



Ethics and Anti-Corruption Commission v Kimaru & 2 others (Environment & Land Case 266 of 2018) [2024] KEELC 3938 (KLR) (30 April 2024) (Judgment)

Neutral citation: [2024] KEELC 3938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 266 OF 2018
FM NJOROGE, J
APRIL 30, 2024**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

WILLIAM KIMARU 1ST DEFENDANT

**BYRON KIPNGETICH GAWON CHOGE (SUED AS ADMINISTRATORS OF
THE ESTATE OF JIM CHOGE (DECEASED)) 2ND DEFENDANT**

WILSON GACHANJA 3RD DEFENDANT

JUDGMENT

1. By the plaint dated 02/7/2018, the plaintiff seeks the following prayers:
 - a. A declaration that the allocation and issuance of lease over land parcel number Nakuru Municipality Block 5/149 by the 3rd Defendant and subsequent transfers to the 2nd Defendants is null and void ab initio and incapable of conferring any estate, interest or right.
 - b. An Order that the registration of lease over Land Parcel Number Nakuru Municipality Block 5/149 and all entries subsequent thereto be and is hereby cancelled.
 - c. An order that the registration of the 2nd Defendants as lessee of Land Parcel Number Nakuru Municipality Block 5/149 be and is his hereby cancelled.
 - d. A permanent injunction to restrain the 2nd 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 manner dealing with land parcel number Nakuru Municipality Block 5/149
 - e. Costs of this suit.



2. The plaintiffs claim is that the government of Kenya had set apart Nakuru Municipality Block 5 for construction of residential houses for civil servants and other government officers; that the property known as Land Parcel number Nakuru Municipality Block 5/149 which fronts an unnamed road off Gusii Road in Nakuru Municipality in Nakuru County had been planned for government housing; that on 07/04/1994 land parcel No. Nakuru Municipality Block 5/149 was illegally alienated to the 1st defendant; that on 26/05/1994 the 3rd defendant caused them to be issued with an allotment letter of the suit property regardless of the fact that the suit property was planned and set aside as for use as public utility reserved for government housing; that the Letter of offer had attached conditions which included acceptance and payment of various costs by way of a Banker's cheque within 30 days; the 1st defendant entered into an agreement with Jim Choge (deceased) to take over his interest contained in the said letter of allotment for the suit property while knowing that he had no transferable interest; that on 30/6/1994 the 3rd defendant caused a lease over the suit property to be issued and registered in the name of Jim Choge and a month later, Kiptum Choge was registered as proprietor; that the suit property had a government House No. NKU/HOU/MG/27; at the time Kiptum Choge was being registered as the owner, a public servant was already in occupation and he has been in occupation to date; that the suit property was not available for alienation in any manner; that in the alternative, the 3rd defendant was the custodian of government land and was in breach of its fiduciary duties by purporting to allocate the 2nd defendant the suit property; that the transfer to the 2nd defendant was illegal; that on 24/01/2007 the government through the Ministry of Housing tried to validate irregularly acquired government houses through a circular which was cancelled on 28/07/2008; that at the commencement of the said validation the 3rd defendant did not make any deposits to validate irregularly acquired government land and that alienation of the suit property and the subsequent transfers were illegal, null and void.

The 1st defendant's defence

3. No appearance was entered or defence filed by the 1st defendant though the court on 13/11/2018 ordered service to be effected upon him by way of substituted service.

The 2nd defendant's defence

4. No appearance was entered or defence filed by the 2nd defendant though it entered appearance on 27/9/2018 through the firm of Sang & Langat Advocates. It filed and subsequently withdrew an application dated 25/9/2018.

The 3rd Defendant's Defence

5. The 3rd defendant filed his statement of defence on 19/09/2018. He denied the averments in the plaint and stated that during his tenure as Commissioner Of Lands which was between the years 1989-1999, he discharged his duties strictly within the law; that the present proceedings instituted against him in his personal capacity after twenty years since he ceased to hold that office are discriminative and amount to abuse of the judicial process; that the said proceedings are in contravention of Articles 25, 27, 47 and 50 of *the Constitution* of Kenya; that the suit property was unalienated government land, available for allocation, and that the alienation thereof under his watch was lawful, having passed through several stages and processes and that his role was to only issue a title deed based on the recommendation of the government officers. He denied knowledge of any transaction between the 1st and 2nd defendants and added that save for the fact that he executed the certificate of lease dated 26/05/1994 and the suit land was registered in the 1st defendant's name, he denied breach of fiduciary duty and all the other allegations of fraud and sought that the plaintiff's suit be dismissed with costs. He further denied that



the suit property was occupied by a public servant at the time of allocation or that it was still so occupied by the time of the filing of his pleading. He declined to plead to the alleged validation of irregular allocation of government land on the basis that he had left office by the year 1999; he denied that illegal alienation can be validated but maintained that the allocation to the 1st defendant of the suit land was legal. He alleged that the present suit is in abuse of the Ethics and Anti- Corruption Commission Act 2011 and that the plaintiff is not entitled to the reliefs sought in the plaint.

EVIDENCE OF THE PARTIES

The Plaintiff's Evidence

6. James Mwachidudu Chemera testified as PW1. He adopted his witness statement filed on 22/01/2020 as part of his evidence. He testified that he is a tenant at House No. MG 27 situated on Land parcel No. Nakuru Municipality Block 5/149. He also testified that he was allocated the house in October 2013 and has been paying rent. He produced as PExh-1 the letter of allotment dated 7/10/2013 by the Nakuru County Director of Housing and stated that he pays Kshs.5000/= as rent per month through the payroll check off system. He produced his current pay slips as PExh.2(a), (b) and (c). He testified that he is an employee of the Ministry of Transport and is based at the Kenya Railways, Nairobi. He further stated that in the year 2014 he became aware that the parcel of land where the house is situated had been grabbed by private individuals. He also stated that later an individual known as Byron Choge went to the house and introduced herself as the son and heir to the late Jim Choge and claimed dispose of the land and use the proceeds to pay debts. PW1 directed Mr. Byron Choge to the Ministry of Housing offices in Nakuru where he could report his claim and he also called the officer in charge of Housing, Nakuru Office Mr. Moses Kiptui informing him of the same. He also stated that since then Mr. Byron had taken more than ten potential buyers to view the suit property.
7. On cross-examination he confirmed that he had been paying rent after he was allocated the house. On re-examination, he stated that he has been a tenant on the suit property since the year 2013 and has been paying rent as per his pay slips.
8. James Nyaga Kithinji testified as PW2. He testified that he works with the plaintiff and that his duties include undertaking valuation for properties under investigations and conducting investigations. He adopted his witness statement dated 29/06/2018 as part of his evidence. He testified that when he conducted a valuation of the suit property, he found a residential house with a tenant in occupation. He also testified that he prepared a valuation report dated 29/06/2018 which showed that the suit property's value is Kshs.30 million. He produced his valuation report in evidence. In his witness statement he stated that when he visited the suit property he found government employees in occupation and they were paying nominal rent that was below the market rent.
9. Julius Waweru Mwangi testified as PW3. He adopted his witness statement dated 9/02/2021 as part of his evidence. He testified that he works at the State Department of Housing and urban Development as Deputy Director, Estates. He testified that his duties included Management of Government Houses Maintenance Leasing, Inventory and keeping the Buildings Register. He also testified that it is land parcel No. Nakuru Municipality Block 5/149 which accommodates the house No. MG 27. He further testified that the house is a middle grade, 2 bedroomed house with a main house, a veranda, pit latrine and servant's quarter. He produced as PExh.3 the building register or asset register with the necessary house details for House No. MG. 27. He testified that some people are claiming the land and yet it was committed for civil servant housing in the 1950's. He further testified that the land was not available for allocation and the house on it is occupied by a public servant who is still paying rent to the government. It was his evidence that the Commissioner of Land allocated the land but that he had no power to alienate land that had been set aside for a public purpose. It was also his evidence that prior



to year 2007, there was no offer for sale of Government houses. Later, sale was recommended by the Cabinet vide the circular dated 24/01/2007 and the addendum dated 2/03/2007. The said circulars listed down the conditions for sale and details of each house, including area, size and number of the plot. However, in 2008 the said circular was cancelled and an advertisement of the cancellation was placed in print media. He produced as PExh.4 the circular dated 24/1/2007, as PExh.5 the circular dated 2/3/2007, and as PExh.6 the newspaper advert. It was his evidence that by the year 1994, the property had not been advertised for sale and the title issued then could only be termed as irregular. It was also his evidence that one of the terms of the said 2 circulars dated 24/1/2007 and 2/3/2007 was to validate irregular acquisition of government houses. He testified that the circular of the year 2007 gave the conditions under which transfer or gifting could occur and that it had to go through the Cabinet and Government Regulation and Financial Procedures. He further testified that a board of survey is convened when the property is beyond repair or uneconomical to repair, or for change of use or during sale; that the process of boarding is guided by Circular No. 2/58 of 1/3/1958 and another of 30/6/2003 (which updated the first circular) which gives details regarding the process of boarding; that reasons for boarding are given and an inspection is done and forwarded to Accounting Officer together with a request to commence a Board of Survey; a form called F.O 58 is then filled out when the board makes its recommendations, which is then forwarded to the accounting officer who recommends the boarding. The forms are then forwarded to the Accounting Officer Treasury as the custodian of Government assets who signs it whereupon the asset is removed from their records in the Government Building Register. He testified that he did not come across any board of survey and that the records indicate that the house is still in existence. He produced as PExh.7 the circular of 1958, as PExh.8 the circular of 30/6/2003 and as PExh.9 the Government Financial Regulations and Procedures. He concluded his testimony by stating that the sale of houses had been reserved for government employees only and that the late Jim Choge was not an employee of the government and so the house on the suit property still belongs to the government.

10. On cross-examination, he maintained that house MG 27 was irregularly allocated. When he was referred to the certificate of lease of the suit property, he confirmed that he had not seen any evidence of an allotment letter. He further confirmed that the 3rd defendant was the Commissioner of Lands who held that office in the 1990s. He admitted that the Ministry was not aware of the said allocation until some succession proceedings by the 2nd defendant came up and the plaintiff, EACC, took up the matter. He also admitted that he does not know if the 3rd defendant has ever been charged with any offence.
11. Wilson Kibichii testified as PW4 and adopted his witness statement dated 8/06/2018 as part of his evidence. He stated that he worked with the Survey Department in the Ministry of Lands. It was his evidence that the plaintiff wrote to him requesting for the documents regarding the suit property. He testified that he found that the parcel was appearing in the RIM but not appearing in the Amendment. He produced a copy of the RIM as PExh.10. He also testified that when survey was done, the parcels were not assigned any fresh numbers as they already had land reference numbers. At the time of the survey, the suit property was given No. 151/4 and he produced the survey plan FR No. 37/97 as PExh.11. It was his evidence that since Plot No Block 5/149 was not contained in the amendment box then the process was not complete and therefore the certificate of lease emanating from such a process was fraudulent.
12. On cross-examination, he confirmed that in the year 2018 he realized that something was missing, that the process was not completed and he added that he is not aware of any certificate of lease issued for the property. The plaintiff's case was then marked as closed. The 3rd defendant elected to close his case without calling any evidence.



SUBMISSIONS

Plaintiff's Submissions

13. The plaintiff filed its submissions dated 9/03/2023 on the same date while the 3rd defendant filed his submissions dated 14/03/2023 on 15/03/2023. Rarely before has a matter that has been undefended by some defendants and so half-heartedly defended by others attracted so much fire from a plaintiff as this matter did. The plaintiff shot from all angles, above, below and from the sides, if only to make assurances double sure, as Shakespeare would say, that its mission was full accomplished without any risk of failure.
14. The plaintiff in its submissions set out the facts of its claim, the process of alienation of land and submitted on whether it had locus to bring the present suit, whether the 2nd defendant's title is absolute and indefeasible, whether it was proper to sue the former Commissioner of Lands in his personal capacity, whether the doctrine of estoppel applicable in the case and whether the plaintiff's suit is time barred.
15. On whether it had locus to bring the suit, the plaintiff relied on the case of Njau vs City Council of Nairobi KLR [1983] eKLR. It submitted that it is established under the *Anti-corruption and Economic Crimes Act* No.3 of 2003 (herein after "ACECA") and has special jurisdiction and mandate under the Act to recover fraudulently and unlawfully acquired public assets. While submitting that unlawful or fraudulent acquisition of public property is an economic crime as defined by Section 2 as read with Section 45 of ACECA, it stated that it had mandate under Section 7(1) (h) ACECA to institute the present proceedings if after investigations it was satisfied that such proceedings are necessary. The plaintiff relied on the case of Kenya Anti-Corruption Commission vs Asis Limited & Others Miscellaneous Application No. 386 of 2003 among other cases in support of its arguments.
16. On whether the 2nd defendant's title is absolute and indefeasible, the plaintiff submitted that the suit property was not unalienated government land and was therefore not available for alienation to any private entity; that the government can also own land; and that the 3rd defendant had no legal authority to issue a lease over alienated government land and allocation of the suit lands was therefore null and void. The plaintiff relied on Sections 3, 9 and 12 Government Lands Act, the cases of the Town Council of Ol'Kalou vs Ng'ang'a General Hardware, Nairobi Civil Appeal No. 269 of 1977, Dr Syedna Mohammed Burhannudin Saheb & 2 Others vs Benja Properties Ltd Nairobi HCCC No. 73 of 2000 among other cases in support of its arguments. It was averred that Section 3 of the Government Lands Act mandated the 3rd defendant to only allocate unalienated government land under delegated power from the President only in certain special instances. If the suit land had been unalienated, posited the plaintiff, then disposal would have been as per Sections 9 and 12 of the Government Lands Act, that is, by way of auction under Section 12. It was averred that such procedure was meant to prevent cronyism. The plaintiff added that under Section 7 of the act the 3rd defendant was expressly barred from usurping the President's power. The plaintiff stated that a title is only indefeasible and sacrosanct when the allocation process has been done in accordance with the law. The cases of African Line Co Ltd Vs the Attorney General Mombasa HCCC No 276 Of 2003 eKLR 2007, The Town Council of Ol'Kalou vs Nganga General Hardware Nairobi Civil Appeal No 269 of 1977 and Champakalal Ramn Shah Vs Attorney General & Another Mombasa HCCC No 145 Of 1997, ICEA vs The Attorney General & Another Mombasa HCCC No 135 of 1998 eKLR 2001 and James Joram Nyaga & Another Vs the Attorney General Nairobi HC Misc. Civil Application No 1732 Of 2004 were among the plethora of authorities cited in aid of the plaintiff's submission.



17. On suing the Commissioner of Lands in his personal capacity, the plaintiff submitted that it has shown that the 3rd defendant who issued the grant to the 1st defendant acted ultra vires so he cannot be said to have acted in his own capacity as a Commissioner of Lands and his action amounted to misconduct. The plaintiff relied on the case of Rhyl Urban Amusement Limited [1959] ALL ER among other cases in support of that argument. It cited a book, “Corruption and Misuse of Public Office” by Collins Nicholas where misconduct in public office was defined. It referred to the Court of Appeal case of Kenya Anti-Corruption Commission Vs Bhangra Limited & Another Civil Application No 185 Of 2009 eKLR (2009) where the court had granted orders of injunction which had been denied by the High Court for reason of non-joinder of the Commissioner of Lands, but hastened to qualify that by referring to the Pashito case (supra) where the same court observed that the Commissioner ought to be joined where his actions are challenged so that he may have a chance of being heard.
18. The plaintiff urged that by referring to the Commissioner with the possessive noun “him” the court distinguished between the Commissioner and the office. The plaintiff indicated that in the case of Kenya Anti-Corruption Commission Vs Chembe Holdings Ltd MSA HCCC NO 70 And 71 Of 2009 (consolidated) an objection raised by the defendants was that by reason of omission to join the office of the Commissioner of Lands, the plaintiff had failed to establish a prima facie case. The court held that failure of joinder was not fatal and also ruled that the naming of the relevant and concerned Commissioner of Lands was not improper and was in fact prudent. The plaintiff also added that in the case of Kenya Anti-Corruption Commission vs Judith Marilyn Okungu and others NBI HCMISC No 187 of 2007 eKLR 2007 the court held that it was proper to sue the former Commissioner of Lands in her own name.
19. The plaintiff rationalized the joinder of the Commissioner of Lands in his name by stating that such joinder was meant to offer him a chance to be heard, and avoid a situation where he would be condemned unheard, and that the authorities cited supported that position. It was further argued that it was the Commissioner who actually effected the alienation, and not the incumbent occupying the office at the time of the suit, who would know the basis of the alienation, know why he acted as he did while in office, and who should in any event personally bear the cost of the suit personally in the end, and that the incumbent Commissioner may not be able to defend ultra vires actions done by a former Commissioner. It was posited that the incumbent Commissioner should not be compelled to defend such ultra vires actions at public expense while such former Commissioner had been on a frolic of his own.
20. Lastly, it was stated that it is a fallacy that the office of the Commissioner of Lands must be joined to the suit since under Sections 54 and 64 of the Registration of Titles Act Cap 281 (now repealed) the court may order the Registrar to cancel correct or substitute or issue any memorial or entry in the register or the order may be entered into the grant or register, thus giving effect to the judgment or order of the court.
21. The plaintiff urged that the Act never stated that the offices of the Registrar or the Commissioner must be party to the suit in which such orders are given; that the 3rd defendant was said to have been joined to the suit in his name for the tort of misfeasance in office to which he should be made personally liable. Protection from personal liability for that tort is thus removed, and for that proposition, the plaintiff cited the two English cases of Reg Vs Deputy Governor of Parkhurst Prison and Others [1992] 1 AC and also Three Rivers District Council & Others Vs Governor & Company of The Bank of England {No 3} [2000] 3 All ER 1.
22. It was submitted that a tortfeasor who dishonestly disregards his plain duty or who does not honestly attempt to do it acts or omits to act at his own peril as to personal liability for his action if it causes



injury. Concomitant with that argument is the argument that the government and the office of the Commissioner of Lands would only incur liability if the particular Commissioner was acting within the confines of the applicable statutes.

23. As to whether the doctrine of estoppel is applicable in this case, the plaintiff relied on the cases of *Mohanlal Lalji Thakrar vs Pirbhai Lalji & Sons Ltd* [1961] E.A 497, *J.K Chatrath & another vs Shah Cedar Mart* [1967] E.A 93, *Macfoy vs United Africa Co. Ltd* [1961] 3 all E.R 1169 and submitted that it is not estopped from denying or challenging the validity of the lease which was prima facie, fraudulent and illegally issued with respect to the suit property; that there can be no estoppel against a statute as the illegal acts of the 3rd defendant can not render valid what the law regards as invalid. Consequently, it is urged that the title which was issued to the 1st defendant and subsequently transferred to the 2nd defendant is null and void.
24. Regarding the question whether the plaintiff's suit is time barred, the plaintiff relied on Section 42(2) of the *Limitation of Actions Act* and the case of *Kenya Anti-Corruption Commission Vs JSK Cargo & Another MSA HCCC No 40 of 2009 eKLR* [2009] and submitted that their case is not time barred as it indisputably seeks to recover lost public property. The plaintiff then sought that its prayers in the plaint be allowed.

3rd Defendant's Submissions

25. The 3rd defendant in his submissions identified the following issues for determination: (a) whether the plaintiff discharged its burden of proof against the 3rd defendant, (b) whether the present suit is discriminative and unconstitutional against the 3rd defendant, (c) whether the 3rd defendant should be held liable for the alleged improper allocation and (d) whether the plaintiff is entitled to the costs of this suit.
26. On the first issue, the 3rd defendant submitted that the plaintiff failed to substantiate the particulars of fraud. The 3rd defendant further submitted that the plaintiff did not join to the suit S.M Osodo who signed the letter of allotment and the other persons who authorized the allocation of the suit property and yet it was on the basis of their confirmation that the land was available for alienation that he executed the grant. Relying on Sections 107 and 108 of the *Evidence Act* in support of his argument that he who alleges must prove, the 3rd defendant further submitted that there is no evidence adduced to demonstrate that the 3rd defendant acted improperly or fraudulently.
27. On the second issue, the 3rd defendant submitted that the suit against him is unconstitutional, scandalous, frivolous, vexatious and amounts to abuse of the court processes and is in violation of Articles 25(c), 27, 47 and 50 of *the Constitution* and ought to be struck out. The 3rd defendant relied on the case of *Joshua Okungu and another vs the Chief Magistrate's Court ACC Nairobi and another* [2014] eKLR in support of his arguments.
28. On the third issue, the 3rd defendant submitted that he issued the grant while acting on instructions from the President and the proper person the plaintiff would have sued is the Attorney General. This is because the 3rd defendant issued the grant while discharging his official duties. The 3rd defendant relied on Section 8 (1) of the Government Lands Act in support of his arguments.
29. On the fourth issue, the 3rd defendant relied on Section 27(1) of the *Civil Procedure Act* and submitted that the plaintiff instituted the present matter while acting in public interest and so it should not be awarded any cost.



ANALYSIS AND DETERMINATION

30. Upon considering the pleadings, evidence and submissions, the following issues arise for determination:
- i. Whether the plaintiff has locus to institute the present proceedings;
 - ii. Whether the 3rd defendant has been properly joined in the suit alone, after a long delay and in his personal capacity;
 - iii. Whether the lease over land parcel No. Nakuru Municipality Block 5/149 issued by the 3rd defendant and the subsequent transfers thereof are null and void and liable to cancellation by this court;
 - iv. Who ought to meet the costs of the present suit.

The issues are addressed as herein under.

Whether the plaintiff has locus to institute the present proceedings;

31. According to the plaintiff, its locus to bring this action is premised on its special jurisdiction and mandate under the *Ethics and Anti-Corruption Commission Act* No. 22 of 2011 to recover fraudulently and unlawfully acquired public assets. Section 11 of the *Ethics and Anti-Corruption Commission Act* provides as follows:

“

“ 11. Additional functions of the Commission

(1) In addition to the functions of the Commission under Article 252 and Chapter Six of *the Constitution*, the Commission shall—

(a).....

(b)

(j)institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.”

32. The present claim revolves around allegations of impropriety in the allocation of the suit land by the 3rd defendant. The impropriety is claimed to be based on the allegation that the suit land was at the time of allocation public property which was unavailable for alienation to any person. The plaintiff claims that the defendants alienated or acquired the land with full knowledge that the same had been planned for public purposes, that is, for use for government housing and in particular for the establishment of residential housing for civil servants and other government officers. It is further claimed that the 3rd defendant alienated government property without following the laid down procedures for convening and carrying out boards of survey on disposal of government buildings.
33. Arising from the foregoing, this court is persuaded that the suit was instituted to reverse or have cancelled the alleged unlawful or fraudulent acquisition or allocation of public property. It is therefore within the mandate of the plaintiff Commission under the provisions of Section 11 of the *Ethics and*



Anti-Corruption Commission Act Act No. 22 of 2011 to bring such a suit. I hereby find that the plaintiff has locus granted by statute to institute the present suit.

Whether the 3rd defendant has been properly joined in the suit alone, after a long delay and in his personal capacity;

34. It is urged that the 3rd defendant should not have been joined in his personal capacity. At the hearing, it emerged that the 3rd defendant was a Commissioner of Lands in the 1990's. The plaintiff has justified the joinder of the 3rd defendant by stating that he acted ultra vires and thus he cannot be said to have acted in his capacity as a Commissioner of Lands and his action amounted to misconduct.

35. The plaintiff cited the Pashito Case (supra), by using the possessive noun "him", as distinguishing the office of the Commissioner of Lands from the individual for the time being holding it. In the Pashito case the respondents Paul Nderitu and two others had sued the appellants Pashito Holdings Ltd. and Shital Bhandari for two declarations and a permanent injunction. The Court of Appeal observed as follows regarding the court's ruling made in that case while the Commissioner of Lands had not been made a party to the suit:

"Obviously, however, he (the Judge) could not have resolved that issue unless the Commissioner was a party to the proceedings and had a fair opportunity to be heard. It is breach of the rule of natural justice to attempt to resolve the issue behind his back and in his absence from the proceedings."

36. Noting the holding in Kenya Anti-Corruption Commission Vs Chembe Holdings Ltd MSA HCCC NO 70 And 71 Of 2009 the respondent's main contention was that having failed to join the Commissioner of Lands to this suit, the plaintiff has not established a prima facie case since some of the actions complained of were committed by that office and orders cannot issue against the office as the office has not been joined. The court held that failure to join the Office of the Commissioner of Lands was not fatal. It stated as follows:

"With regard to the failure to join the Commissioner of Lands, I am of the prima facie view that that failure is not fatal given the facts of this case. The plaintiff has sued the 3rd defendant whom it describes as being at all material times to this suit the Commissioner of Lands appointed under the Government Lands Act, Chapter 280 of the Laws of Kenya. It is the 3rd defendant against whom the allegations of fraud and illegality have been made. At this interlocutory stage, I do not find the naming of the relevant and concerned Commissioner of Lands improper. To the contrary, I find the decision to sue the 3rd defendant prudent."

37. I also take note that in Kenya Anti-Corruption Commission vs Judith Marilyn Okungu and others NBI HCMISC No 187 of 2007 eKLR 2007 upheld the institution of proceedings against the 1st respondent in her personal capacity, for abuse of office, under Section 46 of the Anti-Corruption & Economic Crimes Act, No. 3 of 2003, which together with Section 51 created personal liability for wrongs committed while in office or in official capacity.

38. It is the plaintiff's submission that the government would incur liability only if the Commissioner of Lands was acting within the confines of the applicable statutes. Liability could then be deemed to have fallen on the office held by the concerned officer at the material time.

39. Having regard to the case law cited by the plaintiff as herein above this court does take the position that where the acts of a public officer have been challenged as illegal, ultra vires or misconduct in office, he must be called upon as a person to answer those charges since the law ideally envisages that the



office that he holds would only sanction legal acts. Besides this argument, I am also persuaded that that approach would obviate the dilemma and embarrassment and possibly ridiculous expenditure of taxpayers' funds that would result if incumbents were compelled to defend clear misconduct of their predecessors in office even where it is clearly illegal and they utterly disapprove of it. I therefore hold that joinder of the 3rd defendant in his personal capacity was therefore proper.

Whether the lease over land parcel No. Nakuru Municipality Block 5/149 by the 3rd defendant and the subsequent transfers thereof are null and void and liable to cancellation by this court.

40. The plaintiff alleged that land parcel No. Nakuru Municipality Block 5/149 was set aside for the establishment of residential houses for civil servants. The plaintiff also alleged that land parcel No. Nakuru Municipality Block 5/149 was illegally alienated to the 2nd defendant by the 3rd defendant who issued a letter of allotment despite knowing that the suit property was set aside for government housing. Further, the plaintiff alleged that the suit property has a government house No. MG 27 which has always been occupied by government employees. Within the context of the instant case therefore, the main question that arises is whether Nakuru Municipality Block 5/149 was already alienated, reserved and in use and occupation by government employees by the time the 3rd defendant purported to issue a lease to a private person, and whether that amounted to prior alienation.
41. In support of its case, the plaintiff produced a house allocation letter dated 7/10/2013 issued to James Mwachidudu Chimera who testified as PW1. The letter indicates that PW1 was allocated house No. NKU/HOU/MG/27 effective from 1/11/2013 for rent of Kshs. 5,000/= . PW1 also produced his pay slip given by the Kenya Railways Corporation to show that Kshs. 5,000/= is deducted from his monthly salary. The plaintiff produced a drawing register of NKU/HOU/MG/27 which indicated that the said house has a main house, verandah, latrine and a servant's quarter. The circulars dated 24/01/2007 and 2/03/2007 were also produced. The circular dated 24/01/2007 indicated that the government was ready to offer for sale identified non-strategic houses at the districts in two stages to civil servants. The circular dated 2/03/2007 provided more information on the additional houses for sale and houses to be transferred from sale schedule to the validation schedule among other things. A perusal of the said circular indicates that house No. MG 27 was not included in the said list. The plaintiff produced a newspaper advertisement dated 30/07/2008 which indicated that the intended sale of government houses contained in the circulars dated 24/01/2007, 2/03/2007 had been cancelled. The plaintiff further produced a circular dated 1/03/1958 which was on the process of acquiring and carrying out boards of survey of government buildings and the circular dated 30/06/2003 which was on the board of survey in respect of government buildings. Government Financial Regulations and Procedures were also produced which provided for gifts and transfer of government property. The Registry Index Map and the Survey Plan were also produced.
42. The 1st and 2nd defendants did not defend this suit in any way or controvert the allegations of the plaintiff. The 3rd defendant argued that he signed the certificate of lease in execution of his official duties upon the recommendation of other officers who were not sued in this matter.
43. Section 3 of the Government *Land Act* provides for allocation of unalienated Government land as follows:
 3. The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—
 - (a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;



- (b) with the consent of the purchaser, lessee or licensee, vary or remit, either wholly or partially, all or any of the covenants, agreements or conditions contained in any agreement, lease or licence, as he may think fit, or, with the like consent, vary any rent reserved thereby;
- (c) extend, except as otherwise provided, the time to the purchaser, lessee or licensee for performing the conditions contained in any agreement, lease or licence liable to revocation for such period, and upon such terms and conditions, as he may think fit, and the period so extended, and the terms and conditions so imposed, shall be deemed to be inserted in the agreement, lease or licence and shall be binding on the purchaser, lessee or licensee, and on all transferees, mortgagees, assignees and other persons claiming through him;
- (d) accept the surrender of any lease or licence under this Act;
- (e) accept the surrender of any certificate granted under the East Africa Land Regulations, 1897, or of any lease granted under the Crown Lands Ordinance, 1902, and grant to the lessee a lease under this Act of the area the subject of the surrendered certificate or lease, provided such surrender is made within such period as the President may by notice in the Gazette direct, such period to be not less than twelve months from the commencement of this Act:
Provided that this paragraph shall not apply to land granted under the East Africa Land Regulations, 1897, or leased under the Crown Lands Ordinance, 1902, upon terms which differ from the ordinary terms in force at the time at which such land was granted or leased; and
- (f) accept the surrender of any freehold conveyance under the Crown Lands Ordinance, 1902, or freehold grant under this Act.

44. Section 2 of the Government [Land Act](#) defines “unalienated Government land” as:

“... 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.”

45. Section 7 of the Government [Land Act](#) provides as follows:

“

“7. The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act:

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3, 12, 20 and 128.”

46. It is my view that the plaintiff has sufficiently demonstrated by way of oral and documentary evidence that the suit property was set aside for government housing and that there is currently a government employee who is in occupation. The houses are administered on behalf of the government by a government ministry for the benefit of civil servants who from time to time may need accommodation within Nakuru County. The house was built in the 1950s and has been used for the said purpose since then. This evidence stood uncontroverted and there is no evidence that any of the defendants has ever had possession of the suit property even after allocation. There is no evidence that any of the defendants built that house. No bills of quantities or structural or architectural drawings were produced in the



names of the defendants. They have no narrative as to how the house came to be on the land. The defendants were clearly without any shame attempting to illegally convert a house built with taxpayers' funds by the government into their own private property in broad daylight.

47. I consider the function of housing of civil servants to fall within the domain of public use. This court's finding on this issue is therefore that the suit property was already alienated for public use by the time the 3rd defendant purported to allocate it to the 1st defendant. It has been public land ever since it was designated for accommodation of civil servants, and could not be disposed of by the 3rd defendant without following the boarding process outlined by the plaintiff. The land was therefore public and was not available for alienation to any person and the purported letter of allotment issued to the 1st defendant was null and void ab initio. The Court of Appeal in the case of *Henry Muthee Kathurima v Commissioner of Lands & another* [2015] eKLR held as follows:

“The Commissioner of Lands had no power to alienate public land and any action taken without due authorization is a nullity. We cite the case of *Said Bin Seif v. Shariff Mohammed Shatry*, (1940)19 (1) KLR 9, and reiterate that an action taken by the Commissioner of Lands without legal authority is a nullity; such an action, however, technically correct, is a mere nullity, and not only voidable but void with no effect, either as legitimate expectation, estoppel or otherwise.”

48. Notwithstanding the fact that then Commissioner of Lands, the 3rd defendant admitted that he signed the certificate of lease in execution of his official duties upon the recommendation of other officers who were not sued in this matter the allocation lacked merit if the proper boarding mechanisms that would have released the premises from the list of government houses had not been followed. What stands out in this case is that there is no proper defence raised by any of the defendants to the claim by the plaintiff that the parcel of land was not subjected to a boarding process. Evidence of the plaintiff made it clear that at some point the government wanted to dispose of government houses with priority being given to civil servants, and to regularize illegal allocations made earlier. This intent arose in 2007 but it did not last for long; it fizzled out soon thereafter in 2009 when the idea was cancelled. It was the plaintiff's evidence that by the time the idea was cancelled the 2nd defendant had not committed himself to regularization of his acquisition of the suit premises. He cannot therefore claim any proprietary interest in the suit premises either under the government's revoked disposal plan or the regularization plan. Evidence therefore shows that from as early as year 2007 the Government regarded allocations of land done without a prior boarding process to be irregular. The onus was on the 1st and 2nd defendants to prove that the suit properties were lawfully alienated in their names but they did not participate in the present proceedings and no evidence of compliance with such processes was adduced and the plaintiff's argument that the 3rd defendant fraudulently alienated the suit property to the 2nd defendant remains correct.

49. The conclusion arising from an analysis of the foregoing uncontroverted evidence is that there were two possible scenarios: (a) either that the 3rd defendant never ascertained whether there was a government house on the plot, or, (b) that he ascertained that there was one but nevertheless went ahead to authorize the allotment to the 1st defendant. The Court of Appeal in the case of *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR held as follows:

“In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated 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 as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

In this case, fraud cannot be imputed on the part of the respondent by the mere fact that the record in relation to the subject property was missing at the Lands Registry. To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.”

50. There is very little probability that the 1st scenario is the case because the 3rd defendant was obliged under the provisions of Section 3 of the Government Lands Act to ascertain that the land being allocated was unalienated. This analysis brings the court to the sole finding that the act of allotting the land was consciously done with the knowledge that the same had been reserved for public use and that a house existed on the land which accommodated civil servants even at the time of the purported allocation. The land was therefore not vacant and this was as clear as day for everyone, not just experienced lands officials, to see! With that finding the final conclusion of this court is that is clear evidence of fraud and an illegal scheme to alienate the suit premises by the 1st and the 3rd defendants in which the 2nd defendant allowed himself to be entangled by way of purported transfer to him of the suit property even when the 1st defendant had no proprietary interest therein. The lack of proprietary interest on the part of the 1st defendant is clearly evident in that no letter of allotment in his name was produced and that the purported transfer by him to the 2nd defendant was done while no lease had been issued in his name.
51. The upshot is that the plaintiff's claim herein succeeds as against the 1st and 2nd defendants. I therefore enter judgment in the plaintiff's favour against the 1st and 2nd defendants jointly and severally and I hereby make the following orders:
- a. A declaration is hereby issued declaring that the allocation and issuance of lease over land parcel number Nakuru Municipality Block 5/149 by the 3rd Defendant and the subsequent transfer from the 1st defendant to the 2nd Defendant is null and void ab initio and incapable of conferring any estate, interest or right in either the 1st or the 2nd defendant;
 - b. The registration of lease over Land Parcel Number Nakuru Municipality Block 5/149 in favour of the 2nd defendant and all entries subsequent thereto are hereby cancelled;
 - c. A permanent injunction is hereby issued to restrain the 2nd 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 manner dealing with land parcel number Nakuru Municipality Block 5/149;
 - d. The Land Registrar Nakuru shall expunge all the illegal entries on the register regarding the land known as Land Parcel Number Nakuru Municipality Block 5/149 and it shall be registered in the name of the Permanent secretary to the Treasury to hold in trust on behalf or the government through the Ministry for the time being for Housing;
 - e. The costs of the suit shall be borne by the 1st and 2nd defendant only.
52. Finally, it is regrettable that this judgment was not read in the year 2023 as earlier scheduled because it was thought proper, and parties were expressly so informed in a ruling dated 18/5/2023 (which



appears in all the related files) that this matter and other matters in which some of the parties herein were involved (these are Nakuru ELC 265 of 2018 and Nakuru ELC 267 of 2018) which were partly heard and which raise similar issues, should all be determined contemporaneously. It suffices to state here that at a sitting in Nakuru on 11TH March 2024 and 12th March 2024 when these matters came up for hearing, they were adjourned for two principal reasons recorded in those files. The choice remaining after that adjournment was between further delaying the delivery of this judgment pending the conclusion of the hearings in the other related matters or to deliver it independent of the other matters and this court elected the latter option and the delay involved is highly regretted and the patience of all involved appreciated.

Dated, signed and delivered at Malindi via electronic mail on this 30th day of April 2024.



MWANGI NJOROGE

JUDGE, ELC, NAKURU

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