



**Ethics & Anti Corruption Commission v Mwanyihaji & another (Environment & Land Case 146 of 2018) [2024] KEELC 6884 (KLR) (23 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6884 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 146 OF 2018  
SM KIBUNJA, J  
OCTOBER 23, 2024**

**BETWEEN**

**ETHICS & ANTI CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**MEHASANI HATIBU MWANYIHAJI ..... 1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff commenced this suit vide the plaint dated 14<sup>th</sup> June 2018, against the two defendants, seeking for:
  - a. A declaration that the issuance of a letter of allotment 20<sup>th</sup> March 2009 in favour of the 1<sup>st</sup> defendant over land reference number: MN/1/12425, was fraudulent, unlawful, corruptly irregular and null and void ab initio and ineffectual to confer any right, interest or title upon the 1<sup>st</sup> defendant.
  - b. A declaration that the registration of the lease and issuance of a certificate of lease over land reference number MN/1/12425 in favour of the 1<sup>st</sup> defendant was fraudulent, unlawful, corruptly irregular and null and void ab initio and incapable of vesting any right, interest or title upon the said defendant or any other subsequent person.
  - c. A declaration that the parcel of land reference number MN/1/12425 be vested in the Government of Kenya.
  - d. An Order directed to the Chief Land Registrar and the Land Registrar, Mombasa Land Registry, to rectify the register by cancellation of the entries relating to land reference number: MN/1/12425.



- e. A permanent order of injunction to restrain the Defendants jointly and severally, whether by themselves or through their agents, servants or assigns from alienating, transferring, charging, leasing, sub-dividing, disposing of, wasting, entering or remaining upon, or undertaking any construction or development of any nature on land reference number: MN/1/12425, or from howsoever dealing with the said property, other than by way of a surrender to the Government of Kenya.
- f. An order directed to the 1<sup>st</sup> Defendant, either by himself, subordinates, agents or whosoever, compelling them to render an account to the Plaintiff over the mesne profits drawn from the land reference number: MN/I/12425 from the date it was illegally acquired to the date the suit property is restored to the Government of Kenya.
- g. General damages from the defendants, for wrongful interference with public land and the irregular, illegal and fraudulent manner in which they dealt with the said land compromised in the suit property and damages for breach of statutory provisions.
- h. Costs and incidental to this suit.
- i. Any other or further relief that the court may deem fit to grant in administration of substantive justice.

The plaintiff avers inter alia that in pursuit of its legal mandate it carried out investigations on the allocation of MN/1/12425, the suit property, collected the relevant documents, and established the said land was public land belonging to the Government of Kenya, that had been illegally allocated to the 1<sup>st</sup> defendant, through the letter of allotment of 20<sup>th</sup> March 2009. That on 20<sup>th</sup> March 2009, the 1<sup>st</sup> defendant was issued with a letter of allotment in respect to an un-surveyed residential plot in Mombasa Mainland measuring 0.44ha, and issued with a lease from the office of the Commissioner of Lands for a term of 99 years, from 1<sup>st</sup> January 1999, and that the allotment was fraudulent, and illegal and did not confer any interest upon the defendant or any person. The plaintiff contended that the defendants were aware that the suit property was public land and not available for alienation outside the confines of the then Government Lands Act and Registered *Land Act*. The plaintiff stated that as per the relevant survey plans and cadastral plans, the suit property was reserved for the construction of government houses. The 2<sup>nd</sup> defendant as a public officer was said to have been negligent thus leading to illegal and fraudulent alienation of the suit property. The 2<sup>nd</sup> defendant was also accused of failing to stop the unlawful and irregular alienation of the suit property to the 1<sup>st</sup> defendant, and failing to report to the plaintiff over the said alienation. The plaintiff further claimed the 2<sup>nd</sup> defendant acted over his statutory powers when he sought to alienate the suit property to the 1<sup>st</sup> defendant while being aware the same was public land. The 1<sup>st</sup> defendant was said to be enjoying the use of the suit property, which has been rendered unavailable for the use and benefit of the public. It was averred that the 1<sup>st</sup> defendant had been unduly enjoying mesne profits arising from the suit property at the detriment of the public. The plaintiff argued that the 1<sup>st</sup> defendant held the suit property as a constructive trust for the government, and as such the title ought to be cancelled and rectification done on the register. The plaintiff maintained that it has a legal and equitable interest in the suit property together with the accrued mesne profits and urged the court to issue judgement against the defendants jointly and severally as prayed in the plaint.

2. The Attorney General entered an appearance on behalf of the 2<sup>nd</sup> defendant by filing a memorandum of appearance dated 11<sup>th</sup> October 2018 and proceeded to file a statement of defence on 12<sup>th</sup> March 2021. It is the 2<sup>nd</sup> defendant's case that at all material times, the Chief Land Registrar acted within the statutory provisions and in good faith, and any irregularity was done under the purposeful misrepresentation



and criminal actions of the 1<sup>st</sup> defendant. In response to the particulars of fraud, the 2<sup>nd</sup> defendant claimed that the 1<sup>st</sup> defendant intentionally misrepresented and misled the Chief Land Registrar that the suit property was available for alienation while being aware that the same was public land belonging to Kenya Navy. The 2<sup>nd</sup> defendant argued that the registration process was conducted without the intention of defrauding the public and agreed with the plaintiff that the same should be reverted to the Government of Kenya.

3. The 1<sup>st</sup> defendant neither entered an appearance nor filed a statement of defence.
4. During the hearing the plaintiff called Amani Ali Athman, Senior Land Survey Assistant and Deed Plan Officer at Survey headquarters Ruaraka, Pius Nyange Maithya, a registered land valuer with the EACC, Gordon Odeka Ochieng, director land administration, with the Ministry of Lands, Public Works, housing and Urban Development. Regina Nganga, an investigator, who testified as PW1 to PW4 respectively. The 2<sup>nd</sup> defendant closed their case without calling any witness.
5. PW1 adopted the contents of his statement dated 27<sup>th</sup> April 2023, as his evidence in chief. He stated that the survey of the suit property was done by Kiguru and submitted on 4<sup>th</sup> February 2001, with the assigned number 48236 and survey plan number F/R No. 408/106. The survey was carried out on 11<sup>th</sup> February 2002 and authentication and deed plan number 295283 for parcel number 12426 and deed plan number 295284 for parcel 12425 dated 26<sup>th</sup> March 2009 were issued. He deposed that the records held in their offices showed that the deed plans were checked and sealed on 26<sup>th</sup> March 2009 before being released to the Commissioner of Lands. He stated that the suit property is part of public land that was alienated to aid navigation since it was not far from the Navy radar and lighthouse. He added that the suit property was curved out from a public land, which caused a blockage to the frontage of other plots. On cross-examination, he stated that the suit property blocks the frontage of other plots and the navigation radar, which is critical for the navigation of ships.
6. PW2 stated that he conducted a valuation of the suit property and presented a report to the plaintiff on 12<sup>th</sup> January 2016. The suit property is situate next to KPA Lighthouse and Kenya Navy Radar and is fenced with a perimeter wall. He claimed that there is no access from neighboring ocean plots. He also stated that between the road and the suit property, there are other plots and that the suit property was blocking them from accessing the ocean. He placed the value of the suit property at Kshs 70,000,000/=.
7. PW3 adopted the contents of his statement dated 20<sup>th</sup> November 2015 as his evidence in chief. He testified that there are two processes in land acquisition, one through advertisement and application by interested persons to the Commissioner of Lands, now the National Land Commission. Upon receipt of the application, the Commissioner of Lands would confirm the availability of the land by ensuring that it was un-alienated Government land. If it was un-alienated, the process of planning would commence and a PDP is prepared. The PDP is then forwarded to the Commissioner of Lands for approval and the applicant would be issued with a letter of allotment. The letter of allotment would contain the terms and conditions of the lease as well as the purpose or use of the land allocated, the monies to be paid and the duration within which to pay. The allottee would be required to comply with the conditions and cause the land to be surveyed, after which the Director of Survey would issue a deed plan or RIM which would be used in the registration of the land. The lease would then be prepared in compliance with the documents from the survey office, which would be executed by the Commissioner of Lands, who would then forward it to the respective land registry for registration. PW3 told the court that though the above process was followed, he could not trace the formal application by the 1<sup>st</sup> defendant. What was traced was documents showing one Zaharia was the 1<sup>st</sup> applicant, and was issued with a letter of allotment on 7<sup>th</sup> January 1999, but no payments was made as required and the offer lapsed in 2002. That through a letter dated 6<sup>th</sup> September 2002, from Kenya Ports Authority,



the Commissioner of Lands was requested to nullify the allocation of MN/1/12425 and the same be allocated to KPA, on the ground that if the said land is developed it will block its light house. The Commissioner of Lands responded vide a letter dated 25<sup>th</sup> September 2002, that the nullification of the allocation would be detrimental to the rights of the owner and suggested that KPA negotiate with the owner. PW3 stated that the 1<sup>st</sup> defendant's letter of allotment dated 20<sup>th</sup> March 2009 referred to un-surveyed residential plot 'D' which had no accompanying Part Development Plan. The 1<sup>st</sup> defendant wrote to the Commissioner of Lands through an undated letter accepting the offer and making payment on 25<sup>th</sup> March 2009. The witness also stated that there was a letter dated 13<sup>th</sup> March 2009 by Kiguru, a land surveyor, referring to MN/1/12425 and 12426, where he indicated that he had carried out the identification of the beacons on the plot and KPA land, and that the Kenya Navy facilities were sited within the Kenya Navy land and they did not encroach on the plots.

8. PW4 adopted the contents of her statement dated 23<sup>rd</sup> March 2023 as her evidence in chief. She told the court that their investigations found out that on 7<sup>th</sup> January 1999 an allotment letter had been issued to Zaharia over plot number MN/1/12425 and 12426, who was expected to accept the offer and make payments. However, the acceptance and payments was never done, leading to the lapsing of the offer. However, on 4<sup>th</sup> February 2001 Kiguru, a surveyor carried out a survey over the parcels and the documents were not submitted to the Director of Survey. He claimed that Mr. Kiguru had prepared a survey plan, which was not submitted to the director of survey for approval. That the said Kiguru was to prepare a deed plan and submit it to the Director of Survey, but he failed to do so. She testified that on 2<sup>nd</sup> December 2002 KPA wrote to the Commissioner of Lands requesting for compulsory acquisition of MN/1/12425, and on 26<sup>th</sup> June 2003 KPA wrote another letter to the Commissioner of Lands on the same issue this time with a valuation report of the suit property. Later on 5<sup>th</sup> May 2005, the Commissioner of Lands cancelled the allotment letter to Zahria. On 13<sup>th</sup> March 2009, Mr. Kiguru surveyed plots MN/1/12425 and 12426 where it was indicated that one has to use the Kenya Navy facilities to access the plots. The plaintiff then wrote to the Ministry of Lands requesting for PDP prepared over the two parcels, but they got a response from the Director of Physical Planning on 19<sup>th</sup> November 2015 indicating that there was no record of any approved plan. On 29<sup>th</sup> July 2010 there was communication from the acting PS land confirming that the allocation of the plots were fraudulent. The witness added that the 1<sup>st</sup> defendant is still in possession of the suit property as per the registration documents.
9. The defence hearing was fixed for 7<sup>th</sup> May 2024, when counsel for the plaintiff informed the court that the 1<sup>st</sup> defendant had never entered appearance. The learned counsel for the 2<sup>nd</sup> defendant informed court that their witness, the Land Registrar, was yet to get the relevant documents and requested for 21 days to acquire them. The court granted the 2<sup>nd</sup> defendant a last adjournment and slotted the defence hearing for 17<sup>th</sup> July 2024. On 17<sup>th</sup> July 2024, the counsel for the 2<sup>nd</sup> defendant informed the court that they will rely on the documents they had already filed and closed the 2<sup>nd</sup> defendant's case.
10. The court has perused the entire court file and noted that the 2<sup>nd</sup> defendant did not file a list of documents or witness statements. More so no evidence was produced before the court since no witness testified in support of the 2<sup>nd</sup> defendant's case, so the statement by the 2<sup>nd</sup> defendant's counsel on 17<sup>th</sup> July 2024 that they would rely on the documents already filed is without substantiation.
11. The court has considered the pleadings filed, oral and documentary evidence tendered by the plaintiff through PW1 to PW4, and come to the following determinations:
  - a. The record confirms that the plaintiff was issued by the court with summons to enter an appearance dated 26<sup>th</sup> June 2018 to serve the defendants. The plaintiff attempted to effect



service onto the 1<sup>st</sup> defendant as evidenced by the Affidavit of Service sworn by Patrick Chirongo dated 26<sup>th</sup> September 2018 and filed in court on 1<sup>st</sup> October 2018. He deposed that on 28<sup>th</sup> July 2018 he was unsuccessful in tracing the 1<sup>st</sup> defendant in his last known physical address in Mtwapa and Kianiemi, which led him to serve him through the registered post using his last known postal address on 10<sup>th</sup> September 2018. The plaintiff vide an application dated 14<sup>th</sup> June 2018, sought for leave of court to serve the 1<sup>st</sup> defendant vide newspaper. On 2<sup>nd</sup> October 2018, the court ordered the plaintiff to serve the 1<sup>st</sup> defendant afresh personally or through advertisement in the Standard or Daily Nation Newspaper. On 18<sup>th</sup> October 2018, the plaintiff placed a substituted service advert in the Daily Nation, which was affirmed by an affidavit of service sworn by Francis Makori dated 12<sup>th</sup> November 2018 and filed in court the same day. Despite being served with a hearing notice by the plaintiff, as per the affidavit of service dated 3<sup>rd</sup> November 2023, the 1<sup>st</sup> defendant did not participate in the hearing of the suit.

- b. That as the 2<sup>nd</sup> defendant did not tender any evidence in support of their defence, the averments in their statement of defence remains mere allegations without proof. Accordingly, the court will proceed with the analysis and determination of this suit as if it were entirely undefended. That does not exempt the plaintiff from the duty of proving their case on a balance of probabilities, as was held in the case of *Jabavu Village Limited versus Curzon (Environment & Land Case E040 of 2022) [2023] KEELC 17125 (KLR) (27 April 2023) (Judgment)*, where the court held that:

“Although the suit was undefended, the Plaintiff had a duty to formally prove her case on a balance of probabilities as is required by law.

In the case of *Kirugi and Another v Kabiya & 3 others [1987] KLR 347* the Court of Appeal held that;

“The burden was always on the Plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof”. Likewise, failure by the Defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.”

Similarly, in the case of *Gichinga Kibutha v Caroline Nduku [2018] eKLR* the Court held that;

“It is not automatic that instances where the evidence is not controverted the Claimants shall have his way in Court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.”

- c. From the available evidence, the suit property, is situated in Shanzu next to the Kenya Ports Authority Light House and Kenya Navy Radar. The title is registered in the name of Mehasani Hatibu Mwinyihaji, 1<sup>st</sup> defendant, holding a leasehold for a term of 99 years from 1<sup>st</sup> January 1999 pursuant to a letter of allotment dated 20<sup>th</sup> March 2009. It is the plaintiff’s case that the said registration of the 1<sup>st</sup> defendant as the proprietor of the suit property was irregularly obtained through a corruption scheme carried out by both the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff has urged the court to cancel the said title and restore the land to the government. Section 26 (1) of the *Land Registration Act* No. 3 of 2012 provides inter alia that a certificate



of title can be challenged on the grounds of fraud or misrepresentation or where the title was acquired illegally through a corrupt scheme. It 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.”

The Court of Appeal of Uganda held in the case of *Katende versus Haridas and Company Limited* (2008) EA 173 that,

“for a party to plead fraud in registration of land a party must first prove fraud was attributed to the transferee. It must be attributed either directly or by necessary implications that is, the transferee must be guilty of some fraudulent act or must have known such act by someone else and taken advantage of such act. Fraud can be participatory that is, the party participates in the fraudulent dealings. Fraud can also be imputed on a person, that is, when he or she was aware of the fraud and condoned it, or benefited from it or used it to deprive another person of his rights. All those people who actually participate in the fraudulent transactions and who had knowledge of it are privy and had notice of fraud.”

- c. It is the plaintiff's case that the LR No. MN/1/12425 and MN/1/12426 were surveyed by E.M.J Kiguru, a land surveyor and submitted to the Director of Survey on 4<sup>th</sup> February 2001 for approval. On 12<sup>th</sup> February 2002, the Director of Survey approved survey plan number F/R 408/106 for LR No. MN/1/12425 and MN/1/12426 (new grant). The Director of Survey noted in the said approval that the deed plans would be released to the Commissioner of Lands for further action. On 20<sup>th</sup> March 2009, the 1<sup>st</sup> defendant was allocated by the Commissioner of Lands an un-surveyed residential Plot D in Mombasa Mainland measuring 0.44ha for a term of 99 years from 1st January 1999. Five days later on 25<sup>th</sup> March 2009, the Commissioner of Lands wrote to the Director of Survey requesting a Deed Plan for LR No. MN/1/12425. On the same day, the Commissioner of Lands received an undated letter from the 1<sup>st</sup> defendant accepting the allocation of the suit property and attaching a banker's cheque of Kshs 118,070/= for processing the title deed. A day later on 26<sup>th</sup> March 2009, a Deed Plan No. 295284 F.R No. 408/106 Comps No. 48236 was prepared by Kiguru and approved by the Director of Survey. Six days later on 1<sup>st</sup> April 2009, the Commissioner of Lands wrote to the Senior Registrar of Titles forwarding a signed and stamped grant of the suit property for registration. PW3 testified that the allocation of the suit property to the 1<sup>st</sup> defendant was done without any approved Part Development Plan. The Court has considered the letter dated 19<sup>th</sup> November 2015 from the Director of Physical Planning to the plaintiff confirming that there was no record that PDPs were prepared and approved in respect to LR No. MN/1/12425 and MN/1/12426. During the examination in chief, PW3 explained to the court that a letter of allotment is accompanied by an approved PDP, which shows among other things location of the land, but the letter



of allotment issued to the 1<sup>st</sup> defendant did not have an accompanying approved PDP. The Physical Planning *Act, 1996 (No. 6 of 1996)* (repealed) that was in force at the time the letter of allotment was issued, stated in Section 3 that Part Development Plans shall be prepared by the Office of the Director of Physical Planning. The same office, wrote to the plaintiff on 19<sup>th</sup> November 2015 confirming that they do not have any record of Part Development Plans prepared and approved in respect to the suit property. It is therefore the view of this court that in the absence of an approved PDP, the Deed Plan No. 295284 dated 26<sup>th</sup> March 2009 could not be said to be valid.

- d. The general condition of the letter of allotment dated 20<sup>th</sup> March 2009 allocating an un-surveyed residential Plot D in Mombasa Mainland to the 1<sup>st</sup> defendant, was that subject to the provisions of the Government Lands Act (now repealed) and that the Title would be issued under the Registration of Titles Act (now repealed) or Registered *Land Act* (now repealed). It is therefore clear to this court that at the time of its alienation, and even before its surveyed, the suit property was government land. The repealed Government *Land Act* empowered the Commissioner of Lands to alienate government land on behalf of the President. Section 3 of the repealed Government Lands Act provides that:

“The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, may—  
subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;”

The Act qualifies this power as follows:

“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.”

Section 7 donates the powers of the President to the Commissioner of Lands in alienation of un-alienated government land. It provides;

“The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute or 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.”

Under the special conditions of the letter of allotment, condition 5 stated that the suit property was to be used for residential purposes. However, this is far from the truth, as the evidence before this court demonstrates that as far 6<sup>th</sup> September 2002 Kenya Ports Authority had written to the Commissioner of Lands requesting allocation of the suit property for the smooth navigation of ships along the coastline. In the said letter, KPA informed the Commissioner of Lands to nullify the allocation of the suit property to an individual and reallocate the same to Kenya Ports Authority. The request to the Commissioner of Lands by Kenya Ports Authority to be allocated the suit property for navigation is a clear indication to this court that the suit property cannot be said to have been un-alienated government land. The



suit property touches the beach and is adjacent to KPA Lighthouse and Kenya Navy Radar, which is a clear indication that it was critically located to aid the safe navigation of ships along the coastline; as such was not available to alienation to the 1<sup>st</sup> defendant or any other person. The plaintiff has specifically pleaded fraud attributed to both defendants. In the case of R. G Patel versus Lalji Makanji (1957) EA 314 it was stated,

“Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

The court finds that the plaintiff has proved fraud in accordance of sections 107 to 109 of the *Evidence Act* chapter 80 of Laws of Kenya, by showing the land was not available for alienation, and the process of creating and allocating it to the 1<sup>st</sup> defendant was fraudulent.

- c. The 1<sup>st</sup> defendant did not file defence and adduce any evidence to counter that by the plaintiff. The Court of Appeal in the case of James Joram Nyaga & another versus Attorney General & another [2019] eKLR held that:-

“It follows that the onus was on the appellants to satisfy court that the Commissioner of Lands had requisite powers to grant the suit property to them. The appellants were indeed required to do more in proving that the legal and right procedure was followed in alienating the suit property to them. Bare denials of fraud on their part in acquiring the suit property or assertions that they acquired the suit property legally above board would not suffice.

As it is, other than the certificate of title and the letter of allotment, the appellants did not produce any other evidence to show that the procedure required for alienation of the suit property was followed. There was no evidence tendered of documents from the Department of Survey to show planning or surveying before a land reference number was issued in respect of the suit property. Other than the certificate of title and the allotment letter, the appellants failed to produce any other document in support of their case. It is our view that they failed to prove they were legally entitled to the suit property especially in the face of counter allegations that the suit property had never been de-gazetted as public land, was not available for alienation by the Commissioner of Lands and the respondents’ insistence that the appellants acquired the suit property illegally thus necessitating their eviction. As correctly observed by the trial court, the Commissioner of Lands had no authority to alienate the suit property to the appellants as he purported to do. That was the preserve of the President. It follows, therefore, that the Commissioner of Lands could not have made any grant under the Government Lands Act, nor could he pass any registerable title under the Registration of Titles Act.”

- c. In light of the findings above, and from a reading of Sections 3 and 7 of the Government Lands Act, this court finds that the Commissioner of Lands acted beyond the powers delegated to him when he purported to allot the suit property to the 1<sup>st</sup> defendant for residential uses, while the same was already alienated land and was needed by the Kenya Ports Authority for the safe navigation of ships within the Kenyan coastline. The government was the original owner of the suit property, hence no further title could be issued to a private person like the 1<sup>st</sup> defendant, without following the due process of the law. The issuance of the letter of allotment and the subsequent Grant No. CR 45286 to the 1<sup>st</sup> defendant was irregular and a nullity from the



start. The Court of Appeal in the case of Arthi Highway Developers Limited versus West End Butchery Limited & 6 others [2015] eKLR held,

“As regards complicity by the Commissioner of Lands, the trial court found the officials at the land Registry, who are the custodians and issuers of Titles to have allowed the existence of two different Titles on the same property with all endorsements made thereon, which on its own was participation in the forgery. It observed that the Ministry of Lands kept the master record of all land and the registered owners, under a system which guarantees a land title certificate to be full, valid and indefeasible Title. The Commissioner of Lands failed to explain in this case how two land Title certificates on the same land could exist and which one was genuine. The responsibility to ensure accuracy of the register and authenticity of Titles lay with the Government, which is by law required to pay compensation for any fraud or other errors committed during registration. It was on that basis that the Commissioner of lands was found to have been privy to the forged entries during registration and issuance of the title.”

c. After examining the evidence on record, the court has no doubt that the Commissioner of Lands and or officers in that office were part of the fraud perpetrated by the 1<sup>st</sup> defendant. The speed at which the 1<sup>st</sup> defendant acquired the title documents after he was issued with a letter of allotment supports the allegation of fraud and schemes of corruption. Fraud has everything to do with one’s state of mind and intentions as well as the outcome of those intentions. The Commissioner of Lands issued a letter of allotment to the 1<sup>st</sup> defendant on 20<sup>th</sup> March 2009, and requested a deed plan from the director of survey on 25<sup>th</sup> March 2009. The deed plan was prepared a day later on 26<sup>th</sup> March 2009 and on 1<sup>st</sup> April 2009 the grant was signed, stamped and forwarded to the Registrar of Lands for registration. It is the findings of this court that there is adequate evidence of complicity by the 2<sup>nd</sup> defendant in the 1<sup>st</sup> defendant’s fraud, in the acquisition of the suit property that was public land, that was evidently needed by the Kenya Ports Authority for navigation.

d. The 1<sup>st</sup> defendant though served chose not to defend his title to the suit property. The Court of Appeal in the case of Munyu Maina v Hiram Gathiha Maina [2013] eKLR held,

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant’s testimony.”

c. Consequently, this court finds that the plaintiff has successfully pleaded and proved to a standard above a balance of probabilities that the 1<sup>st</sup> defendant acquired title to the suit property illegally by way of a corruption scheme with the aid of the Commissioner of Lands, and or his officers. The title held by the 1<sup>st</sup> defendant cannot stand and is nullified under Section 80 of the *Land Registration Act* and the 2<sup>nd</sup> defendant ought to rectify the register and



nullify the certificate of lease as provided by Section 80 (1) of the [Land Registration Act](#) which states:

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

- c. The plaintiff has asked for mesne profits but from the valuation report adduced, the land is not in use but has an overgrown bush, which is a clear indication that it has never been put to any economic use. I am therefore not persuaded to make any award for mesne profits. However, the prayer of general damages is merited. The suit property was valued at Kshs.70,000,000 and I make an award of Kshs 5,000,000/= as against the 1<sup>st</sup> defendant, as general damages. . I am inclined not to make an award of general damages against the 2<sup>nd</sup> defendant as the fraud was perpetrated by the office of the Commissioner of Lands, and no specific particulars touching on that office was pleaded and or proved. What the office did was to register documents received from the Commissioner of Lands in the usual cause of business.. The court would however, have considered to award damages against the person who effected the allotment and transfer it that person was personally sued as a defendant.
  - d. Costs are the last issue left and as a winning party, the plaintiff is awarded the costs of the suit as against the 1<sup>st</sup> defendant in accordance with section 27 of [Civil Procedure Act](#) chapter 21 of Laws of Kenya, that provides that costs follow the events unless where otherwise ordered for good cause.
12. Flowing from the foregoing findings, the court orders as follows:
- a. A declaration is issued that the issuance of a letter of allotment dated 20<sup>th</sup> March 2009 in favour of the 1<sup>st</sup> defendant over land reference number: MN/1/12425, was fraudulent, unlawful, corruptly irregular and null and void ab initio and ineffectual to confer any right, interest or title upon the 1<sup>st</sup> defendant.
  - b. A declaration is issued that the registration of the lease and issuance of a certificate of lease over land reference number MN/1/12425 in favour of the 1st defendant was fraudulent, unlawful, corruptly irregular and null and void ab initio and incapable of vesting any right, interest or title upon the said defendant or any other subsequent person.
  - c. A declaration is issued that the parcel of land reference number MN/1/12425 be vested in the Government of Kenya.
  - d. An order is issued directed to the Chief Land Registrar and the Land Registrar, Mombasa Land Registry, to rectify the register by cancellation of all the entries in favour of 1<sup>st</sup> defendant relating to land reference number: MN/1/12425, and restore the property to the Government of Kenya.
  - e. A permanent order of injunction is issued to restrain the 1<sup>st</sup> defendant, whether by himself or through his agents, servants or assigns from alienating, transferring, charging, leasing, subdividing, disposing of, wasting, entering or remaining upon, or undertaking any construction or development of any nature thereon, land reference number: MN/1/12425, or from howsoever dealing with the said property, other than by way of a surrender to the Government of Kenya.



- f. The plaintiff is awarded general damages of Kshs 5,000,000/= as against the 1<sup>st</sup> defendant for wrongful interference with public land and the irregular, illegal and fraudulent manner in which they dealt with the said land compromised in the suit property.
- g. Costs awarded to the plaintiff to be borne by the 1<sup>st</sup> defendant.

It is so ordered.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23<sup>RD</sup> DAY OF OCTOBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Plaintiff : Mrs Abdulrahim

Defendants : M/s Mwanazumba for 2<sup>nd</sup> Defendant.

Leakey – Court Assistant.

S. M. Kibunja, J.

Elc Mombasa.

