Giraffe View Estate Limited v Jemeau & 5 others; Ethics & Anti-Corruption Commission (Interested Party) (Environment & Land Case E129 of 2022) [2025] KEELC 1341 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 1341 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E129 OF 2022

LN MBUGUA, J

FEBRUARY 12, 2025

BETWEEN

GIRAFFE VIEW ESTATE LIMITED ..... PLAINTIFF

AND

ANTONIE GERAD JEMEAU ..... 1ST DEFENDANT

DISMUS ARORI ..... 2ND DEFENDANT

TYLOR ADFORCE EA LIMITED ..... 3RD DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT ..... 4TH DEFENDANT

NATIONAL LAND COMMISSION ..... 5TH DEFENDANT

CHIEF LAND REGISTRAR ..... 6TH DEFENDANT

AND

ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

A party who surrenders land to the State could not lawfully reclaim or transfer any interest in the land to third parties.

This case concerned the status of LR No. 2250/71, a parcel in Karen, Nairobi, originally part of private land surrendered to the Government in 1994 for public utility use. The plaintiff challenged the subsequent allocation of the land to private individuals, arguing the title was acquired unlawfully. The court held that the land, once surrendered for public use, retained its public character and was not available for reallocation. It declared the title issued to the 1st and 2nd defendants null and void, directed re-registration in favour of the Nairobi County Government, and issued injunctive orders to protect the public interest.

Reported by John Ribia

Land Law *– public land vis-à-vis private land – where the land was initially held privately and later surrendered to the State - whether land initially held privately and later surrendered to the State for public utility purposes could lawfully be reallocated to a private party - whether the party who surrendered the land to the State could lawfully reclaim or transfer any interest in the land to third parties - whether issuance of a title deed to such land was fraudulent, illegal and un-procedural - Constitution of Kenya articles 40(6), 62(1), 62(2), and 62(4).*

Brief facts

The suit related to LR No. 2250/71, a parcel of land situated along Mukoma Road in Karen, Nairobi. Originally part of LR No. 2250/8, the land was privately owned by the 3rd defendant, Taylor Adforce EA Ltd. In 1994, following a subdivision scheme, the 3rd defendant surrendered LR No. 2250/71 to the Government as a public utility plot—a condition precedent for the approval of the subdivision. The plaintiff, Giraffe View Estate Ltd, represented sub-lessees of the adjacent LR No. 2250/70 and claimed a community interest in ensuring the reserved public land was protected. Despite the surrender, a certificate of lease for LR No. 2250/71 was issued in 2021 to the 1st and 2nd defendants, who claimed the land had reverted to the 3rd defendant and had been allocated to them in settlement of outstanding debts. The plaintiff, supported by the Nairobi County Government and the Ethics and Anti-Corruption Commission, filed a suit seeking cancellation of the title, restitution of the land to the County Government, and injunctive relief.

Issues

i. Whether land initially held privately and later surrendered to the State for public utility purposes could lawfully be reallocated to a private party.
   1. Whether the party who surrendered the land to the State could lawfully reclaim or transfer any interest in the land to third parties.
   2. Whether issuance of a title deed to such land was fraudulent, illegal and un-procedural.

Held

1. The definition of public land under article 62(1) of the Constitution included un-alienated government land and land which no individual or community ownership could be established by any legal process. Article 62(2) stipulated that public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission. Article 62 (4) provided that public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal.
2. The suit land was public land, the same having been surrendered by the 3rd defendant during the subdivision of its mother parcel 2250/8. The suit land did not fall under the category of un-alienated government land, the same having been alienated and so registered to the government on December 16, 1993.
3. The suit land was not available for alienation to private use as the same had been reserved for public utility. The land could not revert back to the 3rd defendant.
4. The letter from the ministry of land that stated that a title deed had not been issued for plot no. 2250/17 and that the plot was unclaimed did not indicate under which law the 3rd defendant was given a go ahead to commence the titling process. There was no iota of evidence tendered by the 1st and the 2nd defendants to demonstrate how the process culminating in the issuance of title to them was conducted.
5. The 1st defendant had the exact date when the director of the 3rd defendant, Frank Howet died. It was on May 15, 2013. There was no basis that the two defendants made an agreement dated January 1, 2021, 8 years later.
6. There was no evidence of the suit land reverting back to the 3rd defendant or to his allegedly donee of a Power of Attorney. The issuance of a title to the 1st and 2nd defendants was unlawful, illegal and un-procedural.
7. The Certificate of Title issued by the Registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land was the absolute and indefeasible owner

and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person was proved to be a party or where the certificate of title had been acquired illegally, un-procedurally or through a corrupt scheme. Article 40(6) of the Constitution stipulated that the rights under article 40 did not extend to any property that had been found to have been unlawfully acquired.

8. Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed. The title issued to the 1st and the 2nd defendants should be nullified.
9. The entities which were the custodian of land records and were obligated to protect public property (the Attorney General and the National Land Commission) maintained a studious silence, fence sitting during the trial, failing to avail their records relating to the suit property, with the Attorney General and only making a robust presence at the platform of submissions.

Judgment entered for the plaintiff against the defendants.

Orders

i. *Declaration issued that the grant, transfer and or disposition public land known as of LR No. 2250/71 measuring about 0.02900 hectares in Nairobi city County issued to the 1st defendant was illegal, unlawful, unprocedural, fraudulent and corrupt hence a nullity and void ab initio.*
ii. *Order issued that cancelling the title to parcel LR No. 2250/71 in the name of 1st and 2nd defendants.*
iii. *The 6th defendant was directed to register the title of parcel LR No. 2250/71 in the name of the 4th defendant as a public utility plot.*
iv. *An order of permanent injunction was issued restraining the 1st, 2nd and 3rd defendants whether by himself or through his servants, agents, employees, assigns or anybody claiming under them from entering or in any way dealing or interfering with the property known as LR No. 2250/71.*
v. *The 1st defendant shall pay the costs of this suit to the plaintiff, the 4th defendant and the interested party. The 5th and 6th defendants did not deserve an award of costs as they appeared to have in one way or another aided in the fraudulent unlawful schemes going by the issuance of allotment letters and titles to private entities in respect of the public utility suit land, to being missing in action during the trial.*

Citations

Cases

1. Chemey Investment Limited v Attorney General, Permanent Secretary Ministry of Health & Ethics & Anti-Corruption Commission (Civil Appeal 349 of 2012; [2018] KECA 863 (KLR)) — Followed
2. Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021; [2022] KESC 24 (KLR)) — Followed
3. Dorcas Atieno Rajoru & 145 others v Mjahid Sub-chairman Harambee Maweni Committee SHG & 2 others (Civil Case 63 of 2011; [2016] KEELC 554 (KLR)) — Explained
4. Elijah Makeri Nyangw'ra `v Stephen Mungai Njuguna & Another (Environment & Land Case 609 (B) of 2012; [2013] KEHC 5046 (KLR)) — Explained
5. Kenya Anti Corruption Commission v Frann Investments & 6 others (? 215-224 of 2009; [2021] KEELC 1784 (KLR)) — Followed
6. Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others (Environment & Land Case 708 of 2019; [2019] KEELC 4680 (KLR)) — Explained
7. Kipsirgoi Investments Ltd v Kenya Anti-Corruption Commission (Civil Appeal (Application) 288 of 2010; [2011] KECA 326 (KLR)) — Explained
8. Laban Omuhaka Otumbula v Truphosa Okutoyi (Civil Appeal 49 of 2014; [2019] KEHC 1352 (KLR)) — Mentioned
9. Meru & 3 others v Meru (Civil Appeal 9 of 2018; [2023] KECA 1600 (KLR)) — Explained

10. Munyu Maina v Hiram Gathiha Maina (Civil Appeal 239 of 2009; [2013] KECA 94 (KLR)) — Mentioned
11. Muthaiga North Residents Association v Nyari House Limited; National Land Commission & another (Interested Parties) (Environment & Land Petition 115 of 2015; [2022] KEELC 2578 (KLR)) — Explained
12. Ngimu Farm Limited v Attorney General (Environment & Land Case 373 of 2017; [2019] KEELC 1099 (KLR)) — Followed
13. Republic v Commissioner of Lands & 4 others Exparte Associated Steel Motors (Miscellaneous Civil Suit 273 of 2007; [2014] KEHC 2498 (KLR)) — Followed
14. Republic v Commissioner of Lands, Director of Survey, City Council of Nairobi, Cami Graphics Limited & Ntemi Limited Ex parte Associated Steel Limited (Miscellaneous Civil Suit 273 of 2007; [2014] KEHC 2498 (KLR)) — Followed
15. Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 othersGarbage Collector & 15 others (Civil Appeal 617 of 2003; [2004] KEHC 10 (KLR)) — Mentioned
16. Republic v National Land Commission Ex Parte Giraffe Estate Ltd; City County Government of Nairobi, & 5 others (Interested Parties) (Environment and Land Miscellaneous Application 44 of 2018; [2020] KEELC 2364 (KLR)) — Explained
17. Samuel Kamere v Lands Registrar, Kajiado (Civil Appeal 28 of 2005; [2015] KECA 644 (KLR)) — Followed

Statutes

1. Constitution of Kenya, 2010 — article 40(6); 62(1); 62(2); 62(4) — Interpreted
2. Government Lands Act (repealed) (cap 280) — section 2 — Cited

Advocates

Litano for Plaintiff
Ms. Kwanya holding brief for Mange for 1st & 2nd Defendants
Ms. Umayi for 4th Defendant
Ms. Warini for 5th Defendant
Ms. Kubai for 6th Defendant
Kemunto h/b for Mercy Biwott for Interested party

JUDGMENT

1. The plaintiff is a company formed to manage an estate known as Giraffe View Estate on behalf of its share holders who are residents and registered owners of various sub lessees in parcel LR, 2250/70 in Karen. It filed this suit through a plaint dated 4.4.2022 contending that an adjustment property LR. 2270/71 (hereinafter, the suit parcel) is public land which has fraudulently, illegally and un-proceduraly been alienated in favour of the 1st and the 2nd defendant.

2. It is pleaded that the 3rd defendant surrendered the suit property and a property known as LR No 2250/8/6 to the 4th defendant as public utility plot and public access road respectively in 1974 as a precondition to obtain approval for sub-division of the 3rd defendants demised mother title known as LR No 2250/8 situated along Mukoma Road in Karen within Nairobi.

3. The plaintiff therefore prays for Judgement as follows;

    i) A declaration that the grant, Transfer and or disposition of public land known as of LR No 2250/71 measuring about 0.02900 hectares situate along Mukoma Road in Karen within

Nairobi city County to the 1st defendant was illegal, unlawful, unprocedural, fraudulent and corrupt hence a nullity and void abinitio.

ii) An order of rectification cancelling the transfer, disposition, grant and or allocation of public land known as of LR No 2250/71 measuring about 0.02900 hectares situate along Mukoma Road in Karen within Nairobi City County to the 1st defendant together with any such entries on the Land Register in favour of the 1st defendant and registration of the said land in the name of the 4th defendant with a reservation entry that said land is a public utility for construction of a public health centre in terms of the surrender of the said property to the 4th defendant by the 3rd defendant.

iii) A mandatory order directing the 3rd defendant whether by itself, its agents or anyone claiming under it to submit and deliver up to the 4th defendant all duly executed surrender documents and all the necessary documents for surrender and registration of a property known as of LR No 2250/71 measuring about 0.02900 hectares situate along Mukoma road in Karen within Nairobi City County to the 4th and 5th defendants within 45 days of this order and in default thereof, the Deputy Registrar of this court be and is hereby authorized to execute all the necessary documents to facilitate registration of the said land to the 4th defendant in terms of order (ii) above.

iv) An order of permanent injunction restraining the 1st, 2nd and 3rd defendants whether by himself or through his servants, agents, employees, assigns or anybody claiming under him, pursuant to his instructions or whatsoever from entering, encroaching, trespassing, remaining on, using, damaging, wasting away, charging, mortgaging, leasing, transferring, disposing off and or in any manner dealing or interfering with public land known as of LR No 2250/71 measuring about 0.02900 hectares situate along Mukoma Road in Karen within Nairobi City County surrendered by the 3rd defendant to the 4th defendant.

v) An order of permanent injunction restraining the 4th, 5th, and 6th defendants whether by himself or through his servants, agents, employees, assigns or anybody claiming under him, pursuant to his instruction or whatsoever from public land known as of LR no 2250/71 measuring about 0.02900 hectares situate along Mukoma Road in Karen within Nairobi City County other than for purposes of utilization, development or construction of public health facility or utility for public purpose.

vi) Costs of this suit

vii) Any other relief that his honourable court deems fit.

4. The suit is opposed by the 1st and 2nd defendants *vide* their statement of defence dated 20.9.2022 where they aver that the suit property has never been public land. They contend that the plaintiff has no legal claim over the suit property and wants to fraudulently take over possession of the same for their personal use.

5. The 3rd defendant did not enter appearance in this matter.

6. The 4th defendant filed a statement of defence dated 29.5.2023 averring that the suit land is public land reserved for a health facility, the same having been surrendered by the 3rd defendant. It contends that the said land is not available for allocation to private individuals.

7. The 5th defendant filed a statement of defence dated 29.9.2022 denying the claim of the plaintiff, but did not tender any evidence during the trial.

8. Similarly, the 6th defendant filed a statement of defence dated 20.2.2023 but did not tender any evidence.

9. The Interested party filed a statement of claim dated 14.9.2023 contending that the suit land is reserved for public use by the 4th defendant, hence the same was not available for allocation. It is averred that the suit property was acquired through a surrender following a subdivision scheme plan of parcel 2250/8/6 belonging to the 3rd defendant. The interested party therefore prays for judgment to be entered in the following terms;

   a) A declaration that he suit parcel of land particularly described as LR. 2250/71 is public property belonging to the Government of Kenya.

   b) A declaration that the plaintiff, 1st, 2nd and 3rd defendants, their agents, servants, employees and/or assigns do not have any right or interest on parcel of land particularly described as LR. 2250/71.

   c) A permanent injunction do issue against the plaintiff, 1st, 2nd and 3rd defendants or any other person, restraining them, their agents, servants, employees and/or assigns from trespassing upon, transferring, leasing, wasting, developing and/or dealing in any manner whatsoever dealing with the suit property particularly described as LR. 2250/71, which property is public land of the Government of Kenya.

   d) An order directing the 5th defendant to issue a letter of allotment to the 4th defendant, Nairobi City County Government with condition that it be utilized for the sole use of establishing a public health facility.

   e) An order directing the 6th defendant to register the suit property known as LR 2250/71 and issue a Certificate of Lease to Nairobi City County Government and it be utilized for the intended purpose of surrender which is to develop a public health facility.

   f) Costs of the suit.

Case for the Plaintiff

10. The case for the plaintiff was advanced by one witness namely Benedict Clay (Pw1) and was supported by the 4th defendant as well as the interested party. Pw1 introduced himself as a director of the plaintiff and he adopted his witness statement dated 30.3.2022 as his evidence. He also produced the 8 documents in their list dated 4.4.2022 as plaintiff's Exhibits 1-8. His evidence is that the plaintiff is a company which was established to manage the affairs of Giraffe Estate whose residents including Pw1 are owners of subleases of parcel 2250/70, and that the plaintiff is the registered owner of the reversionary interest in the aforementioned parcel of land.

11. Pw1 gave a historical background of the dispute contending that the 3rd defendant was the registered owner of the large parcel 2250/8 measuring 21 acres (the mother title) situated in Langata in Nairobi County. That around year 1974, the 3rd defendant applied and obtained approval from the 4th defendant to subdivide the mother title into 4 parcels namely; L.R Nos 2250/69, 2250/70, 2250/71 and 2250/8/6. Parcel 2250/70 was then subdivided into 10 plots which were sold to the plaintiff. Parcel 2250/8/6 was surrendered by the 3rd defendant as public land reserved for a road. Similarly, parcel 2250/71 was also surrendered as public land reserved for construction of a public utility for the welfare of the public including the residents adjacent to the said plot. To this end, Pw1 availed various documents to support their claim including a copy of the title for parcel 2250/70 whose last entry indicates that the reversionary interest in the said parcel is registered in favour of the plaintiff.

12. That the plaintiff has fenced off the said suit parcel 2250/71 to guard it from land grabbers and trespassers, pending the actual utilization of the suit parcel by the 4th defendant.

13. Pw1 avers that in December 2017, the 3rd defendant attempted to take over the suit property by lodging a claim of historical land injustice against the 4th defendant, prompting the plaintiff to file the case; Judicial Review ELC No. 44 of 2018, of which, the court delivered a decision on 28.5.2020 to the effect that the suit land was public land.

14. That despite the fact that the suit land is public land reserved for a public purpose, the plaintiff discovered that on or about 22.3.2021, the 1st defendant purported to obtain a 99 year leasehold of the suit property with effect from 1.4.1996 through a Grant issued on 31.5.2021. That the 1st defendant then threatened to forcefully take over the suit property.

15. Pw1 further states that the 4th and 5th defendants who are custodians of public property have neglected and or absconded public obligation to protect public property and utilize the same since 1974 and have connived with the 1st, 2nd and 6th defendants to unlawfully, illegally, irregularly, unprocedurally, fraudulently and through corrupt schemes alienated the suit land in favour of private persons.

16. That in light of the foregoing, the plaintiff lodged a complaint with the Interested party through a letter dated 28.3.2022, that is why they have joined the said entity in these proceedings.

17. On cross examination by the 4th defendant, Pw1 reiterated that the suit property had been surrendered for public utility.

18. On cross examination by the Interested party, Pw1 averred that he complained to the interested party because the 1st and 2nd defendants had attempted to take over the suit property by appearing at the gate of the plaintiff's estate where they had an official search certificate indicating that they were the registered owners of the suit land. He reiterated that the suit land was surrendered as public land and he was able to identify the surrender document at page 30 of the interested party's bundle of documents.

19. On cross examination by the 1st and 2nd defendants, Pw1 stated that before the surrender, the suit land was owned by the 3rd defendant. He is aware that the land has never been utilized. He is not aware that the National Land Commission (NLC) had taken over the said land, and he is not aware of any ruling delivered by NLC. He is aware that a title was issued to the 1st and 2nd defendants.

Case for the Interested Party

20. The case for the Interested party was advanced by two witnesses (DW1 & DW2). Dw1 is Aloise Matoke who works with the County Government of Nairobi (4th defendant) as a Deputy Surveyor in the department of Built Environment and Urban Planning. He adopted his witness statement dated 14.9.2023 at page 9-11 of the interested party's trial bundle as his evidence. He produced the documents at page 75-78 of the same bundle as their D- exhibit 1.

21. His evidence is that the interested party requested the 4th defendant to avail particulars relating to various parcels including the suit land 2250/71. That as per their records, their department of City Planning and Architecture had received a letter from NLC, indicating that NLC had received an application from the 3rd defendant requesting the suit land to revert back to it (3rd defendant) as it was not utilized for its intended purpose after surrender of over 20 years ago. The NLC wanted comments from the 4th defendant.

22. Dw1 recalls that he was requested by his Chief officer to attend a public hearing at NLC in regard to the suit land, of which Dw1 gave the position of the 4th defendant that the said land was public land and could not be surrendered back to the 3rd defendant.

23. That on 12.2.2015, the 3rd defendant wrote to the 4th defendant indicating that the suit land was indeed surrendered but had remained undeveloped and was making a request for the said land to revert back to them. That by a letter dated 19.3.2015, the 4th defendant declined the request, indicating that there was no time limit for the 4th defendant to utilize the suit land.

24. That on 8.4.2015, the 3rd defendant still did another request, this time round to the Minister for Urban Planning and Housing to have the decision of the 4th defendant rescinded, reviewed or set aside, of which the 4th defendant again emphasized that the land was for public utility and the Chief officer of health was directed to take possession of the said land.

25. Dw1 emphasized that parcel 2250/71 is a county public utility land as far as their records are concerned.

26. On cross examination by the 1st and 2nd defendants, Dw1 averred that there was an approval of subdivision given to the 3rd defendant with a condition for surrender of some portion of the land. That once surrendered, the land belonged to the 4th defendant and was to be used for a health centre. However, the health centre was not constructed.

27. He reiterated that indeed the 3rd defendant did write to the 4th defendant on 8.4.2015 requesting for the suit land to revert back to them for the reason that it was not utilized for the intended purpose. He avers that there was a memo directing the Chief health officer to take possession of the suit property.

28. DW2 is one Mulki Omar an investigating officer of the Interested Party and an advocate of the High Court of Kenya. He adopted his witness statement dated 16.9.2023 as his evidence and he produced the 27 documents in their trial bundle as their exhibits. He avers that he was tasked to investigate allegations of fraudulent transactions relating to the suit parcel 2250/71. To this end, he conducted investigations through interviews, recording of statements and collection of documents.

29. That from the Director of Land administration, he gathered information that the suit land was a resultant subdivision of the mother title owned by the 3rd defendant. That on 24.3.1994, an instrument of surrender was registered between the 3rd defendant and the Commissioner of Lands for public utility purpose. However, after the surrender, the land was allocated to Dosana Holdings Limited and Janato Limited through a letter of allotment dated 18.1.1996.

30. That on 6.7.2000, the ministry of lands issued a letter indicating that the suit land was surrendered to the government hence there was no proper allocation, hence the letter of allotment was withdrawn.

31. That a search dated 21.3.2022 indicates that the suit parcel is registered in the name of the 1st and 2nd defendants as from 31.5.2021 with an IR No 234176. However, the said IR No was corresponding to a different parcel altogether that is LR No 5908/812.

32. Dw2 also found a letter dated 19.9.2011 in which the 3rd defendant was writing to the Commissioner of Lands requesting for reversion of the suit land to them. However, the 4th defendant (by then the City Council of Nairobi) had affirmed that the suit parcel was for public utility and that the same could not be surrendered back to the 3rd defendant. Another request made by the 3rd defendant to the ministry of lands to set aside the decision of the 4th defendant bore no fruits.

33. Dw2 further stated that the 4th defendant also availed survey records relating to the suit parcel to him indicating that Survey plans were received at survey of Kenya on 22.4.1993 and assigned computation

number 29371. The survey was processed and approved on 26.4.1993 for subdivision of the mother parcel 2250/8. He added that the suit parcel 2250/71 was surrendered as public land and registered as such on 24.3.1994, and the same was not available for allocation to third parties.

34. On cross examination by the plaintiff, Dw2 stated that the director of the 3rd defendant was one Frank Howett who allegedly died in the year 2013, but the agreement for sale of the suit parcel 2250/71 dated 15.1.2021 is between the 1st and 2nd defendants on one hand and Frank Howett on the other hand. He reiterated that the suit parcel was surrendered on 24.3.1994.

35. Dw2 further states that in the Judicial Review case No 44 of 2018 concerning the suit property, the 3rd defendant was the 2nd interested party, thus by year 2021 when the sale agreement for the suit land was being drawn, the 1st and 2nd defendants were aware that the suit parcel was public land.

36. On cross examination by the 1st and the 2nd defendants, Dw2 stated that they received a complaint from plaintiff's advocate stating the suit property was public land but there was a search certificate bearing the names of the 1st and 2nd defendants as the registered owners. Dw2 further stated that when land is alienated as public land and it is not utilized, it remains public land for the Government to do as it pleases.

37. Dw2 also reiterated that the IR NO in the title held by the 1st and 2nd defendants corresponds to a different parcel No 5908/813.

Case for the 1st and 2nd defendants

38. The case of the above defendants was advanced by the 1st defendant as Dw3 and 2nd defendant as Dw4. Dw3, Antonine Gerald Jemeau adopted his witness statement dated 30.11.2023 as his evidence . He also produced the 5 documents in their list dated 24.1.2024 as their exhibits 1-5. His evidence is that he worked for the 3rd defendant from year 1978 until year 2013 when its director died. That sometimes in year 2002, the 3rd defendant had financial difficulties, but the director, Frank Howet, urged him to continue working, intimating that he would dispose off some land in order to pay him. He was then given a Power of Attorney by lawyers of Mr. Frank and was told to pursue the disposal of the parcel in order to pay accruing debts.

39. He avers that since he had all the necessary documents, he followed up the matter with the ministry of lands before the death of Frank and was therefore issued with a title. He was to dispose off the land in order to pay outstanding debts to 3rd parties including the 2nd defendant.

40. On cross-examination by the plaintiff, Dw3 stated that he worked for the 3rd defendant whose director was one Frank Howet who died on 15.5.2013. He avers that the suit parcel 2250/71 was a subdivision of the larger 22 acres parcel, and that the plaintiff's land was also part of this larger parcel.

41. Dw3 admits that he was part of the agreement dated 15.7.2021 where he was claiming to be the donee of a Power of Attorney from Frank Howet, but the said Power of Attorney which was given to him before the death of Frank has no stamp of registration. He was told to sell the land, and that is what he tried to do in the agreement of year 2021.

42. Dw3 further avers that it is one Dulcie Spencer a sister of Frank Howet who got the title for him as she had been trying to get the title from the ministry before the death of Frank. She apparently died in December 2021.

43. Dw3 is aware that the mother title belonged to the 3rd defendant, and that the suit parcel was transferred to the Government in year 1994, however, as the land was idle, the 3rd defendant got it back. He was given the said land by the 3rd defendant as compensation for his duties and severance pay.

44. On cross examination by the 4th defendant, Dw3 stated that he is aware of the surrender of the suit land to the Government, but Frank requested the land to revert back to him. He is also aware that the 4th defendant responded to Frank's request indicating that the land was public land.

45. On cross examination by the Interested party, Dw3 stated that the mother title consisted of 22 acres, of which the conditions for subdivision was the surrender of a portion thereof. However, Frank found a portion which was not surrendered and was undeveloped and he applied for the same from the ministry, and he was given back the land by the time he died in year 2013. He contends that having had the title by year 2013, the 3rd defendant could not have been asking for the same in year 2015.

46. Dw4, Dismas Ondieki Arori introduced himself as someone who does mining and he adopted his witness statement dated 30.11.2023 as his evidence. He avers that before Frank died, he called him telling him that he had a piece of land he was to give the 1st defendant to dispose off for purposes of paying debts including the sum of Ksh 8.7 million owed to Dw4 by Frank. That was the basis upon which he signed the agreement dated 15.1.2021, and was also the basis of his name appearing in the title.

47. On cross examination by the plaintiff, Dw4 stated that he was contacted by the 3rd defendant, specifically by Frank and the 1st defendant to supply them with mining materials known as side pox. He supplied the same between year 2009-2011, and was owed the sum of Ksh 8.7 million. In 2011, Frank called him, telling him that he gave the 1st defendant a piece of land to sell to recover the debt.

48. That when Frank died, Dw4 inquired from the sister of Frank as to how he was to be paid, that is when she told him that they do the agreement. He avers that in the said agreement of 15.6.2021, the 1st defendant was exercising his authority as a donee of a Power of Attorney. He understands that Frank died in year 2013.

49. He went on to state that it was Frank Howet, his siter and the 1st defendant who called him in year 2018 (Dw4 corrected the year to be 2008) to talk about the land, but he knows nothing about the surrender of the land.

50. Dw4 further stated that he first saw the title in his name in year 2022, but as far as he is concerned, he was to get his money and not the title, hence the title can be cancelled.

51. On cross-examination by the interested party, Dw4 stated that the land is located at Karen, that he has no interest in the said land as it is not his land and that what he wants is his money from the 1st defendant as he is the one who took him to that company.

Submissions

52. The submissions of the plaintiff are dated 17.10.2024 where it is argued that the suit property is public land hence not available for alienation to private parties. Plaintiff has cited the decision in the case Milimani ELC No 44 of 2018 *R V NLC Exparte Giraffe View Estate ltd, County Government of Nairobi & 5 others Interested Parties*, where the suit land was declared to be public land. Adding that once land is reserved for a particular purpose, the land is rendered as alienated land. To buttress this point, reference was made to the cases of *Muthaiga North Residents Association v Nyari House Limited ; National Land Commission & another (interested party)* (Environment and Land Petition 115 of 2015) (2022) KEELC 2578 (KLR) (12.7.2022) (Judgment) and *Kipsirgoi Investment limited v Kenya Anti-corruption Commission* (2013) eKLR.

53. It was submitted that the 3rd defendant could not sustain or pass any interest in the suit land. Thus the acquisition of a title by the 1st and 2nd defendants is a nullity and unlawful in terms of the provisions

of article 40(6) of the *Constitution*, and should hence be cancelled. To this end, the plaintiff has cited a raft of authorities including; *Dina management limited v County Government of Mombsa & 5 others* (Petition8 (E010) of 2021) (2023) KESC 30 (KLR) (Constitution and Human Rights) (21April 2023) (Judgment), *Munyu Maina v Hiram Gathiha Maina* (2013) eKLR, *Samuel Kamwere vs Land Registrar, Kajiado* (2015) eklr.

54. The submissions of the Interested party are dated 29.10.2024, where they echo the arguments proffered by the plaintiffs, emphasizing that having surrendered the suit land to the government, the 3rd defendant could not have claimed it back. To buttress their arguments, the interested party too has relied on several authorities including; *Kenya Anti Corruption Commision v Frann Investment Limited & 6 Others* (2020) eKLR, *Chemey Investment Ltd v Attorney General & 2 others*(2018) KLR.

55. The submissions of the 4th defendant are dated 24.10.2024 where they too echo the arguments proffered by the plaintiff and the interested party, emphasising that once surrendered and set aside for a particular public purpose, the suit land was not available for re-allocation. The 4th defendant has similarly relied on a number of authorities including; Misc Civil suit no. 273 of 2007 *Republic v Comissioner of Lnds & 4 others , Exparte Associated Steel Limited*.

56. The submissions of the 1st and 2nd defendant defendants are dated 29.10.2024 where they contend that the suit land is private land, having been so alienated by the National Land Commission in their favour. It was further argued that during subdivision, the 3rd defendant had allocated the suit land to the 1st and 2nd defendants as payment for their dues, but its director unfortunately died. Nevertheless, he had applied for the land to revert back to him as it was never utilized for its purpose.

57. In support of their arguments, the 1st and 2nd defendants have cited several authorities including; *Republic v Commissioner of Lands & 4 others exparte Associated Steel Motors* (2014) eKLR, *Laban OmuhakaOtumbula v Truphosa Okutoyi* (2019) eKLR.

58. The submissions of the 6th defendant (the Attorney General) are dated 19.11.2024. A perusal of the same reveals that this entity is submitting on factual issues (see paragraph *10*, 17-19, *22* etc in the body of submissions), yet this entity did not proffer any evidence. It is unacceptable for the 6th defendant to purport to adduce evidence in the platform of submissions. In the circumstances, the said submissions are hereby disregarded.

Determination

59. There is no controversy that the suit property LR No 2250/71 came to be from the subdivision of the larger mother parcel 2250/8 measuring about 22 acres which was owned by the 3rd defendant. There is also no controversy that the plaintiff occupies an adjustment property LR No 2250/70 also arising from the subdivision of the mother title. It is also quite apparent that the 1st and 2nd defendants have a certificate of title for the suit property LR No 2250/71 with effect from 1.4.1996, but the date of issuance of the title is not known as the second page of the title was not availed. The two defendants however have a lease for the suit property issued on 31.5.2021.

60. The question therefore falling for determination is whether the suit land is public land or whether it is private land owned by the 1st and 2nd defendants, and what reliefs are available.

61. The definition of public land is to be found under article 62(1) of the *Constitution* and includes; "unalienated government land and land which no individual or community ownership can be established by any legal process. Article 62(2) thereof stipulates that:

> " Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission.."

62. Article 62(4) provides that;

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

63. The above cited law captures the current legal framework which came into force *vide* the 2010 Kenya Constitution. The previous legal regime governing public land was to be found under the now repealed *Government Lands Act* which stipulated thus;

> " Under section 2 of GLA, unalienated land was defined as Government land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment"

64. The evidence proffered by PW1, Dw1 & 2 was that the suit property was surrendered to the government during the subdivision of the mother title parcel 2250/8 in 1994. The instrument of surrender has been availed by the interested party (page 30 of their bundle), which shows that the 3rd defendant was surrendering the suit parcel to the government.

65. The document at page 33-40 of the same bundle captures historic details of the mother title with its resultant subdivisions. Entry no 20 shows that the mother title was transferred to the 3rd defendant on 17.5.1972. Entry no 28 dated 2.8.1993 captures approval of subdivision of the mother title resulting in parcel 2250/69 transferred to Scot on 2.8.1993 at entry no 29, entry 30 is not legible, entry 31 reads; " Surrender to the Government of the Republic of Kenya in respect of LR No 2250/71 on 16.12.1993.", while the next entry relates to parcel 2250/70.

66. The 2nd defendant stated that he doesn't know about the surrender, but again, he also doesn't appear to know how the suit land came to be. And even though his name is on the title, he avers that his interest was to be paid money owed to him by the 3rd defendant. He has no interest in the suit land.

67. As for the 1st defendant, he stated that he was well conversant with the history of the land. During cross examination, he stated thus;

> " I know that the land had been transferred to the government in 1994...."

68. Another point for consideration is the decision made in the case Judicial Review Milimani ELC No 44 of 2018 *R V NLC exparte Giraffe View Estate ltd, County Government of Nairobi & 5 others Interested Parties* where the Exparte applicants (current plaintiff) had sought orders inter-alia, to stop the National Land Commission from hearing a complaint lodged by the current 3rd defendant amongst others to the effect that the suit land was never surrendered to the Government. In a decision dated 28.5.2020, the court found that "the suit properties (read parcels 2250/71 and 2250/8/6) are public properties....."

69. The above decision has not been set aside in any manner.

70. This far, it is clear that the suit land was public land, the same having been surrendered by the 3rd defendant during the subdivision of its mother parcel 2250/8.

71. The next question is did the suit land revert back to the 3rd defendant after the surrender?. Still on cross examination, the 1st defendant had stated that;

> " Frank Howet had said that the land was lying idle for too long and this guy (me), (read the 1st defendant) was claiming compensation , so he got the land back ".

72. However, and as rightly submitted by the plaintiff, the interested party and the 4th defendant, the suit land did not fall under the category of un-alienated government land, the same having been alienated and so registered to the government on 16.12.1993. To this end, I find that the case Misc Civil suit No 273 of 2007 *Republic v Commissioner of Lands & 4 others , Exparte Associated Steel Limited* cited by the 4th defendant is applicable herein where it was held that;

> " It is thus our holding that the disputed plot having already been set aside as a public utility plot, the same was held in trust by the 1st respondent for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot"

73. Similarly in the case of *Ngimu farm limited v Attorney General* (2019) eKLR cited by the interested party, it was held that;

> " It is clear that the suit lands were surrendered to the Government of Kenya free of costs and in consideration of approval of subdivision plan. The plots surrendered are to serve public purposes in accordance with the planning requirements of the subdivided land and the eventual uses that the lands will be put in. Unlike compulsory acquisition, there is no reversionary interest that the surrenderee retains in the case of surrender pursuant to subdivision. As stated above the surrender was a condition precedent to the approvals of the subdivision scheme"

74. And in the case of *Dorcas Atieno Rajoru & 145 others v Mjahid Sub-chairman Harambee Maweni Committee SHG & 2 others* (2016) eKLR the court stated that;

> " Indeed it is a trite law that plots for public utilities and open spaces are usually surrendered to either the council, the county government or the national government that is required to hold plots meant for public utilities on behalf of the residents of the place where such plots are situated"

75. What resonates from the above analysis is that the suit land was not available for alienation to private use as the same had been reserved for public utility. Thus from whichever angle one looks at the matter, the land could not revert back to the 3rd defendant.

76. Be that as it may, the court will still interrogate the question as to whether somehow the land did revert back to the 3rd defendant. The first document of the 1st and 2nd defendants, a letter dated 2.5.2013 from the ministry of lands reads as follows:

Taylor Adforce (EA)

Director

F.H Howitt

Box 43165

Nairobi

Ref: Plot Number 2250/71

Reference is made to your letters dated 13th April 2012 and 30th June 2012 on the above subject.

Your request to be issued with a title deed for plot no 2250/71 has been considered. According to the records in the Department of Lands File no. 34928 the plot is still unclaimed and therefore you can start the titling process immediately.

Signed

Sammy Wekesa

For Permanent Secretary

CC. The Permanent Secretary

Director of Administration

Chief Land Registrar

77. The above letter does not indicate under which law the 3rd defendant was given a go ahead to commence the titling process. What more, there is no iota of evidence tendered by the 1st and the 2nd defendants to demonstrate how the process culminating in the issuance of title to them was conducted.

78. It is worthy to note that the 1st defendant has the exact date when the director of the 3rd defendant, Frank Howet died. It was on 15.5.2013. If that be the case, on what basis did the two defendants proceed to make an agreement dated 15.1.2021, 8 years later!

79. The 1st defendant contends that he was the donee of the Power of Attorney given to him by Frank as at the time he was making the agreement to sell the land to himself in year 2021. However, that alleged Power of Attorney was null and void in view of the fact that the alleged donor was deceased. In the case of *Meru & 3 others v Meru* (Civil Appeal 9 of 2018) [2023] KECA 1600 (KLR) (27 October 2023) (Judgment) Neutral citation: [2023] KECA 1600 (KLR), the Court of Appeal stated thus;

> " On whether the power of attorney survives the death of the donor, there is consensus by both courts below that the power of attorney is extinguished upon death of the donor. We agree with that finding".

80. This far, it is crystal clear that there is no evidence of the suit land reverting back to the 3rd defendant or to his allegedly donee of a Power of Attorney. It follows that the issuance of a title to the 1st and 2nd defendants was unlawful, illegal and un-procedural.

81. The law is clear that, the Certificate of Title issued by the Registrar upon registration 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 and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. This position is buttressed by the provisions of article 40(6) of the *Constitution* which stipulates that;

> " The rights under this article do not extend to any property that has been found to have been unlawfully acquired"

82. The courts have also reinforced this position through a battery of decisions as in *Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another* (2013) eKLR , *Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others* [2019] Eklr. In Chemey Investment Limited v Attorney General & 2 others [2018] Eklr, the court stated that;

> "Decisions abound where courts in this land have consistently declined to recognize and protect title to land, which has been obtained illegally or fraudulently, merely because a person is entered in the register as proprietor.

83. I conclude that the title held by the 1st and the 2nd defendants in not protected under the laws of Kenya.

84. What then is the relief available?. In seeking the cancellation of the aforementioned title, the plaintiff avers that all the transactions carried out on the suit property post the surrender are a nullity. I do agree. In the case of *Republic vs Minister For Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others* Mombasa HCMCA No 617 of 2003 [2006] 1 KLR (E&L) 563, cited in *Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others* [2019] eKLR Maraga, J (now retired Chief Justice) expressed himself as follows:

> "Courts should nullify titles by land grabbers who stare at your face and wave to you a title of the land grabbed and loudly plead the principle of the indefeasibility of title deed."

85. This far, I come to the conclusion that the title issued to the 1st and the 2nd defendants should be nullified.

86. It is however disheartening to see that the entities which are the custodian of land records and are obligated to protect public property (read the Attorney General and the National Land Commission) maintained a studious silence, fence sitting during the trial , failing to avail their records relating to the suit property, with the Attorney General and only making a robust presence at the platform of submissions!.

87. I must also point out that although the 1st and 2nd defendants had proffered a joint defence, it became clear during the trial that the person who was involved in the transactions relating to the suit property was the 1st defendant. He admitted that much. The 2nd defendant maintained a position that he had no interest in the suit property, as all he wanted was to be paid his debts. He also stated that he was shown the title by the 1st defendant in year 2022, and according to him, that title can be cancelled.

88. Against this background I find that plaintiffs claim is merited and I proceed to give the following orders;

    i) A declaration is hereby issued that the Grant, Transfer and or disposition public land known as of LR No 2250/71 measuring about 0.02900 hectares in Nairobi city County issued to the 1st Defendant was illegal, unlawful, unprocedural, fraudulent and corrupt hence a nullity and void abinitio.

    ii) An order is hereby issued cancelling the title to parcel LR No 2250/71 in the name of 1st and 2nd defendants.

    iii) The 6th defendant is hereby directed to register the title of parcel LR No 2250/71 in the name of the 4th defendant as a public utility plot.

    iv) An order of permanent injunction is hereby issued restraining the 1st, 2nd and 3rd defendants whether by himself or through his servants, agents, employees, assigns or anybody claiming

under them from entering or in any way dealing or interfering with the property known as LR No 2250/71.

v) On costs, I direct that the 1st defendant shall pay the costs of this suit to the plaintiff, the 4th defendant and the Interested party. The 5th and 6th defendants do not deserve an award of costs as they appear to have in one way or another aided in the fraudulent unlawful schemes going by the issuance of allotment letters and titles to private entities in respect of the public utility suit land, to being missing in action during the trial.

DATED, SIGNED AND DELIVERED AT NANYUKI THIS 12TH DAY OF FEBRUARY 2025 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Litano for Plaintiff

Ms. Umayi for 4th Defendant

Ms. Warini for 5th Defendant

Ms. Kubai for 6th Defendant

Ms. Kwanya holding brief for Mange for 1st & 2nd Defendants

Kemunto holding brief for Mercy Biwott for the Interested Party