of Land was in charge of alienation of government and trust land, approval of development plans, preparation, registration, and

issuance of titles, leases for all categories of land, whether under the Registered Land Act, Land Titles Act, Registration of Documents Act, and Government Land Act.

421. PW1, PW2, PW3, and PW5 are urging the court to find that the defendants were involved in a fraudulent exercise. Fraud must be specifically pleaded and distinctly proved on a balance higher than on a balance of probabilities. The burden was upon the plaintiffs to prove every averment of fraud and or illegality and abuse of office, pleading in paragraphs **6, 7, 8,** and **9** of the plaint.

422. In this suit, the only document that the plaintiff has to show that there was a reservation is **P. Exhibit No. (1) and (2).** In the correspondence file produced as **P. Exhibit No. (13),** there is nothing from the Ministry of Lands and Settlement to show that land records maintained as a matter of fact and law show when Kitale Primary school, before **1973**, became the owner of **55 Ha** of land as public land, its boundaries, beacons, sketch map, deed plan, coordinates, RIM, or any other distinct description of the land.

423. Further, there is nothing from the said departments, survey department, through PW2, that the school land had previously been surveyed. Thirdly, and more importantly, none of the witnesses from the physical planning department, survey department, and the land department tendered any document to show that after the alleged surrender of **2.44 Ha**, the deed of surrender, if any, was other than the alleged implementation in the development plan, formally registered through any land registration system in Kenya.

424. More importantly, the plaintiff did not call the relevant officers from the National Land Commission, who are the successors to the Commissioner of Lands, to establish if there was any complaint made to them regarding the alleged illegal allocation of public land. Other than PW5, the plaintiff did not tender before the court any expert report from the Land Fraud Department of the DCI or the National Land Commission, out of which investigations were carried out to establish liability on the part of the 3rd defendant.

425. The plaintiff also relies on the Senate Report as **P. Exhibit No. (21)**. In ***The Institute of Social***

Accountability & Another -vs- National Assembly of Kenya & Others Petition No.1 of 2018 [2021] KESC 30[KLR] (6th August 2021) (Ruling), the court held that under **Section 60(1) (b)** of the Evidence Act, courts take judicial notice of the general course of proceedings and privileges of Parliament, however such reports are not legally binding on the court. They cannot amount to evidence.

426. From the evidence tendered by the 1st and 2nd defendants against what the plaintiff's witnesses have produced, several things arise as to whether illegality, abuse of office, and fraud have been proved.

427. Expert evidence does not trump all other evidence. It must not be considered in a vacuum. It is considered alongside all other evidence. If there is conflicting expert opinion, a judge must test it against the background of all other evidence in the case to decide which one should prevail. In ***Criticos -vs- National Bank of Kenya Limited [2022] KECA 870[KLR],*** the court observed that expert evidence is not automatically admissible. PW1, PW2, PW3, and PW4 appeared before this court

supporting the plaintiff's claim of irregularity and fraud in alienation of the suit property, which otherwise was public land unavailable for alienation.

428. Unfortunately, the documents which came from the four witness departments, before me, betray the very foundation of their expertise in the relevant departments they are professing before me. If at all, there was a surrender reservation, a development plan implementing both the surrender reservation and the implementation as the witnesses want the court to believe, the easiest thing for them would have been to tell the court candidly why their own departments did not return adverse comments or object to the alienation the moment the 3rd defendant as the then Commissioner of Lands sought for their expert opinions on whether the suit property was available for alienation.

429. More strangely, PW1, PW2, PW3, and PW4 told the court that it took them a whopping **30** years to discover the error or anomaly, not on their own motion as government departments, but by the plaintiff's prompting, through PW5.

430. Coming to the evidence of PW5, his evidence is that he sought witness statements and documentation

from the relevant departments, who dealt with the transaction in **2021** after discovering the existence of the suit property title in the course of a complaint lodged by Kitale School over **L.R. No**. **153**. PW5 says that out of the documents and witness statements, he made what he calls factual findings and reached an opinion that the alienation was fraudulent, illegal, unprocedural, and was done through abuse of office by the 3rd defendant. Asked in cross-examination whether the other participants, be they departments or individuals, in the transaction were persons of interest, PW5 said that they did not reach out to them.

431. The 1st, 2nd, and 3rd defendants have pleaded that the suit is actuated by malice, is selective, and not filed in public interest. A collateral to this is when PW5 was asked if anyone complained to the National Land Commission or whether he involved the National Land Commission, which, under **Section 14** of the National Land Commission Act, to establish the legality and validity of the title held by the 2nd defendant.

432. According to the plaintiff's witnesses, the court should, without more, make a finding that there was

a surrender of **2.44 Ha** as public land, which was eventually reserved and vested to the government as an open space in **1973**. In ***Kenya National Highway Authority -vs- Mistry Premji Ganji (Investments) Ltd [2024] KECA 500 [KLR]***, the case centered on an alleged encroachment on a road reserve, where the applicant demolished the respondent's perimeter wall and structures, based on an alleged compulsorily acquired reserve under Gazette Notices of **1969**. The trial court held that the government alleged compulsory acquisition was incompetent as no final survey or compensation was proved, and that the respondent's boundary walls were within the fixed survey plan.

433. Survey plan, and documentation of the alleged ownership of the **2.44 Ha** by a public school, surrender instruments of the **2.44 Ha** executed by the surrender and surrendering registration of surrender documentation, implementation of the same on both through the known registration regimes or systems at the time, and on the ground by way of delineation, placed of beacons, and fixing of boundaries between the school, the access road and other users of the land on the ground is what

the plaintiff's witnesses have been unable to exhibit before this court, so that the court can make a finding on liability on the part of the 1st and the 2nd defendant that the writing was both on the wall and on the ground that the allocated parcel which became the suit land was an open space for all to see, which the 3rd defendant overlooked, ignored existing documentations in his office, or the line departments and overruled expert advice from the Director of Surveys, and the Director of Physical Planning.

434. In the course of their evidence, PW1, PW2, PW3, and PW4 explained to the court the procedure governing land allocation in **1996**. PW1, PW3, and PW5 specifically told this court that the 3rd defendant ignored the provisions of the Physical Planning Act since **P. Exhibit No. (2)** was the operative legal document at the time. That evidence must be taken with a pinch of salt. It is legally untenable for the Physical Planning Act, which only became operational in **1998**. The laws on physical planning in operation between **1994** and **1996** were the Land Planning Act, Town Planning Act, the Local

Government Act, and the Development and Use of Land (Planning) Regulations, **1961**.

435. The question of whether, apart from **P. Exhibit No. (1)** and (2), the open space of **2.44 Ha** was handed over to the school, beaconed, and boundaries fixed on the ground and taken possession of by the intended custodian, user(s), fenced, and started being used by members of the public for recreational purposes or other enjoyment as public goods, as submitted by the plaintiff remains unanswered.

436. It is a trite law that written submissions cannot replace pleadings or amount to evidence. This was the holding in ***D.T. Moi -vs- Mwangi Stephen Muriithi & Another [2014] eKLR.*** The plaintiff has extensively submitted on the history, necessity, and relevance of open spaces, or green spaces, in environmental law, generally, and in particular in planning law. Other than pleading illegal or fraudulent acquisition of public land and public interest, the plaintiff did not plead **Article 42** of the Constitution, breach of the right to a clean and healthy environment, or present evidence on how, if the alienation is not cancelled, there would be

interference with the right to a clean and healthy environment generally and a denial of environmental goods to the neighbourhood.

437. From the foregoing, it is my finding that the plaintiff has failed to establish fraud in the alienation, allocation, issuance of an allotment letter, PDP, lease, its survey, plan, amendment of RIM, transfer, registration, and issuance of a certificate of lease in favour of the 1st defendant, and later in the name of the 2nd defendant.

438. Similarly, the plaintiff has been unable to prove and establish that the 3rd defendant ignored, overlooked, declined, and or went against any existing or available data or facts that the suit property was part of surrendered, reserved, documented, and designated public land, as open space incapable or unavailable for alienation to private parties.

439. The suit is dismissed.

440. This being a public interest claim, each party shall bear their own costs.

441. Orders accordingly.

Judgment dated, signed, and **delivered** via **Microsoft Teams/Open Court** at **Kitale** on this **29th** day of **April 2026.**

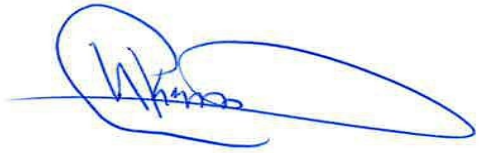
In the presence of:

Court Assistant - Dennis

Miss Githinji for the plaintiff present

Odwa for the 1st and 2nd defendants present

Kiprotich for the 3rd defendant present



HON. C.K. NZILI
JUDGE, ELC KITALE.