



REPUBLIC OF KENYA



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Ethics & Anti-Corruption Commission v Cherogoe & 3 others (Environment & Land Case 54B of 2021) [2024] KEELC 1488 (KLR) (15 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1488 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 54B OF 2021
A OMBWAYO, J
MARCH 15, 2024

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

SHADRACK KOSKE CHEROGOE 1ST DEFENDANT

**THE ADMINISTRATORS OF THE ESTATE OF SAID ABDALLA AZUBEDI
(DECEASED) 2ND DEFENDANT**

PHELSEY ENTERPRISES LIMITED 3RD DEFENDANT

WILSON GACHANJA 4TH DEFENDANT

JUDGMENT

1. The Ethics and Anti-Corruption Commission (hereinafter referred to as the plaintiff) has come to this court by way of plaint against Shadrack Koske Cherogoe and the administrator of the Estate of said Abdalla Azubedi (deceased), Phelsey Enterprises and Wilson Gachanja (hereinafter referred to as the defendants). The plaintiff states that at all material times to this suit the Government of Kenya set aside and alienated a portion of Land in Nakuru Municipality Block 5 for public purposes and in particular for the purposes of establishment of government offices. The property known as Land Parcel Numbers Nakuru Municipality Block 5/251 which is a prime plot situated along Moi Road next to Ardhi House, opposite Regional and County Criminal Investigations Offices in the Nakuru Municipality in Nakuru County had been planned, reserved and used for Government offices.
2. The Plaintiff contends that on 13/4/1994, Sachekoko Investments, a business associated with 1st Defendant, made an application for allocation of a proposed commercial plot in Nakuru Municipality Block 5 to the Commissioner of Lands and that while application letter stated above was being circulated for comments, it is noteworthy that on 28/8/1 995 the Senior Provincial Records Officer



indicated to the Land Officer that "the plot applied for marked in red on the sketch falls on government reserved area for offices."

4. Despite the comments above, a letter of allotment was issued to Sachekoko Investments on 16th October 1995 indicating the parcel as unsurveyed residential plot measuring approximately 0.09 ha. Sachekoko accepted the allotment vide an undated letter that was received on 7th November 1995.
5. The authority to issue the letter of allotment in respect of this plot was sought from the Minister of Lands and Settlement on 21st November 1995. This was being done 36 days after the letter of allotment had been issued to Sachekoko investments. The Plaintiff further avers that the Government Approvals Form G. A 1 was filled but still the plot was indicated as a vacant government land. The Plaintiff intimates that the 4th Defendant issued a Lease in the name of 1st Defendant on 6th February 1996. The said Lease was registered in Nakuru on 7th February 1996.
6. The 1st Defendant entered into an agreement with Said Abdalla Azubedi (deceased) to take over his purported interest in Nakuru Municipality Block 5/251 measuring 0.09 hectares knowing very well that he had no transferable interest.
7. The Plaintiff avers that on 6th February 1996 the 4th Defendant fraudulently and/or illegally caused a lease to be issued over Land Parcel Number Nakuru Municipality Block 5/251 measuring 0.090 Hectares to be registered in favour of Said Abdalla Azubedi (Deceased) purportedly pursuant to the said Letter of Allotment for Nakuru Municipality Block 5/251 measuring 0.09 hectares despite the fact that the suit property was at all material times planned and set aside for use as a public utility reserved for Government offices.
8. The Plaintiff contends that the suit property was no available for alienation in any manner whatsoever to 1st Defendant or to any other person and the purported issuance of a lease to him and transfer to the 2nd and 3rd Defendants were fraudulent, illegal, null and void and conferred no estate, interest or right in or over the suit property to them.
9. The plaintiff has given the particulars of fraud and illegality on the part of the defendants. The plaintiff avers that the 4th defendant as the commissioner of Lands was the custodian of all Government Lands and by purporting to allocate the same for private use was in breach of his fiduciary duties.
10. The plaintiff prays for judgment in terms of a declaration that the allocation and issuance of lease over Land Parcel Number Nakuru Municipality Block 5/251 by the 4th Defendant and subsequent transfers to the 2nd and 3rd Defendants is null and void ab initio and incapable of conferring any estate, interest or right. The plaintiff prays for an order that the registration of lease over Land Parcel Number Nakuru Municipality Block 5/251 and all entries subsequent thereto be cancelled.
11. She further prays for an order that the registration of the 2nd and 3rd Defendant as lessees of Land Parcel Number Nakuru Municipality Block 5/251 be and is hereby cancelled.
12. Lastly, she prays for a permanent injunction to restrain the 3rd Defendants by themselves, their agents, servants, assigns or any other person whatsoever from charging, transferring, leasing wasting, entering, developing, sub-dividing, occupying and/or dealing in any matter dealing with land parcel number Nakuru Municipality Block 5/251. She prays for Costs of the suit plus interest.
13. The 1st defendant filed defence denying any wrong doing and fraud and averred that he acquired the property procedurally and in good faith and paid the prerequisite fees and was duly allotted the land, thereafter the lease was prepared and registered at the lands office Nakuru and a certificate of lease issued. He denies having sold and transferred the land to the 2nd defendant.



14. The 2nd and 3rd defendant filed defence but later filed amended statement of defence and counterclaim. In the statement of defence the 2nd and 3rd defendants state that the suit property was bought from the 1st defendant after due diligence as they did a search on the register of the property and after paying valuable consideration and taking possession of the property, the 2nd defendant transferred the same to the 3rd defendant. The 2nd and 3rd defendants deny any act of fraud. The 2nd and 3rd defendant pray that the suit be dismissed with costs.
15. In the amended counter claim the 2nd and 3rd defendants (now the 1st and 2nd plaintiffs) sued the Ethics and Anti-Corruption Commission, Shadrack Koske Cherogoe, Wilson Gachanja, National Land Commission, County Land Registrar Nakuru, and the Honorable Attorney General claiming that the 2nd plaintiff is the legal owner of the suit property. The 1st plaintiff purchased the property from the 2nd defendant in the counter-claim and transferred it to the 2nd plaintiff.
16. According to the 2nd plaintiff, he is the lawful owner of the property. The plaintiffs state that they are innocent purchasers for value without notice. The 1st and 2nd plaintiffs pray for a declaration that the Plaintiff/ Counter Claimant having procured a search confirming the suit property LR No. Nakuru Municipality Block 5/251 is registered in the land register and on basis of this presentation the 1st Defendant and by extension any of his transferees relying on this representation are entitled to be indemnified and compensated for any loss and/or damage arising thereof.
18. The 1st Plaintiff and by extension the 2nd Plaintiff being bonafide purchasers of the suit property LR No. Nakuru Municipality Block 5/251 at a valuable consideration without notice of any third party's interests and in occupation of the suit premises their interests in LR No. Nakuru Municipality Block 5/251 their rights to property are protected under Article 40 of *the Constitution* of Kenya 2010. The plaintiffs pray for a declaration that the 2nd Plaintiff is the legal owner of Title No. Nakuru Municipality Block 5/251.
19. Moreover, the plaintiffs pray for an order of injunction restraining the Defendants jointly and severally, their servants, agents and/or anyone claiming through the Plaintiffs quiet enjoyment of Title No. Nakuru Municipality Block 5/251.
20. In the alternative, the matter be referred to Alternative Dispute Resolution Process under the National Land Commission within a time frame the court may deem fit to grant. The plaintiffs pray for costs plus Interest at court rates.
21. The 1st defendant filed defence to the counter claim stating that he never entered into any agreement with the 1st plaintiff's father, the said Abdalla Azubedi (deceased) and that the registration to the said Abdalla Azubedi was done fraudulently. He prays that the counter-claim be dismissed.
22. The 5th and 6th defendants to counter-claim filed Defense denying the allegations of fraud and further stated that the fraud was on the part of the 2nd and 3rd defendants. The Ethics and Anti-Corruption Commission on its part filed a reply to the amended defence and defence to counter-claim and stated that the 2nd and 3rd defendant's counter claim arose out of illegality hence was null and void. The 4th defendant denied the allegations by the plaintiff that he acted fraudulently illegally and in breach of fiduciary duty. The 4th defendant avers that the proceedings against him as a person are unconstitutional abuse of judicial process as he did not act in his personal capacity.
23. When the matter came up for hearing the plaintiff called 7 witnesses. PW1 Wilson Kibichi, an employee of the department of Lands Public works housing and development and specifically in the directorate of Surveys and being the principal cartographer and head of surveys office relied on his statement filed on 23rd June 2021 which was adopted as evidence in chief. According to the witness, the initial parcel



was Nakuru Municipality Block 5/219. Block 5/251 was excised from Nakuru Municipality Block 5/219. The government institutions are located on Nakuru Municipality Block 5/219. The property is occupied by the ministry of lands Ardhi house, the law courts and the Kenya Police. The excision was done on 4/1/1996.

24. On Cross Examination by Langat learned counsel for the 1st defendant, he states that after excision, Nakuru Municipality Block 5/219 remained as it was after excision. The excision was done by a Government surveyor. Registration of Block5/251 was done by the Government. The records are kept by Director of Surveys. The Director of Surveyors should explain missing documents. The computation files are misplaced but there is a possibility that it can be found. There is Part Development Plan. The Registry Index Map emanates from the Director of surveys. The land exists and is registered in the names of a person.
25. On cross examination by Ali learned counsel for the 2nd and 3rd defendants, he states that he recorded the statement in 2021. This was on a date he cannot remember. The last time he looked for the documents was in 2021. The members of public have access to the survey records. They keep records of those requesting for the files and only allow the investigative agencies. On 4/1/1996 he worked at survey of Kenya. He confirmed that survey works were done.
26. On cross examination by Ngure, counsel for the 4th defendant, he states that he has the authority of Director of surveys to appear in court. He is aware of section 3(2) of the surveys Act. On re-examination, he states that after the excision of 251, the remaining parcel was given number 252. The parcel is next to 77. It is in 252.

PW2, Bonface Kariuki Waweru, a valuer by profession heavily relied on his statement which was adopted as evidence in chief. He is a registered valuer and estate agent. He is employed by Kariuki and company valuers. He knows Nakuru/Municipality /block 5/251. He did valuation of the property and came up with a valuation report. He inspected the property on 5/11/2019 and prepared the report on 14/11/2019. He valued the property at kshs70, 000,000. The plot is on Moi Road next to Ardhi house opposite CID headquarters. He found developments on the parcel such as shops and offices.land. It is a prime plot with government offices. He relied on the R.I.M for Nakuru/Municipality/Block 5. He did a search and found that the current owner is Phelsey Enterprise Ltd.
27. On cross examination by Langat learned counsel for 1st defendant, he states that when he did the report, he was an employee of EACC. His task was to do valuation. He found the neighboring land is comprised of government offices.
28. On cross examination by Ali, he states that he is not able to confirm the previous owners. He did not value the structures because they are temporary. He did not interact with the owners of the structures.
29. PW3, Silvester Osodo a former Principal Land Administration Officer and now a County Coordinator in National Land Commission based at Wundanyi Lands Office adopted his statement as evidence in chief. His duties used to be issuance of letters of allotment and used to receive money on behalf of office and would receipt the same. In this matter he issued the letter of allotment. There was an application by Sachekoko Investments dated 13/4/1994. It was marked by the senior Lands officer. The instructions was to find out whether the plot was available. M/s Alula commented that the plot applied for edged red on sketch map fell in government reserved area. A PDP was prepared and valuation was done and a letter of allotment was issued. The parcel was falling on a government reserve for offices. The land had an earlier commitment. He participated in the preparation of lease document and forwarded the lease document to the commissioner of Lands for execution.



30. He prepared a government approval form that forwarded application to Minister for Lands. It was approved by Hon J Mulinge the minister for lands as he then was. He asked the Registrar to register the lease. The beneficiary was Shadrack Koskei Cherogoe. The lease is dated 6/2/1996.
31. On cross examination by Langat, he states that he worked as a lands administration officer. Shadrack made an application and action was taken by the Commissioner of Lands by the preparation of the PDP. Shadrack did not participate in preparations of the PDP and letter of allotment. He was not involved in the confirmation of the property. The transaction was approved by the Minister. He had the status report that says that the plot reserved forms part of government officers. He states that P Amiani was a Senior Lands Officer. She confirmed that the plot was available for allocation. The land was vacant government land as per the approval form. The form does not show that the land was set aside for building government offices.
32. Mr Shadrack paid government stamp duty. He issued the letter of allotment, prepared lease and accepted the application letter. Shadrack Koskei did not do anything improper. There are no records that 251 was government land for public use. The land was a plan attached to an application. He does not have documents to show that the land was government reserve for officers.
33. On cross examination by Ali, he states that it is Sachekoko that made the application. The 2nd and 3rd defendant did not make any application. He gave a clean bill of health in the allocation. Physical searches were not allowed. The 2nd and 3rd defendants were not involved in the process. The approval to issue the letter of allotment was given by the minister for lands. The letter came first. The approval by the minister came last. At that time He could not object because the highest office had given approval.
34. On cross examination by Ngure, he states that he signed the letter of allotment. The part of the commissioner of lands was signed by Michael C Kigen. Mr. Wilson Gachanja did not participate in this forum. The process of land allocation was not the work of the commissioner alone. It involves various offices. The minister for lands gave authority for the allocation. He cannot confirm that William Gachanja is used as a scape goat.
35. PW4, Robert Simiyu relied on his statement that was adopted as evidence in chief. He testified that he is an Assistant Director Land Administration. His role includes processing of Development applications and liaises with the other departments of government. They issued a letter of allotment to Sachekoko Investments. The commissioner of lands issued allotment letter despite the status showing that it was reserved for the government. The SPRO stated that the land applied for fell on land reserved for government offices. After the communication the application was considered. The provincial Rift Valley Physical Planner was asked to draw a PDP. It was drawn and forwarded to the Commissioner of Lands vide a letter dated 30/8/1995. The physical planner is based in Nakuru. It was produced as PEX4. The signature on 31/8/1995 is by the Director Physical Planning.
36. The Commissioner of Lands signed the PDP on 19/9/1995. The plan does not have a PDP No and the plot was valued. A letter of allotment was issued dated 16/10/1995 to Shadrack who accepted the offer. It was received on 7/11/1995 PEX 14. He paid the stand provision PEX 15.
37. The request for amendment of RIM was done PEX 16. The RIM was amended. The commissioner of lands commenced the issuance of the lease. The lease was processed. Before issuance of lease there was government approvals. According to the witness, the land was not available for allocation
38. On cross examination by Langat, he states that he is a land administration Officer and has been in the office for 25 years. He is aware of the legal process of allocation of un-alienated government land. In 1995, a land officer known as P Amiani confirmed that the plot was available for allocation. The



- letter was seeking the authority to issue a letter of allotment. One cannot prepare a letter of allotment without authority of the minister. Apart from the comment by the Senior Principal Records officer, there is no evidence that it is alienated Government Land.
39. On cross examination by Ali, he states that the correspondence file is kept at the headquarters. An advocate can do an official letter and be allowed to peruse the file. Said Abdala Azubedi does not appear in the correspondence file.
 40. On cross examination by Ngure, he states that the approval was not signed by Mr Wilson Gachanja. The Minister for lands Major Jackson Mulinge considered the application. Allocation is not a one man show. Mr. Gachanja was not the only one involved in the process. He can't be sued alone.
 41. PW5 was Erick Munene Nyamu the Land Registrar Nakuru. He has been a Land Registrar since April 2023. He took over from Margaret Omolo. He relied on the statement which was adopted as evidence in chief. The Land Registrar registered the lease that was forwarded from Nairobi on 7/2/1996. The lease was registered under the name of Shadrack Koske Cherogoe on 7/2/1996. It was charged on 4/6/1997 and Discharged on 18/6/1998. On 18/6/1998 and transferred to Said Abdalla Azubedi on 30/9/2024 and later was transferred to Phelsey Enterprises Limited. On 12/3/2020, a restriction was lodged by Ethics and Anti-Corruption Commission.
 42. On cross examination by Mr. Langat, he states that the role of registering a lease is the role of the Land Registrar. The lease herein was registered by the Land Registrar. There was no role by the person registered. On cross examination by Ali, he states that the current registered proprietor is Phelsey Enterprises Ltd.
 43. PW6, s Agosta Mecca adopted his statement which was admitted as evidence in chief. He was the investigating officer at Ethics and Anti-Corruption Commission and investigated this case. He was allocated this case in January 2019. He collected documents number 1 to 15 in the bundle from the Ministry of lands. He got a letter from business Registration Ltd for Sachekoko Enterprises. The proprietor is Shadrack Koskei Cherogoe
 44. From the documents in the parcel file, there is an application to Sachekoko Ltd, he detected irregularity. Sachekoko was registered on 12/1/1996. On PDP, he established that it has not undergone the whole process. It did not have the plan number. The allotment letter was done on 16/10/1995 on an unsurveyed residential plot Nakuru. The PDP was for a proposed commercial plot. The letter of allotment was issued before Sachekoko was registered. There is a letter dated 21/11/1995 whose reference is authority to issue allotment. The letter was done after issuance of allotment letter. The PDP to area was reserved for Government office. The parcel of land had government offices.
 45. Nakuru/Municipality/Block 5/251 was excised from Nakuru/Block 15/219. The land Comprised of the DCS office, law courts Police /Stations, labour office lands office and county government offices. It was not possible for the area to be an un-surveyed residential plot.
 46. On cross examination by Langat, he states that the letter of allotment was issued on 16/10/1995. He confirmed from the land officer that the letter was issued on 16/10/1995. I was informed that the allottee collected the letter on 17/10/1995. The document circulated upto 6/2/1996. It was his opinion that led to the filing of the case. The area was reserved for government offices. The Senior Principal Records Officer commented that the property was reserved for government offices.
 47. The comments were made by Alula for Senior Principal Records Officer. However, there is no signature by Alula. There is no stamp. The 1st defendant made an application and it was approved by Honorable Mulinge on 29/11/1995. The area was reserved for government offices. The initial parcel of land was Nakuru/Municipality block 5/219. The land was reserved for government offices.



- The land 251 was exercised from Block 5/219. Block 5/219 was reserved for government office. It had government buildings. There is the RIM for block 5/219. There are no records that the plot is government reserved land. Plot No 251 was not in existence on the date of allocation, it was on 13/4/1994. The date of allotment is 16/10/1995. The allotment was un-surveyed residential plot. Shadarack accepted the letter of allotment.
48. The transfer to the Said Abdulla Azubedi was not registered. There is no date. The documents were given by said Abdalla Azubedi
 49. On cross examination by Ali, he states that he invited Mr. Said Abdalla Azubedi to his office on 25/2/2019. The second time it was his son on 5/11/2019. They mentioned that they were ready to be compensated. He established that the document was not registered. He confirmed that the transfer was registered. The 2nd defendant did not participate in the transactions. The 2nd and 3rd defendant were not involved in the fraudulent transactions. He visited the site of the suit property on 5/11/2019 and found private business, Hotel, printing and there are permanent structures.
 50. On cross examination by Ngure, he states that the letter of allotment was signed by one Mr Osodo who was not sued. The letter confirming the availability of the plot was signed by one Mrs P Amiani who was also not sued. The government approval was not signed by Mr. Gachanja. Gachanja issued the lease. He did not do the process alone. Mr Osodo was not sued but was made a witness. PW6 was recalled and stated that the old parcel was Nakuru /Municipality/Block 5/219. Which was amended to create parcel number Nakuru /Municipality/Block 5//251. Folio No. is 288/116. He produced a copy of the survey plan. Parcels number Nakuru /Municipality/Block5/251 and Nakuru /Municipality/Block 5/5/252 were created from Nakuru /Municipality/Block 5/219 that comprised of government offices.
 51. The 1st defendant, shadrack Kosgei Cherogoi adopted his statement as evidence in chief and testified that he did due diligence and found that the suit property was unalienated Government land available for allocation and had no government structures. He applied and was allocated. He was issued with a letter of allotment and title. He did not participate in issuance of a letter of allotment lease or title. He took possession and paid all dues. There was an advocate called Kayai. He took a loan of 200,000 against the title. He came to learn that the land was transferred to Azubedi. He never transferred the land to Azubedi and had no agreement with him.
 52. On cross examination by M/S Maina, learned counsel for the plaintiff, he states that the land was empty. He did a search and found that it was government land near the Nakuru law courts and the Labour offices and the land office. When he applied it was block 1/251. The letter of allotment has no plan number. The PDP was not attached. The business was registered. The land was allotted the Sachekoko investment. He registered the company on 12/1/1996 before allotment. The letter of allotment was issued in 1995. It is the government that allocated me the land. He has no problem surrendering the land to the government and has neither charged a land nor sold it.land.
 53. On cross examination by Ali, he states that he did not know the 2nd and 3rd defendants. They were not involved in the application. He got the title in 7/2/1996 and gave the original title to his advocate Mr Kayai in 1998 and never wrote any letter. He has never signed any agreement of sale. Mr Kayai informed him that he had found a buyer. Mr Kayai gave him Ksh 500,000 for civil jail. Mr Kayai took the money but he had no agreement with Azubedi. Mr Kayai had no instruction to sell but saw the agreement just in 2021. The land is being possessed by Azubedi for over 10 years. He does not pay rent to the 1st defendant but the 1st defendant has never sued him. The structures there were constructed by Azubedi. The 1st defendant constructed the wall but the Azubedis constructed the houses. He has never filed any report to the police on forgery. Mr Kayai gave him 500,000. An amount he has never given back.



54. On cross examination by M/s Ngure, he states that he applied for the land from Government and followed the law. He did due diligence and does not know Gachanja and had never met Mr. Gachanja and that had no relationship with him. On cross examination by M/S Nyambura, learned state counsel, he states that the plot had no PDP when he applied but he reiterates that he did due diligence.
55. The 2nd and 3rd defendants called Feisal Said a businessman who lives in Nakuru and one of the Administrators of the estate of Said Abdala Azubedi. He is also the director of the 3rd defendants/ Counter claimants. He relied on his statement which was adopted as evidence in chief. He confirmed that the 3rd defendant is in possession of the property. There is a hotel and business premises on the property. The structures were done in 1998. Shadrack Koskei Cherogei was the seller of the property represented by A N Ngunjiri. His advocate was Mr Njau Kayai. The sale agreement is dated 12//6/1998. The agreement was witnessed by the advocates. He put in a counter-claim and applies that he be indemnified. He has been summoned by Ethics and Anti-Corruption Commission two times. The issue was about the land No. Nakuru /Municipality/Block 5/251. He prays for judgment.
56. On cross examination by Mr Langat, he states his father purchased the property in 1998 when he was in form two and was about 15 years old. He was not present during the transaction. He does not know who was present. His father paid two million Kenya shillings. The selling price was four million Kenya shillings. He does not know whether Shadrack Koskei was present. The agreement was signed by Njau Kayai advocate and not the 1st defendant. He does not have a transfer and the consent of the commissioner of Lands to transfer. He prayed for two million Kenya Shillings being the purchase price paid by Azubedi to Shadrack through a bank transfer. He does neither have a bank statement nor the bank transfer. He does not have the receipts.
57. On cross examination by M/S Maina, he states that the property was registered in his father's name in June 1998. He found his father on site building some structures when he came from school. There are temporary and permanent structures. There were no other structures. There is a hotel called Bermuda in a wooden structure. He is not aware of any fraud committed by his father. He did not come with a certificate of lease.
58. His father did due diligence but he did not have a certificate of official search. The Selling price was 2 million.
59. On cross examination by M/S Ngure, he states that his late father purchased the suit property and before that he conducted due diligence. A good title was passed to him and he developed the property. The property had a good title. He does not know Wilson Gachanja and has no claim against him.
60. On cross examination by M/S Nyambura, he states that he seeks damages against Attorney General and has sued the Land Registrar because they want to take the land back. He has no evidence for costs of Kshs100,000 monthly. He is not a director of Phelsey enterprises Ltd. That is close of the 2nd and 3rd defendant case. The 4th defendant and the Attorney General did not call any evidence.

Submissions

61. The plaintiff submits that the suit property is public land and was previously used as a Police Canteen which still exists to date but is now run as a hotel known as Bermuda Hotel. The plaintiff relies on the repealed Government Lands Act and contends that the land was neither available for alienation nor did the Commissioner of Lands had power to make the Lease.
62. The plaintiff argues that there is little doubt that the land is and has at all material times, before the alienation been in the possession of the Government of Kenya. The plaintiff contends that it is the 1st



- defendant's own words that upon inquiry, he established that the land was marked as G.L on the plans at the lands registry. On the land stands prefab structures previously used a police canteen, which still exists to date but now run as a hotel business by the name, Bermuda Hotel.
63. The plaintiff cites the case of *Mako Abdi Dolai vs. Ali Duane & 2 others* (2019) eKLR, where the court emphasized the historical context surrounding the disposition of Government land in Kenya. Prior to the promulgation of the 2010 Constitution and the 2012 amendments to the body of Land Laws, the regulatory framework was governed by the Government Lands Act, which has since been repealed.
 64. Under the repealed Act, the authority to dispose of public land was vested in two entities: the President and the Commissioner of Lands, as stipulated in Section 3 and 9, respectively. The court's analysis indicates that even during that period, specific procedures and processes were mandated for the disposition of Government land.
 65. These procedures encompassed the identification of land by the Local Government Council within the geographical jurisdiction of the land to ascertain whether the parcels earmarked for alienation were genuinely Government Land. Additionally, the inquiry sought to determine the availability of the identified land for disposition.
 66. This historical overview underscores the meticulous steps and protocols in place during the relevant period for the proper and lawful disposal of Government land, shedding light on the considerations and verifications integral to the process.
 67. According to the plaintiff, the specific procedural prerequisites were required for the allocation of public land. This included an application to the Commissioner of Lands, subsequent issuance of a Letter of Allotment specifying conditions, drawing and approval of a Part Development Plan (PDP) by the local authority, forwarding the approved PDP to the Director of Physical Planning, and the subsequent handover of the approved PDP alongside the original Letter of Allotment to the Director of Surveys. The Director of Surveys would then prepare a Survey Plan, and only upon completion of these procedural stages would the Commissioner of Lands issue title. The contention here is that this procedural sequence was not adhered to in the present case,
 68. The plaintiff submits that in accordance with Section 2 of the Government Lands Act, un-alienated land is defined as government land not presently leased or lacking a letter of allotment from the Commissioner of Lands. Under Section 3 of the repealed Government Lands Act, only the President had the power to alienate Public Land. The power is merely delegated to the Commissioner of Lands in certain limited circumstances such as where the allocation is for charitable, educational, sports or religious purposes. The allocation of the suit property and subsequent grant of title to the 1st defendant cannot be deemed to be a legitimate exercise of the delegated powers of the Commissioner of Lands. Therefore, no interest was created which could be conferred on him.
 69. The plaintiff cites the case of *Kenya Anti-Corruption Commission v Lima Limited & 2 others* [2019], where this court held that the commissioner of lands had no authority to alienate the land as under section 3 of the Government Land Acts the power to alienate un-alienated government land lay with the president.
 70. The power to delegate was delegated to the commissioner of lands in limited circumstances, which did not apply, to the current suit property.
 71. The plaintiff relied on *NBI HC. Misc. Appl. 1732 of 2004, James Joram Nyaga & Another v Attorney general & Another* (unreported) on the authority of the Commissioner of Lands and further referred to *Funzi Island Development Limited & 2 others v County Council of Kwale & 2 others* [2014], eKLR on the same. The plaintiff claims that he has proven that the land was not available for alienation



- and that the 4th defendant had no authority to make the alienation and thus, it conferred no benefit to the 1st defendant."
72. He further cites NBI, HC. Misc. Appl. 1732, James Joram Nyaga & another v Attorney General & another (unreported) the Court referring to Section 3 and 7 of the GLA observed at page 24:
- 'The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Petitioners as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap. 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap. 281 of the Laws of Kenya.'
73. The plaintiff argues that even if for arguments' sake it could be conceded that the land was available for alienation, there can be no doubt that the Commissioner of Lands had no legal authority to make the Lease in the circumstances of this case, The lease was not being made for educational, religious, charitable or sports purposes or under any of the exceptions that would entitle the Commissioner to make the grant under section 3 of the Government Lands Act. As per the letter of allotment and the special conditions attached to the grant, the lease was made for residential purposes and therefore the Commissioner of Lands had no power to allocate and make the lease.
74. The plaintiff further relies on Ethics and Anti-Corruption Commission v Wilson Gacanja & 3 others; Nairobi City Council (Interested Party) [2020] eKLR, the court ruled; -
- "Fifth, there is no evidence to suggest that the President of Kenya authorized or was privy to the impugned alienation. Under Section 3 of the repealed Government Lands Act, the power to alienate unalienated Government land was vested in the President of the Republic of Kenya. The Commissioner of Lands only exercised limited delegated authority in limited circumstances. The 1st 2nd and 4th defendants have not demonstrated to the court that the land was unalienated Government land and that the impugned alienation was made by the President of the Republic of Kenya as required by the law".
75. The 1st Defendant asserted that the suit property was designated as GL, not private land, reserved for a public use. Before allocation to 1st Defendant, the suit property functioned as existing government offices which had the Judiciary, Central Police Station, Labour Offices among other government offices. –
76. Observing the record, it is evident that 1st Defendant was first allocated the land in 1995. At that time, the governing legislation was the Land Planning Act, Cap 303, which was subsequently repealed by the Physical Planning Act Cap 286. The *Physical and Land Use Planning Act* No. 13 of 2019 have in turn, superseded the latter. The Land Planning Act incorporated provisions for public lands, with Regulation 11 (3) of the Development and Use of Land (Planning) Regulations, 1961 defining "public purpose." This included nonprofit purposes declared by the Minister, encompassing educational, medical, and religious objectives, public open spaces, car parks, and government and local government purposes.
77. The plaintiff argues that at the time, the suit property held the designation of existing government offices, categorizing it as a public utility. Consequently, it could not be deemed un-alienated public



land, as asserted by the Defendant, and thus, it was not available for alienation to him or for any subsequent alienation.

Process of unalienated public land

78. In the case of Republic v, Minister for Transport & Communication & 5 Others Ex Parle Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 012003 [2006/ 1 KLR (E&L) 563. Justice Maraga emphasized that titles obtained through land grabbing, even if claimed under the principle of indefeasibility, should be nullified if a constitutional challenge succeeds, given the supremacy of *the Constitution*.
79. The plaintiff ultimately submits that this court ought to find that the alienation of the land reserved for existing government offices was un-procedural and unlawful. The absence of an approved Part Development Plan (PDP) by the Director of Physical Planning and Central/Regional Authority, in line with the provisions of the repealed Land Planning Act Cap 303 (replaced by the Physical Planning Act Cap 286), shows that the defendants were in breach of the law. The PDP would have addressed the issue of public user of the suit property.
80. The irregular first allocation means 1st Defendant had no valid legal interest to transfer to subsequent owners. As such, the 2nd Defendant's title is not protected under Article 40 of *the Constitution*, and the land automatically vests in the government as per Article 62(2) of *the Constitution*. Article 40 of *the Constitution* guarantees the right to property but limits it when unlawfully acquired. Given the irregularities in the initial acquisition, 2nd defendant cannot claim protection under Article 40, and the doctrine of bona fide purchaser does not apply when the root of the title is challenged. The 2nd Defendant's failure in due diligence is noted, especially considering the location of the public property.
81. The plaintiff argues that the Lease also required the allottee to develop the suit property within 24 months upon actual registration of the Lease. The 1st defendant confirmed that he has never developed the plot and never sought any approval to develop the land as required from the local government or the county government ever since he got the registration. This is contrary to the Special condition 2. The process would be a hurdle to the 1st defendant because his Lease indicates the user as commercial purpose yet the plot falls within the area reserved for existing government offices as per the approved PDP No, 234.
82. In Benjamin Otieno Okumu v County Government of Nyandarua 120181 eKLR learned Judge ruled that; -

“I find that the terms and conditions of the allotment letter were further not met by the Applicant to the effect that he was to develop the land within 24 months upon receipt of the allotment letter but had just started developing the same in the year 2017, more than 11 years after the allotment which in effect reverted the land back to the County Government making it an asset of the said county. The same was therefore to be dealt with in accordance with the Intergovernmental Relations Technical Committee, which was established by the *Intergovernmental Relations Act*, 2012 to take over the residual functions of the Transition Authority after expiry of the term of the Authority to finalize the audit and verification of assets and liabilities of the defunct Local Authorities.



83. The plaintiff cites the Court of Appeal in the case of Joseph N.K. Arap Ng'ok v Moiwo Ole Keiwua & 4 others (1997) eKLR stated that; -

“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.

84. The plaintiff urges that the land was allotted for residential purposes and yet the area was reserved for government offices and that there was manipulation of Government records. The plaintiff argues that the 2nd and 3rd defendants can't hide behind protection under the principle of innocent purchaser for value without notice because the property was obtained contrary to the provisions of law. Moreover, the plaintiff argues public interest and public trust outweighs the private interest and therefore the parcel of land having been public land can't be converted to private land.

85. The 1st defendant submits that to succeed in a claim of fraud, the Plaintiff not only need to plead but also particularize it by laying out water tight evidence upon which the court would make such finding. It is therefore, trite law that any allegations of fraud must be pleaded and strictly proved.

86. The 1st defendant cites the Court of Appeal case of Kuria Kiarie & 2 Others -vs-Samp Magera (2018) eKLR where it was held as follows:

“The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria —vs- Nansingh Madhusingh Darbar & Another [2000] eKLR, where Tunoi, JA (as he then was) states as follows:

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

87. The same procedure goes for allegations of misrepresentation and illegality. See Order 2 Rule 4 of the Civil Procedure Rules. As regards the standard of proof, the Court of Appeal in the case of Kinvanui Kamau —vs-George Kamau [2015] eKLR expressed itself as follows:

88. It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo -vs- Ndolo (2008)1 KLR (G & F) 742 wherein the court stated that:

“...we start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the Respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the Respondent was certainly not one beyond a reasonable doubt as in Criminal Cases...”

89. It is clear from the authorities cited herein above that in cases where fraud is alleged, it is not enough to simply infer fraud from the facts.

90. The plaintiff heavily relies on the comments made on a letter dated 13/4/1994 (exhibit 3). The comments that “the plot applied for edged red on the sketch falls on government reserved area for



- offices. Size of the plot is 0.1296 ha approx...: made by Ms. Alula on 28/8/1995 are not to prove fraud because the maker was not called and that apart from the comments made in the said letter, all the witnesses called by the plaintiff failed to produce any other evidence to justify and/or prove their allegations that the suit property was not available for allocation as it was a government land.
91. The 1st defendant denied having sold the suit property to the 2nd defendant. He stated that he did not sign a sale agreement, a transfer deed and/or applied for a consent to transfer the suit property. The 2nd defendant further stated that at the time, he was in prison and that he was loaned Kshs.500, 000 by Kayai Advocate.
 92. The 2nd and 3rd defendant have also grounded their claim on fraud and accused the 1st defendant of having acquired the suit property fraudulently and thereafter sold it to the 2nd defendant. They have asked for compensation of loss of Kshs.2,000,000/= and loss of user of Kshs.100,000/= per month.
 93. The 1st defendant argues that he has demonstrated clearly herein above that the acquisition of the suit property was above board. All the evidence led by the government was clear that the 1st defendant did not commit any fraud. All he did was to identify a vacant land and he applied for it. His application was approved by the government.
 94. The 1st defendant further submits that there is no evidence of fraud on the part of the 1st defendant as against the 2nd defendant. The 2nd and 3rd defendants' only witness testified under cross examination that he was not aware of the transaction between his late father and the 1st defendant. He however, stated that the purchase price was allegedly 1,500,000/=. The claim for compensation for compensation for Kshs. 2,000,000/= cannot be granted simply because there is no evidence of fraud. In any event, the 2nd and 3rd defendants have been in possession and use of the suit property. They have benefited as much from the property.
 95. The 1st defendant submits further, were made are that the claim for Kshs.100,000/= per month as loss of income is not supported by any evidence. No accounting books were produced to show that the 2nd and 3rd defendants were making such an amount every month.
 96. In conclusion, he submits that the plaintiff has failed to prove its case on a balance of probabilities. The 2nd and 3rd defendants have also failed to prove their counterclaim on a balance of probabilities. He urges the court to dismiss the suit and counterclaim and award costs to the 1st defendant.
 97. The 2nd and 3rd defendants argues that the 3rd Defendant herein is the holder of suit property Title No.Nakuru/Municipality Block 5/251 vide a valid transfer to its name on 30/9/2014. Upon the registration of the said transfer, the 3rd Defendant did in law become the absolute and indefeasible owner of the suit property.
 98. The root of the Plaintiffs title is traceable. PW3 confirmed to the court that the signature on the letter of Allotment in this matter is his. He stated that the 1st Defendant herein was issued with the Letter of Allotment dated 16th October 1995. PW5 provided the Lease document dated 7th February 1996 (Exh.11) and a copy of the Certificate of Lease (Exh.12). He also provided copy of the White Card in Nakuru Municipality Block 5/251 (Exh. 14). The White card as produced indicates that the land after registration in the name of the 1st defendant was charged to Barclays Bank. Thereafter a transfer was registered and the ownership changed to the 2nd Defendant who later transferred it to the 3rd Defendants who are the present registered owner. He confirms the transfers between the 1st defendant, the 2nd Defendant and the 3rd Defendant and the original title was also provided.



99. He cites the case of Joseph N. K. Ara Ngok... Vs... Justice Moiyo Ole Keiuwa & 4 Others. Civil Appl, NO. 60 of 1996, the Court of Appeal held that:-

“It is trite that such title to landed property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to the provisions of the Act under which the property is held.”

100. to the 2nd and 3rd defendants, from the above facts, it is apparent that with the valid registration of the transfer, the 2nd Defendant and eventually the 3rd Defendant became the absolute and indefeasible owner of the suit property. The 2nd and 3rd defendants argue that they committed no illegality.

101. The Defendants were never Involved In the application, approval and eventual issuance of the Certificate of Lease to the 1st Defendant.

102. The 2nd and 3rd defendants submit that the standard of proof of fraud in civil matters is a bit higher but not to the level in criminal matters which the Plaintiff nor the 4th and 5th Defendant In the Counter Claim met and thus did not prove as against the 2nd and 3rd Defendants in the main claim any illegality of fraud and/or corrupt scheme.

103. Ultimately, the defendants argue that being the registered owner of the suit property, the 3^{co} Defendant is deemed to be the absolute and indefeasible owner of this suit property which ownership can only be challenged if the same was acquired through fraud or misrepresentation in which he is found to have been aware and involved. The 2nd and 3rd defendants cite the provisions of Section 26(1)(a) & (b) of the Land Registration Act 2012, which provides:-

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party: or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

104. The 2nd and 3rd defendant argued that they are bonafide purchasers for valuable consideration without notice of any fraud.

104. The 2nd and 3rd defendant further argue that if the land is found to be public land then they are entitled to be identified by the defendants in the counter claim for any loss occasioned preferred on the misrepresentation on availability of the property, having been requested/maintained in the land records. The 4th defendant did not file submissions.

105. The 4th defendant on his part submits that the plaintiff did not substantiate the allegations of fraud against him as the process of alienation was followed starting with the investigation that showed that the parcel of land was available for allocation. That the senior lands Officer Mrs. P. Amiani confirmed that the land was available for allocation. That the commissioner of lands issued the grant after approvals



by various officers and therefore he is not liable if the property is found to be illegally alienated. The 4th defendant argues that the proper person to have been sued was the Attorney General pursuant to the provisions of the *Government Proceedings Act* Cap 40 Laws of Kenya because the commissioner of lands was acting as a public officer when he issued the grant.

106. The learned senior state counsel, Nyambura Kiringu submits that the suit property was not available for alienation because it was a government reserve and marked as G.L and therefore not private land. The suit property had government structure being a police canteen which exists up to date but now referred to as Bamuda hotel and that the land had functioning government offices including the Judiciary, Central Police Station and Labor Office. The learned state counsel argues that the land had government structures and therefore could not be described as un-alienated government land.
107. The learned state counsel submits that the 2nd defendant was not a bonafide purchaser for value without notice because he failed to produce the transfer document required including the receipt for stamp duty and that the 1st defendant asserted that he never sold the suit to the 2nd defendant. That the 2nd and 3rd defendant never showed evidence that money passed hands. The Attorney General prays that the suit be dismissed with costs.

Analysis and Determination

108. The following issues have come to light in this matter and ought to be analyzed and determined.
 1. Whether the property was alienated Government land or un-alienated government land and therefore available for allocation
 2. Whether the 2nd and 3rd defendant were innocent purchasers for value without notice.
 3. Whether Public interest outweighs private interest.
 4. Whether Wilson Gachanja is liable in person for the wrongs of the office of the commissioner of lands.

Analysis and Determination

109. On the 1st issue as to whether the property was alienated Government land or unalienated government land at the time of allocation, this court finds that the land in dispute is known as Nakuru Municipality block 5/251 that was curved out of Nakuru Municipality block 5/219. The historical background of the said parcel of land is that on the 13th April 1994, Sachekoko investments applied to the Commissioner of lands for a proposed Commercial plot in Nakuru Municipality block 5. According to the applicant he undertook to develop the plot as per the existing development plan of the Municipal Council of Nakuru. The office of the commissioner of lands did due diligence to confirm the status of the plot and referred the application to the senior lands officer to check the status of the land and it was confirmed by the lands office that the plot applied for edged red on the sketch fell on government reserved area. Despite the report that the plot fell on the government area reserved for offices, the application was processed and a letter of allotment dated 16th October 1995 was issued to Sachekoko investments as an offer for the plot. Sachekoko Investments accepted the offer and paid the requisite fees on 9th November 1995. The Registry Index Map was amended and a lease was prepared in favor of Sachekoko Investments and forwarded to The Land Registrar Nakuru on the 6th February 1996. It is on record that it is the then Minister for lands the late Hon J.K Mulinge who gave the authority for the land to be allocated. The register for the parcel of land was opened in the Nakuru Land Registry on the 7th of February, 1996 under the registration section of Nakuru Municipality Block 5 and the land was designated as parcel number 251 measuring 0.0900 acres. The lessor was the Government of



Kenya and the lessor was Shadrack Koske Cherogoe for a term of 99 years from the 1st of October 1995 at the rent of Ksh 36,000 per annum. The certificate of lease was issued on the same date. On the 4th of June 1997, the property was charged to the Barclays bank Ltd to secure an uncertain amount and the same was discharged on 18th June 1998 and on the same date the property was registered in the names of Said Abdalla Azubedi and a certificate of lease was issued on the same date. The property was later registered in the names of Phelsey Enterprises Ltd on 30th September 2014 and a certificate of lease issued on the same date.

110. The plaintiff's case is that the suit property was not available for alienation in any manner whatsoever to the 1st defendant or to any other person because it had already been alienated to the government for public utilities and therefore the allocation, allotment and issuance of title was illegal, fraudulent, and null and void. The 1st issue for determination is whether the suit property was government land available for alienation. This court finds that the parcel of land No 251 was created from parcel of land no Nakuru Municipality block 5/219 that was clearly alienated for government offices and the remainder of Nakuru Municipality block 5/219 became Nakuru Municipality block 5/252 that was left for the government after extinguishing Nakuru Municipality block 5/ 219. Parcel number Nakuru Municipality block 5/252 comprises of the law courts and the police headquarters. The plaintiff produced the PDP NO 234 approved on the 14th December 1984 that clearly showed that the whole of parcel no Nakuru Municipality block 5/219 had been alienated for the existing Municipal Council offices, proposed site for Ministry of Lands and settlement offices and the existing government offices.
111. This court finds that the suit property was part of an already alienated government land designated as Nakuru Municipality block 5/219 and had public utilities and therefore was not un-alienated government land and therefore was not available for alienation by the commissioner of land.
112. Even if it is argued that the land was un-alienated government land available for alienation by the commissioner of lands, due process was to be followed.
113. The supreme court in *Dina Management Ltd Vrs County Government of Mombasa and 5 others* petition 8 (E010) of 2021 (2023) KESC 30 (KLR) Appl 2023 where it found:-

“As we have established above, before allocation of the unalienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property. In the case of *Funzi Development Ltd & others v County Council of Kwale*, Mombasa Civil Appeal No 252 of 2005 [2014] eKLR the Court of Appeal, which decision this court affirmed, stated that: “...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title.”

109. We note that the suit property was subsequently converted and HE Daniel T Arap Moi registered as owner and obtained a freehold title. Further, the suit property herein is within the then Mombasa municipality. Contrary to the appellant's averment, section 10 of the GLA is applicable. Being a town plot, within the jurisdiction of the 1st respondent and its predecessor, it ought to have been an allocation for a lease for a term not exceeding 100 years.
110. Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a



title cannot be held as infeasible. The first allocation having been irregularly obtained, HE Daniel Arap Moi had no valid legal interest which he could pass to Bawazir & Co (1993) Ltd, who in turn could pass to the appellant.

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

112. We therefore agree with the appellate court that the appellant's title is not protected under article 40 of *the Constitution* and the land automatically vests to the 1st respondent pursuant to article 62(2) of *the Constitution*. We hasten to add that, the suit property, by its very nature being a beach property, was always bound to be attractive and lucrative. The appellant ought to have been more cautious in undertaking its due diligence."

114. According to section 2 of the Government Lands Act (Repealed), the following is the definition of unalienated land;

"unalienated Government land" means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment.

115. Section 3 of the Physical Planning Act, Cap 286 of the Laws of Kenya defines unalienated land in similar fashion.

116. The court of appeal in High Court Civil Appeal No. 288 of 2010, Kipsirgoi Investments Limited vs Kenya Anti-Corruption Commission relied on section 2 of the Government Lands Act and Section 3 of the Physical Planning Act when it found that the suit property was planned as an open space and held that the subsequent lease under section 3 of the GLA was irregular as the land was already alienated.

117. Under section 3 of the Government Lands Act (Repealed), it states;

3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—

(a) a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;

118. The act further states;

The powers of the President under this paragraph are delegated to the Commissioner in the following cases only (Cap. 155 (1948), Sub. Leg.)—

(a) for religious, charitable, educational or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President;



119. In *James Joram Nyaga & Another v the Hon. Attorney General & Another* [2007] eKLR, the court, in reference to sections 3 and 7 of the Government Lands Act stated;

The above section clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December, 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya.

120. The land in dispute was already alienated for public utilities as Nakuru/ Municipality Block5/219 and was fully developed with the Nakuru High Court Station, The Nakuru County Government Offices and the Ministry of land offices therefore it could not be deemed un-alienated. The 4th defendant therefore had no authority in law to make the alienation and therefore no interest could be conferred upon the 1st defendant. The upshot of the above is that the land was not available for allocation. The 1st defendant did not procedurally obtain title as the Suitland was public land. Section 26 states as follows;

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”

121. Moreover, it is not clear under which powers the minister for lands was acting in authorizing the allocation of the land to the 1st defendant but is clear that the powers to alienate land were bestowed to the President of the Republic of Kenya and the Commissioner of Lands in some special cases. Though the facts of this case do not demonstrate fraud by the defendants, it demonstrates illegality and procedural impropriety and therefore the certificate acquired by the 1st defendant and subsequently the 2nd and 3rd defendant was obtained illegally and un-procedurally and therefore cannot be protected by the court.
122. The next issue is whether the 2nd and 3rd defendants are bonafide purchasers for value without notice and therefore entitled to the counter-claim.



123. In the case of *Katende v Haridar & Company Limited* [2008] 2 E.A.173, the Court of Appeal in Uganda held that:

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

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

124. In this case, the title held by the 3rd defendant cannot be described as valid because it is in respect of purported private land illegally excised from public land. It is not clear how the 2nd defendant purchased the property when the person holding title at that time was serving a jail term. The 2nd and 3rd defendants who are the 1st and 2nd plaintiffs in the counter claim did not produce the evidence of a duly executed and registered transfer of land from the 1st defendant to the 2nd defendant. In the absence of an agreement of sale signed by the 1st defendant and transfer of the property registered at the lands office by the registrar of lands, the title cannot be described as valid and therefore the court is inclined to find that the 2nd defendant did not purchase the property in good faith and therefore did not transfer a good title to the 3rd defendant because the 3rd defendant. The 2nd and 3rd defendants are therefore not entitled to the counter claim and the same is dismissed with no orders as to costs.

124. I do further find that Wilson Gachanja is not personally liable in this transaction as he acted as the commissioner of lands and that it is not proved that he acted fraudulently and that many officers were involved including the minister for lands ho Jackson K Muinge.

125. I do find that there are no orders sought against the 4th defendant by the plaintiff

126. The upshot of the above is that the plaintiff has proved her case on a balance of probabilities and I do find her entitled to the prayers sought thus:-

1. a declaration that the allocation and issuance of lease over Land Parcel Number Nakuru Municipality Block 5/251 by the 4th Defendant and subsequent transfers to the 2nd and 3rd Defendants is null and void ab initio and incapable of conferring any estate, interest or right.
2. an order that the registration of lease over Land Parcel Number Nakuru Municipality Block 5/251 and all entries subsequent thereto be cancelled.
3. that the registration of the 2nd and 3rd Defendant as lessees of Land Parcel Number Nakuru Municipality Block 5/251 be and is hereby cancelled.
4. permanent injunction to restrain the 3rd Defendants by themselves, their agents, servants, assigns or any other person whatsoever from charging, transferring, leasing wasting, entering,



developing, sub-dividing, occupying and/or dealing in any matter dealing with land parcel number Nakuru Municipality Block 5/251. She prays for

5. Each party to bear own costs as the illegalities and unlawfulness was committed by the whole ministry of lands and the same cannot be visited upon the commissioner of Lands.

JUDGMENT SIGNED, DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 15TH DAY OF MARCH 2024.

A. O. OMBWAYO

JUDGE

