



Kenya Anti-Corruption Commission v Bernsoft Limited & 2 others (Environment & Land Case 168 of 2009) [2023] KEELC 16159 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEELC 16159 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 168 OF 2009
LL NAIKUNI, J
FEBRUARY 16, 2023**

BETWEEN

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

BERNSOFT LIMITED 1ST DEFENDANT

EQUITRONICS LIMITED 2ND DEFENDANT

SAMMY SILAS KOMEN MWAITA 3RD DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment herein before this Honorable Court emanates from a suit instituted by “the Kenya Anti-Corruption Commission (now defunct) - the Plaintiff herein. It was filed through a Plaint dated 9th June, 2009 on even date against the 1st, 2nd and 3rd Defendants herein. In a nutshell, the is case entails the recovery of a public property that belongs to the Government of Kenya but which intermittently was through irregular, fraudulent, illegal and wrongful means transferred to duly registered private entities perpetrated by some public officers while there were still in office.
2. Initially, the Plaintiffs herein moved this Court vide a Chamber Summons application filed under the Certificate of Urgency seeking for temporary injunction orders restraining the 1st, 2nd and 3rd Defendants herein from alienating, encumbering, disposing off, wasting, damaging, dealing, interfering in any manner all that parcel of land known as Land Reference Numbers MN/1/2396 also known as house number HG 143 (Hereinafter referred to as “The Suit Property”) pending the hearing and final determination of this suit. Consequently, the interim orders were granted by court.
3. Although, upon being served with summons to enter appearance dated 12th June, 2009, all the Defendants herein filed a Memorandum of Appearance on 23rd June, 2009, it was only the 3rd



Defendant herein who filed a Statement of Defence was filed on 10th July, 2009. Subsequently, on 23rd February, 2021 the parties fully complied with the provisions of Order 11 of the Civil Procedure Rules 2010, on the pre - trial conference and the matter was fixed for full trial accordingly.

4. On diverse dates of 29th November, 2021, the 18th July, 2021 and 19th July, 2021 the trial commenced whereby the Plaintiff summoned five (5) witnesses identified as – PW - 1, PW - 2, PW – 3, PW - 4 and PW – 5 respectively who testified accordingly. Eventually, on 18th July, 2022 the Plaintiff closed their case.

ii. The Plaintiff's Case

5. From the filed pleadings, it is stated that the Plaintiff was a State body Corporation (now defunct) established under the provisions of the State Corporation Act, Cap. 446 and the Anti - Corruption & Economic Crimes Act No. 3 of 2003. On the other hand, the 1st and 2nd Defendants herein were limited liability private Companies incorporated under the *Companies Act* Cap 486 of Laws of Kenya, while the 3rd Defendant was at the material times of the suit the Commissioner of Lands hence a public servant/officer duly appointed under the provisions of the Public Services Commission Act and the Government Lands Act Cap, 280 (now repealed) (Hereinafter referred “The GLA”). The Plaintiff claimed that at all material times of this case, the Government of Kenya through the then East African Community (Hereinafter referred to as “The EAC”) reserved the suit property situated in Bamburi/ Nyali estate within the Municipality of Mombasa for the construction of a house for the members of staff of then Directorate of Civil Aviation (Hereinafter referred to “The DCA”) the current Kenya Civil Aviation Authority (Hereinafter referred to as “The K.C.A.A”). It did that by way of a Survey Plan Folio Reference Numbers. 131/31 dated 22nd October, 1975. During the hearing, the Plaintiff produced as part of its exhibits, a copy of the Survey Plan dated 18th August, 1976. It averred that, on or about 18th August, 1976 and upon completion of the survey exercise, the Government of Kenya through the EAC caused it to be prepared and registered a Deed Plan for the suit property. Accordingly, the said Deed Plan was duly registered with the Director of Survey. Sometimes in the year 1977, the Government of Kenya through the then EAC completed the construction of a four (4) bedroomed bungalows with a servant quarters on the suit property – number MN/1/2396 to MN/1/2415 and allocated it to the Senior Staff Members of the Department of Customs (now the current Kenya Revenue Authority (Hereinafter referred to as “The KRA”) then the DCA and the Directorate of Metrology in order to house its members of staff. At the trial, the Plaintiff produced a copy of a letter showing the distribution of the houses it was already allocated, reserved for use by members of staff and that it was in actual occupation of the said houses. The said houses were entered into the Government Building Register as “HG – 1” and later on changed to “HG - 143 to 162” respectively. The suit property and the houses formed part of the Government Land reserved for use and to be held by the then the DCA as public utility and for public purposes of housing the members of staff of the said the DCA. The Plaintiff produced Sketch Plans for the said houses to that effect.
6. The Plaintiff averred that by dint of the provisions of the *Civil Aviation Act* Chapter 394 of the Laws of Kenya, the KCAA was established to provide air navigational services in place of the then DCA pursuant to the provisions of the said Cap 394. The Minister for Transport, vide a Gazette Notice dated 13th October, 2006 vested the KCAA all movable and immovable property and assets which were by 24th October, 2002 held by the Government on behalf of the DCA which included the suit property and the house thereon. During the hearing, the Plaintiff produced a copy of the Vesting Order (meaning a transfer of property without a Conveyance) marked as Plaintiff Exhibit Number 6. For clarity sake, the Jowitt’s Dictionary of English defines “Vesting Order” as being:- “The Court of Chancery had, and the Chancery Division has the power of making orders passing the legal estate



in property without a Conveyance. Also Commissioners appointed by several modern statutes and others have power by vesting power to legal transfer estate without the necessity of a Deed of Transfer.

7. The Plaintiff claimed that sometimes in the year 2000 the 1st, 2nd and 3rd Defendants fraudulently, unlawfully, wrongfully and illegally used the Survey Plan and Deed Plan prepared by the then EAC and registered with the Director of Surveys to prepare and register a Grant in the name of the 1st Defendant. They claimed the said Grant was prepared and registered in favour of the 1st Defendant who subsequently transferred it to the 2nd Defendant without the consent, knowledge or approval of the Board of Directors of the KCAA, the Minister for Transport, Minister of Lands and Minister for Finance and/or without following the due process of bonding the house on the suit property as provided for in the provision of the Government *Land Act*, the Government Financial Regulations and Bond of Survey Procedures. The Plaintiff averred that the allocation of the houses to the 1st Defendant and the subsequent transfer to the 2nd Defendant was done unlawfully, corruptly and contrary to the provisions of the laws as per the detailed and itemized particulars set out under Paragraph 13 (a) to (d) of the Plaint. Further, the Plaintiff contended that the 3rd Defendant herein, as a public officer, deliberately abused the powers vested in him by being a holder of that office by deliberately transferring the property in fraudulent means and in excess of his statutory powers and authority. Clearly, his actions were “ultra vires” the relevant statutes and amounted to abuse of office as provided for under the well stated out particulars of Paragraph 14 (a) to (e) of the Plaint. Further, these actions of omission and commission by the 3rd Defendant were set out in particulars of misfeasance in Public office under Paragraphs 14 (a) to (e) and 16 (i) to (iii) of the Plaint. As a result, the Plaintiff urged Court to declare these acts by the 1st, 2nd and 3rd Defendants as illegal, wrongful and fraudulent and order for the cancellation of the said registration and all entries on the relevant land register and restoration of the said suit property to the Government of Kenya.

8. In summary, the Plaintiff prayed for the following specific reliefs:-

- a. A declaration that the allocation to the 1st Defendant and subsequent issuance of the Lease to the 1st Defendant of the Land comprised in MN/1/2396 and the subsequent transfer the 2nd Defendant irregular, fraudulent and illegal and consequently null and void.
- b. An order for rectification of the register by cancellation of the title and all entries made on the Land Register in favour of the 1st Defendant and the subsequent transfer to the 2nd Defendant in respect of Land Reference Number MN/1/2396.
- c. An order of preservation and a permanent injunction against the 2nd Defendant, its agents, servants or assigns restraining it from leasing, transferring, charging, taking possession or in any other manner however from dealing with MN/1/2396 otherwise than by transfer or surrender to the Kenya Civil Aviation Authority and/or the Government of Kenya.
- d. General Damages for fraud and breach of fiduciary duty as against the 3rd Defendant.
- e. Costs of and incidental to the suit.

As indicated, on 29th November, 2021 the Plaintiff summoned the five (5) witnesses who testified as follows:-

Examination in Chief of PW - 1 by M/s. Songole Advocate.

9. PW – 1 called Mr. Amani Ali Athman was sworn and testified in English language. He stated being a Senior Land Surveyor Assistant based at the Director – Survey Headquarters Ruaraka, within the



County of Nairobi. Currently, he was serving as an Authentication Officer and also an Alternate Deed Plan Officer. He was duly authorized to testify in this court.

He was a holder of Higher Diploma, Bachelor of Environment Planning and Management. Currently, he was undertaking a Masters Degree in Geo - mapping and Remote surveying. He was a professional member of the Institutional Survey of Kenya. He possessed a East Africa Land Survey Certificate.

He recorded a statement dated 9th June, 2021 and adopted it as evidence in Chief. He stated that the statement was self - explanatory. He filed a list of documents on dated 29th May, 2018 and marked as Plaintiff Exhibit numbers 1 – 3. They were:-

- a. A Survey Plan dated 13th February, 1976 Folio No. 131/31.
- b. A authentication slip – dated 18th February, 1976.
- c. A Deed Plan issued on 18th August, 1976.

On 14th November, 2002 they were certified as true copy.

That is all.

Examination in Chief of PW - 2 by M/s. Songole Advocate

10. PW – 2 called Dennis Kangethe Kimani was sworn and testified in English language. He was a Chief Legal Officer for K.C.A.A. He joined the authority in the year 2011 as a Legal Assistant. He rose through the rank to the current position. He was an Advocate of the High Court of Kenya. He was majoring in Air and Space Law. Currently, he was undertaking a Masters degree course in International Business Law.

He recorded his witness statement on 14th June, 2019. He adopted it as part of his evidence in the case. The statement was filed on 17th June, 2019. From his witness statement, he had referred to several documents which he relied on as evidence in support of the case. These were: -

- a. A letter by the Chief Engineer dated 16th December, 1974;
- b. A letter from the Ministry of Works dated 24th April, 1978;
- c. A Vesting Order appearing in Legal Notice No. 173 of 13th October, 2006 issued by the then Minister for Transport, Honorable Ali Chirau Mwakwere.

The stated that the said documents were produced and are marked Plaintiff Exhibit numbers 4, 5 and 6. PW – 2 testified that the purpose of the Vesting Order was to confer to the K.C.A.A with all movable and immovable property as well as the liabilities that were initially held by the DCA. He stated that in the instant case, the property transferred to KCAA was all that parcel of land known as Land Reference numbers MN/I/2396. On the suit land, there was a house registered entered on the Government records as No. HG.103. He averred that by no means, the KCAA had never disposed off the property. There was no Board Resolutions to that effect as would ordinarily happen in the event the alienation had taken place. He stated he saw a company trading in the names and style of Bernsoft Limited, the 1st Defendant herein.

11. Initially, the records indicated they were the allottees from 9th April, 2002 having been issued it by Mr. Sammy Silas Komen Mwaita the then Commissioner of Land – the 3rd Defendant herein. From the records it showed that they had transferred the property to another company trading in the names and style of Equitronics Limited, the 2nd Defendant herein.



In conclusion, he underscored that as this particular property already had been alienated to the DCA, the purported alienation to the 1st and 2nd Defendants was improper, illegal and irregular based on the facts that:-

- i. The process of by the allocation of the land by the Government had been very elaborate and finalised.
- ii. The documents filed by the Defendants never showed the particulars of how they acquired the suit property.
- iii. There was the Consent for boarding by DCA.
- iv. There was no prove of boarding of the property, the Surveying process in accordance with the Government regulation.
- v. The block of houses were to be occupied by staff members of the KRA and the Department of Metrology. They were in possession of these departments.
- vi. The Defendants only had the title deed but which had been recommended for revocation by the report of the Commission of Inquiry into the Illegal and Irregular allocation of Public Land (The Ndungu) Commission.

Luckily, the property was preserved through an injunction granted by Court. He stated that the title the Defendants had was Grant No. CR 36327 Lease for 99 years from 1st April, 1998.

Examination in Chief of PW - 3 by M/s. Songole Advocate

12. PW – 3 was Mr. Dedan Ochieng Okwama. He was sworn and testified in English language. He was the appointed Investigation Officer attached at the EACC under the provision of Section 23 of the Anti Corruption and Economic Crimes Act, No. 3 of 2003. His duties included conducting investigations into reports and allegations of corruption, bribery and economic crimes and making appropriate recommendations on the outcome of the investigations conducted. He was part of the team that investigated and collected the documents on the suit property – MN/I/2396. He recorded his witness statement dated 30th May, 2018 which he relied on as his evidence in this case.
13. He informed Court having received the complaint from KCAA vide a letter dated 11th May, 2009. They undertook the task as a team. In the course of the investigation, they learnt that on or about 16th December, 1974, the Government of Kenya, through the then EAC, agreed to reserve 20 plots each measuring ½ acres situated in Nyali area(also known as Bamburi) for use by government departments namely KRA, DCA and Directorate of Metrology, Mombasa for the construction of Senior Staff houses. Thereafter, a Licensed Surveyor appointed by the Government conducted and completed the survey of the said twenty plots and submitted the Survey Plan folio reference number 131/31 to the Director of Surveys for approval and registration. PW – 3 informed Court that on 13th February, 1976 the Surveys confirmed the registration of the Survey Plan number 131/31 by way of an indent dated 18th February, 1976 and informed the Surveyor who prepared the Survey Plan to prepare Deed Plans for the 20 plots. After the registration of the said Survey Plan, the Government through EAC caused to be prepared and registered Deed Plans for 20 Plots.
14. He observed that though the Government surveyed the 20 plots, but confessed that the government inadvertently failed to process titles for the said parcels. However, the Government still proceeded on with the construction of the house. This was an oversight on its part as the title ought to have been processed. Nonetheless, the government houses were constructed and were registered. The houses were assigned numbers High Grade (HG) 1 to 20.



15. He informed Court that sometimes in the year 1977, the Government completed the construction of the four bed roomed bungalows with servant quarters, on the 20 plots. As his testimony, he produced a letter dated 23rd January, 1980 showing the specific numbers for each house. He reiterated that the suit parcel was No. Bamburi Housing 43. There was a sketch map showing – Plaintiff Exhibit No. 7 as the Complainant letter and Exhibit 8 letter and 9 is the letter 23rd January, 1980 and the ketch Map.
16. He asserted that the Minister for Transport, vide a Kenya Gazette dated 13th October, 2006 (Plaintiff Exhibit No. 6) vested in the KCAA all the movable and immovable assets which were by 24th October, 2002 held by the Government on behalf of DCA and which included the suit property.

PW - 3 averred that after all these process, sometimes in the year 1998, they found out that the 1st and 2nd Defendants were fraudulently and illegally allocated the suit land. They used the Survey Plan folio 131/31 dated 22nd October, 1976 and Deed Plan No. 99257 dated 18th August, 1976 to prepare a Grant in the name of the 1st Defendant. The Grant was issued by the 3rd Defendant without the consent of the DCA or the Ministry of Lands or Ministry of Transport of the Ministry of Finance. In the course of the investigation, the team never came across to any consent obtained by DCA. Thus, as far as they were concerned, these assets were still under the custody of DCA. There were letters from the Permanent Secretary that the assets belonged to the DCA and were secure. There were two letters dated 2nd February, 1999 and 10th February, 1999 written the Permanent Secretary, Ministry of Public Works marked as Plaintiff Exhibits No. 10 and 11. He confirmed that the Grant issued the 2nd Defendant was by the Commissioner of Lands - the 3rd Defendant. The Grant was produced and marked as Plaintiff Exhibit No. 12.

17. According to him, the investigation team established that the property – 20 Plots were reserved and set aside for public and not private use. That purpose never changed. It was still for the DCA. They were not available for individual use. There was no boarding of the house as required in the GLA and Government Financial Regulations and Board of Survey Procedures. The investigation team wrote a letter dated 8th May, 2009 to the District Estate Surveyor inquiring whether there had been any boarding (ready for alienation to private parties) had been done. The team never received any response stating no boarding was done to the house. The Plaintiff Exhibit No. 13 and 14 were the two letters both dated 8th May, 2009.
18. In conclusion, PW – 3 opined that the team found out that the property was not available to any individual. Therefore any action to the contrary was illegal. Indeed, he stressed the point that the property was mentioned in the report of the Commission of Inquiry on Illegal and Irregular acquisition of Public land (The Ndung'u Commission). The report made a recommendation to have the title deed registered in the names of the Defendants be canceled and/or revoked. He sought for the Honorable Court to grant the prayers as particularized in the Plaint.

Examination in Chief of PW – 4 by M/s. Songole Advocate

19. PW – 4 is called Julius Waweru Mwangi. He was sworn and testified in English language. He was a holder of the national identity Card bearing numbers 454057. His date of birth was 24th April, 1962 He was formerly the Deputy Director of Estate Management which was within the Housing and Urban Development of Ministry of Transport Infrastructure Housing Urban and Public Works.

He was in Court to adduce evidence on the illegal alleviation of public house intended for DCA. He recorded witness statement on 12th March, 2022 and relied on it entirely.
20. His testimony was that these houses were constructed under the EAC. Later on they were taken over by the Public Works after the collapse of the EAC. They maintained a register of all the houses building .



After the construction of these houses – it was under Bamburi High Grade 1 but it was changed to Mombasa HG. 143. The occupants were officers serving under the Metrological Department. They were public officers. The houses were not available for public use. To him, these houses were never sold to the 1st and 2nd Defendants nor any one else. He recalled that there was only one occasion the Government had intended on selling its houses. The project aimed at what the Government called structures which were “Non-strategic” and they were listed in a circular dated 2nd March, 2007. But all in all, the suit property in the instant case were not in that list for sale. However, for some reasons, this never took place. There were two circular dated 24th January, 2007. The 2nd circular cancelled the intention of sale of the houses termed as “Non-strategic” initiative.

He informed Court that, the other circular dated 30th July, 2008 held that the advertisement cancelling the intended sale. It was published in newspapers. He produced several exhibits marked as Plaintiff Exhibits numbers 15, 16, 17 18 and 19, being the Building Register; the letter dated 24th January, 2007; the Letter dated 2nd March, 2007; the letter dated 28th July, 2008 and the print advertisement in carried out in the media dated 30th July, 2008 respectively.

He concluded by holding that the houses still belonged to the Government of Kenya though at the moment they were under a State Corporation – The K.C.A.A.

Examination in Chief of PW – 5 by M/s Songole Advocate.

21. PW – 5 is called Mr. Benson Mucele Ingonga. He was a holder of the national identity card bearing numbers 11469976. His date of birth was 10th July, 1973. He was the Senior Assistant Director of Public Prosecution in the office of Deputy Public Prosecution (DPP) in charge North Eastern Province/Region based in Garissa. Previously he worked as a Registrar of Titles in the Ministry of Lands. He was here to testify on f the matter before court.

PW – 5 testified that in November, 2010, there were various Legal Notices issued in respect of various parcels of Land. One being MN/1/2414. The notices were in respect of revocation of titles which had been irregularly allocated to individuals yet the land were public property. He informed Court being aware that a Gazette Notice was issued on 26th November, 2020 where the title of that land was revoked and the land was supposed to revert back to Government – KCAA. He believed that the position to date. The Gazette Notice was produced and marked as Plaintiff Exhibit No. 21.

V. The 1st, 2nd And 3rd Defendants’ Case.

22. As indicated earlier, it is instructive to note that despite proper service having been effected upon the 1st, 2nd and 3rd Defendants, as demonstrated from several affidavit of service, the 1st and 2nd Defendants failed to enter appearance. Legally speaking, interlocutory Judgement in default ought to have been entered against the 1st and 2nd Defendants under the provision of Order 10 Rules 4, 6 and 9 of the Civil Procedure Rules, 2010 but being a land matter the practice has been all cases have to undergo formal proof before Judgement id delivered.
23. On 10th July, 2009, the 3rd Defendant filed his Statement of Defence. Primarily, he denied the contents of Paragraphs numbers 5, 6, 7, 8, 9, 10, 11, 12, 14 Particulars (a) to (e), 15, 16 Particulars (i), (ii) to (iii), 18, 19 and 20 of the filed Plaint. He held that as the Commissioner of Lands he performed/executed his duties within his statutory powers and not “Ultra Vires” as alleged by the Plaintiff herein. Despite filing the Defence, the 3rd Defendant filed no other documents to support his case. Indeed, he also never participated in the hearing of the case though served with the hearing notices.



Vi. The Submissions

24. Notwithstanding of the hearing date having been fixed in court and in the presence of the 3rd Defendant herein, for no apparent good reason and/or justifiable cause whatsoever, the 3rd Defendant failed to attend the hearing of the case held on 18th July, 2022. He opted to neglect, refuse and/or fail to embrace his fundamental right of fair hearing as enshrined under Articles 25 (c) and 50 (1) and (2) of *the Constitution* of Kenya, 2010. Thus, the Plaintiff's case proceeded to its logical conclusion.
25. In all fairness, the parties were all directed to file their written submissions within a given stringent stipulated time frame accordingly. Thereafter, upon full compliance the Honorable Court reserved a date for delivery of Judgment accordingly on notice.

A. The Written Submissions by the Plaintiff.

26. On 5th October, 2022, the Learned Counsel for the EACC, the Plaintiff herein, M/s. Songole A. Brilliant Advocate filed a very comprehensive and detailed written submissions dated 4th October, 2022. M/s. Songole Advocates commenced by stating that it was common knowledge that the then Directorate of Civil Aviation which was now K.C.A.A and the Department of Meteorologist offer essential services, are on duty 24 hours and were classified as security organs of the Government as they handled the airspaces of the Country. Consequently, the twenty (20) houses mentioned above were classified as institutional and disciplined forces houses and were removed from the usual pool of government houses which were earmarked for sale. See Plaintiff Exhibit No. 10 and 11).

The Counsel stated that the 1st, 2nd and 3rd Defendants case was not that they bought the houses which were constructed by the Government. She underscored the fact that like any other private entity, the Government also could own property. Indeed, the Defendants gave an impression that they were allocated the suit property as unalienated Government Land.

During the hearing, the Plaintiff produced a copy of the Grant in favor of the 1st Defendant – Exhibit No. 12 – the Deed Plan for Land Reference No. MN/1/2396. It was part of the Grant which was issued to the 1st Defendant by the 3rd Defendant in the year 2002. It was the same the Deed Plan which the Plaintiff retrieved from the Director of Survey dated 18th February, 1976. The Counsel argued that the 1st Defendant and 3rd Defendant with the knowledge that it was a Government house therein fraudulently used the same Survey Plan and Deed Plan to prepare a Grant in the year 2002.

27. The Counsel further submitted that the Grant in favour of the 1st Defendant was prepared and registered by the 3rd Defendant without the consent or the approval of the Government Departments mentioned herein and the boarding the houses on the suit land for sale at the market value as provided for in the GLA, the Government Financial Regulations and Board of Survey Procedures.

The Counsel submitted that the 1st Defendant could not claim he was allocated the suit property lawfully and procedurally without even attempting to show how the same was allocated to him. To buttress her point, the Counsel cited the case of:- “African Line Transport Company Limited –Versus - The Honorable Attorney General Mombasa HCCC. No. 276 of 2003 eKLR (2007) where the government stated out the corrected procedure to be followed before one was issued with a Grant for unalienated Government land, to wit:- “Secondly, all the defence witnesses were unanimous that in the normal course of events planning comes first then surveying follows, a letter of allotment is invariably accompanied by a PDP (Part Development Plan) with a definite number. There are then taken to the Department of Survey, who undertake the surveying. Once the surveying is complete, it is then taken to the Director of Surveys for authentication and approval. It is then taken to reference number is issued in respect of the Plot”



28. The Counsel's contention was that during the course of the investigation, the Plaintiff never came across any Part Development Plan (P.D.P) Letter of Allotment or a Survey Plan specifically for Parcel of Land No. MN/I/2369. She averred that the reason there was no Part Development Plan and the Letter of Allotment for the suit property at the Ministry of Land was because the 1st Defendant could not be legally allocated the suit property by the Government taking that the said land had already been surveyed and was being used by the public institution to house its members of staff. It was not unalienated Government Land and could not be "Planned" by the Director of Physical Planning for the purpose of issuing a Letter of Allotment. Further, the Counsel stated that the land could not also be surveyed by the Director of Survey on behalf of the Defendants as it had already been surveyed.

The Counsel submitted that the Plaintiff's averments and the evidence produced before court were unchallenged and uncontroverted by the 1st, 2nd and 3rd Defendants herein. The Defendants could not claim to be innocent allottee or purchasers without notice. The Counsel summarized the issues raised by the Plaintiff in their case as follows:-

- a. The Government surveyed the suit land in the year 1976 and Deed Plan prepared.
 - b. The suit property was reserved, allocated and set aside for use for the construction of houses to be used by members of staff of the Director of Civil Aviation Metrological department and customs.
 - c. The Bungalow and Servant quarters was to be for the Government Staff.
 - d. The houses were still registered as property of the Government of Kenya and not private individuals. They had never been boarded for purposes of selling to private entities or anyone else whatsoever.
29. She urged court to invoke the doctrine of Public interest vis-à-vis private interest as devolved into at length in the case of "Nbi Misc. Civil Application No. 158 of 2005 – John Peter Mureithi & Another –Versus- The Republic eKLR (2006).

Consequently, the 1st Defendant transferred the suit land to the 2nd Defendant who had been holding it since year 2002. She argued that, as Constructive trustee one received property for his own benefit with the knowledge that it was transferred to him in breach of trust – who willfully shuts his eyes to that obvious fact. The Counsel asserted that the public who were the beneficiaries of the suit property and hence were entitled to it. She pressed that there be a relief for the restitution of the property which was being held by a Constructive trustee.

The Counsel justified that the Plaintiff had legal capacity "Locus Standi") to have instituted this suit by virtue of the provision of Section 7 (1) (h) of the Anti - Corruption and Economic Crimes Act, 2003 whereby it gave the EACC the legal mandate to investigate any loss of or damage to any public property and institute Civil proceedings to recover if such property or for compensation.

The Counsel submitted that the title deed being held by the 2nd Defendants was not absolute and indefeasible as the land had already been surveyed and a house constructed to house Government employees. She reiterated that, like any person, the Government could own land and houses for specific purpose. She stressed that the suit land was not un-alienated Government Land. Therefore, it was not available for alienation to any private entity. To support this point, the Counsel stated that under the provision of Section 3 of the GLA Cap. 280 (now Repealed), the power to alienate un-alienated Government land was vested in the President of the Republic of Kenya only except in certain cases where such power had been delegated to the Commissioner of Lands. Those instances included religious, charitable, educational or sports purposes, exchanges, sale of small remnants of land acquired



for town planning purposes, use of local authorities for Municipal or district purpose, extension of existing township leases, temporary occupation of farm lands on grazing licences, sale of farms and plots which had been offered for sale and remained unsold and so forth.

If any parcel of land was available for alienation, then the Commissioner of Lands was obliged to dispose them in the prescribed manner as required under the provision of Sections 9 and 12 of the Government *Land Act*. The law for disposal of un-alienated town plots was so elaborate so as to prevent the Commissioner of Lands or the President of the Republic from allocating town plots to their cronies and friends at the detriment of the public.

Therefore, based on the above legal position, the Counsel averred that the 3rd Defendant could not have issued the Grant to the 1st Defendant under the provision of Section 7 of the GLA since the Proviso to the said section. She held that the interpretation of Sections 3, 7, 9, 12 and 13 of the GLA vis-à-vis the powers of the Commissioners of Lands were given adequate consideration in a plethora of cases which she cited. These were the cases of:- The Town Council of Ol - Kalau – Versus- Ng'ang'a General Hardware, Nbi. Civil Appeal No. 269 of 1977, Champakalal Ramn Shal – Versus- The Attorney General & Another, Mombasa HCCC No. 145 of 1997, Insurance Company of Easy Africa –Versus- The Attorney General & Another Mombasa HCCC No. 135 of 1998 eKLR (2001). James Joram Nyaga & Another – Versus- the Hon Attorney General & Another Nairobi High Court Misc. Civil Application No. 1732 of 2004 eKLR (2007), Milan Kumarn Shah & 2 Others – Versus- City Council of Nairobi Civil Suit No. 1024 of 2005 (OS) Nbi. HCCC 3063 of 1996 Paul Nderitu Ndungu & 20 Others –Versus- Pashito Holdings, Dr. Syedna Mohammed Burhannudin Swaleh & two others – Versus - Benja Properties Limited; Nbi. HCCC No. 73 of 2000, Shiva Mombasa Limited – Versus - Kenya Revenue Authority & Another Mombasa HCCC No. 171 of 2004, eKLR and Kenya Anti Corruption Commission – Versus - James Raymond Njenga & Another Eldoret HCCC No. 61 of 2008 eKLR (2010). In all the above cited cases, the holding by Courts were that the legal mandate and powers by the then Commissioner of Lands on unalienated Government land were limited. The Courts held inter alia:-

- a. Under the provision of Section 9 of GLA suit premise was not available for alienation and the procedures laid under the provision of Sections 12 and 13 of GLA were not complied with in the process of alienating it.
- b. The title is indefeasible and sacrosanct if the process of allocation of the land was to be done in accordance with the law. The Commissioner of Lands had a duty to cater for public rights while performing his duties.
- c. The provision of Section 3 of GLA set out special powers of the President. They were delegated to the Commissioner of Lands in certain defined cases. The provision of Section 3 of GLA was to be read with the provision of Section 7 of the Act. Sections 3, 12, 20 and 128 of Act limits the power of the Commissioner of Land to executing leases or conveyances on behalf of the President and the proviso specifically limits the power to alienate un - alienated land to the President.

The Commissioner had no powers to alienate land that which had already been reserved for another purpose or already reserved.
- d. The concept of indefeasibility of title should not un-discriminately be allowed to camouflage unlawful activities towards the acquisition of such title in the process courting disorder and encouraging land grabbing.



Applying the laid - down legal principles derived from the above cited cases, the Counsel averred as follows:-

- a. The Plaintiff never found any evidence during its investigations to show that the President of the Republic of Kenya executed the Grant in favour of the 1st Defendant. Indeed, the 3rd Defendant who allocated the suit property to the 1st Defendant never showed any such evidence either.
- b. The 3rd Defendant had no authority to allocate the suit property to the 1st Defendant when he was the duly appointed Commissioner of Land in year 2002. He never adduced any evidence to show that the President of the Republic directed him to sign the Grant in favour of the 1st Defendant.
- c. The 1st Defendant had also neither showed that he applied to the President of the Republic of Kenya to be allocated and that indeed he was allocated the suit land.
- d. Besides, even if, for argument sake, had the President of Kenya allocated the suit land to the 1st Defendant and the 3rd Defendant had executed the Grant on instructions of the President, the same would still be unlawful because the suit property was land that had already been surveyed and reserved for public purpose. It was not available to anyone else apart from the Government of Kenya. The suit property was already being used for a specific purpose. It was un-alienated Government Land.
- e. The title is sacrosanct and indefeasible and could only be challenged on account of fraud, mistake or misrepresentation.
- f. The Grant which was issued to the 1st Defendant by the 3rd Defendant was in violation of the provision of the GLA Cap 280 and the same was a nullity. The interests of the Department of Customs (now Kenya Revenue Authority) and Directorate of Meteorological and the Public as a whole should take precedence over the right of the 1st, 2nd and 3rd Defendants herein who had unlawfully, illegally and wrongfully benefited from the suit premises since year 2002 which was over 22 years to date.
- g. The Commissioner of Land held the suit land in trust of the people of Kenya and in particular K.C.A. A but he elected to abuse that power and office. The land was not un-alienated land and the same could not be allocated to the 1st or 2nd Defendants or any other person at all for private use. The land was and still set aside by the Government for public use and the same was still not available for allocation to the 1st Defendant by the 3rd Defendant or any other person.

30. Additionally, the Counsel submitted that the Commissioner of Lands had to be sued in his personal capacity and not the office he held. It is the 3rd Defendant, the then Commissioner of Land, as a person, who issued the grant to the 1st Defendant hence acted ultra vires. He could not be said to have acted in his own capacity as the Commissioner of Lands. His action amounted to misconduct in public office. For the meaning of misconduct in public office, the Counsel cited an extract from the book:- “Corruption and Misuse of Public Office” by Collins Nicholas which stated as follows:-

“Misconduct in a public office is committed when the holder of that public office acts or omits to act in a way which is contrary to his duty. That duty may be one imposed upon him either at common law or by statute”.



She submitted that the 3rd Defendant acted contrary to his statutory duties. She held that the 3rd Defendant was personally liable to the loss which other Defendants were likely to suffer in the event that the Court ordered that the title deed issued to the 1st Defendant was a nullity. It was for this reason that the Plaintiff had sued the 3rd Defendant in his personal capacity and not the office he held. To buttress her point she cited the following authorities:- Rhyll Urban Amusement Limited (1959) AKER.

31. Thus, the Counsel applied the above legal principles to the instant case by asserting that the action of the 3rd Defendant were not actions of the office of the Commissioner of Lands, as he had no authority under the law to allocate the suit land to the 1st Defendant. He acted in his own personal whim and not of the said office. He was rightfully joined in the suit. She contended that the further purpose of joining the Commissioner of Lands was to avoid a situation where he would be condemned unheard – that is to accord him/her the opportunity of being heard on the question of the capacity of the alienation being challenged. It would be a breach of natural justice to attempt to resolve the issue behind his back and absence (See the case of Pashito Holdings & Another Supra). It's not the office of the Commissioner of Land which was liable but the person himself/herself who held it.
32. In the case of:- "Kenya Anti - Corruption Commission – Versus - Judith Marylyn Okungu Appl. No. 187 of 2007 eKLR (2007)" Court held:-

“It was right for the Plaintiff to have sued the Defendant in his personal capacity for wrongs committed while in office”-.

Thus, the right person to sue was the person who acted illegally and outside his statutory powers while effecting alienation of public land. He was the person who would know why he acted unlawfully or in the manner in which he acted. Such a person did not deserve to be covered by suing the incumbent/ office or even tax payers' funds to defend his action. If found liable he should also personally bear the costs of the suit.

Furthermore, the Counsel submitted that the Plaintiff had enjoined the former Commissioner of Lands in his private capacity in this suit on the basis of the Tort of Misfeasance in office otherwise referred to as abuse of office and for which the Applicant submitted should be personally held liable rather than the office of the Commissioner of Lands.

Thus, the Counsel submitted that the obvious consequences of a tort was to give rise to a course of action against the Tortfeasor, a public officer who dishonestly disregarded his plain duty or who did not honestly attempt to do it, acts at peril and if injury resulted he was liable for it. In the instant case, the Government would have been liable only if the Commissioner of Land acted within the confines of the applicable statutes. The 3rd Defendant was personally liable in the given circumstances. But if the Commissioner of Lands ignores or acts outside the scope of the statutes authorizing his action, then, the liability must squarely fall upon his shoulders – where he breaches or reflects to follow the law/applicable statutes.

33. Further, the Counsel submitted that the Doctrine of Estoppel was not applicable in this case. The Plaintiff was not estopped from denying or challenging the validity of the Grant which was "Prima Facie" fraudulent and illegally issued with respect to the suit property. There could be no estoppel against a statute. The actions of the Defendants or any other Civil Servant could not render valid something that makes invalid.



She cited the of:- “J.K. Chartract & Another – Versus - Shah Cedar Mart (1967) E.A. 93 where the Court considered the scope and application of the estoppel by stating as follows:-

“The doctrine that there can be no estoppel against a statute simply means that an estoppel cannot render valid something that the law makes invalid; so that if a statute declares a transaction to be invalid or expressly declares that something should be done then the doctrine of estoppel cannot be used to override the specific directions of the law”

The Counsel submitted that if the actions of the 3rd Defendants were a nullity, the title which was issued to the 1st Defendant and subsequently transferred to the 2nd Defendant was null and void. The provision of Article 40(6) of Constitution of Kenya and Section 23 of the Registration of the Titles Act Cap 281 (now amended) could not protect that which was a nullity ab-initio.

34. Finally, the Counsel held that the suit by the Plaintiff was not statutory barred under the provisions of Section 42 of the Limitation of Action Act Cap 22 by introducing Sub - Section 1(k) and (2) which read as:-

“This Acts does not apply to action, including claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property is sought.

Section 42(2) of the *Limitation of Actions Act* Read as follows:-

“Sub-Section (1) (k) shall apply retroactively”

She argued that it was not in dispute that the Plaintiffs sought to recover a lost public property. Hence, the provision of Section 7 of the *Limitation of Actions Act* does not apply to this case. The Plaintiff's action was pursuant to the provisions of ACECA and not the Government Lands Act per se. the Plaintiff's action was also based on the provisions of the Registration of Titles Act among other statutes.

The Counsel averred that the public interest in this case and balance of convenience tilted in favor of granting the orders prayed for in the Plaint. The suit should be allowed as prayed from the Plaint filed on 9th June, 2009

V. The Issues for Determination

35. I have keenly assessed the filed pleadings by all the parties the empirical documentary and orally evidence adduced by the summoned by the witnesses, the written submissions, the myriad cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.

For the Honorable Court to be in position to arrive at an informed, just, reasonable and equitable determination, it has condensed the subject matter into the following three (3) salient issues. These are:-

- (a) Whether the suit filed by the Plaintiff herein against the 1st, 2nd and 3rd Defendants has merit whatsoever.
- (b) Whether the parties are entitled to the relief sought
- (c) Who will bear the costs?



Vi. The Analysis and Determination.

Issue No. (a) Whether the suit filed by the Plaintiff herein against the 1st, 2nd and 3rd Defendants has merit whatsoever

Brief Facts:-

36. Before embarking on the analysis of this sub - heading its significant to first and foremost extrapolate the brief facts of the case herein. From the filed pleadings on or about 16th December, 1974 the Government of Kenya through the then EAC agreed to reserve twenty (20) plots each measuring half an acre situated in Nyali estate (also known as Bamburi) for building 20 Senior Staff Houses for use by members of Government of the following departments – the KRA, DCA and Directorate of Metrology, Mombasa for the construction of Senior Staff houses
37. Subsequently, a licensed surveyor was appointed by the Government who carried out the survey of the said twenty (20) plots for the Senior Staff. The Government of Kenya surveyor Plan folio ref No. 131/31 to the Director of Surveyors for approval and registration. The Survey Plan was registered on 13th February, 1975 and authenticated on 16th February, 1976. the Plots was allocated Nos. MN/1/2396 to MN/1/2415 by the Director of Surveyors. He confirmed the registration of the Survey Plan by way of an indent dated 18th February, 1976 and informed the licenced surveyor who prepared Deed Plan to prepare Deed Plans for 20 parcels of lands. According to the said indent, the survey for the 20 parcels was done for the purposes of new grant for the Senior Staff housing at Nyali. After the registration of the survey Plan and the indent the Government caused to be prepared and registered Deed Plan for all the twenty parcels of land to wit Land Reference No. MN/1/2396 to MNB/1/2415 the suit land being Land Reference No. MN/1/2396. However, is information the Grants for the respective parcels in favour of the Government were never processed. Instead, in year 1977 the Government completed the construction of the four bed roomed bungalows with servant quarters on the suit land and they were entered into the Government building register as HG (high Grade) 1 to 20 later on the numbering changed to HG (high Grade) 143 to 162. These houses had never been “boarded” as expected for sale of Government property. It still formed part of the assets of the Government.
38. On the establishment of the KCAA, the Minister for Transport, vide a gazette Notice dated 13th October, 2006 vested in the KCAA all the moveable and immovable property and assets which were by 24th October, 2002 held by the Government on behalf of the DCA and which included the suit property and the house thereon. These departments offer essential services and are on duty 24 hours and are classified as security organ of the Government as they handle the airspace of the country.
39. All said and done, in the year 2002, its alleged the 1st Defendant fraudulently used the Survey Plan folio No. 131/31 dated 22nd October, 1975 prepared by the Government and registered with the Director of Surveys to prepare and register a grant in its name. The Deed Plan annexed on the Grant issued to the 1st Defendant was prepared by Rodregues the same person who prepared Survey Plan. It will be noted that the said Grant does not have a number indicated on it. It was issued by the 3rd Defendant. They knew that it was the Government which had prepared the Deed Plan in the year 1976 for the suit property and constructed a Government House thereon but used the same survey plan and Deed Plan to prepare the Grant in year 2002. Thus the Grant in favour of the 1st Defendant was prepared and registered by the 3rd Defendant without the consent or the approval of the Government departments mentioned herein and without boarding the house on the suit property for sale at the market value as provided for in the Government *Land Act*. The Government Financial Regulations and the Board of Survey procedures. For these reasons, the Plaintiff filed this suit and sought for the prayers as stated out in the Plaint. That is adequate on the facts of the case.



40. Now turning to the analysis of the sub-heading enumerated herein. Having stated the brief facts of this case, this court underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising thereof. Under the provision of Article 61 of *the Constitution* of Kenya, 2010 land has been classified into three (3) categories. These are Public, Community or Private land. This case concerns public land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.

41. But before I can address this issue, I wish to deal with the applicable law considering that the suit land was registered under the GLA, Cap. 280 (now repealed). Guided by the legal provision of Section 23 (3) (c) of the *Interpretation and General Provisions Act*, Cap 2 holds that:-

“Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligations or liability acquired, accrued or incurred under a written law so repealed”. (See the case of “Tukero Ole Kina & Another -Versus – Sheikh Said (also known as TSS) & 5 others (2015) eKLR and Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & Others (2012.) eKLR where the Supreme Court held:-

“As for non – criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relates only to matters of procedure or evidence or prima facie prospective, retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature.”

42. Based on this, in Kenya today, by dint of Section 107 of “The *Land Registration Act*” of 2012”, by and large, the law applicable to this matter here when the Grant to the suit property was issued in the year 1976 will be the GLA Cap. 280 (Now Repealed) but of course, if my interpretation of the law is correct, it does not preclude applying certain aspects of the current *Land Registration Act*, No. 3 of 2012 and *Land Act*, No. 6 of 2012 would be applicable herein.

43. Having stated that, I now wish to underscore that one of the major gains that Kenyans attained from the promulgation of *the Constitution* of Kenya was the introduction of the Chapter five – Articles 60 to 72 of Constitution of Kenya on Land and Environment. As a result, it led to the repealing of various land laws. The GLA vested so powers to the President of the Republic of Kenya and to so large extend to the then Commissioner of Lands on allocation of unalienated public land. The President would delegate the said powers to the Commissioner of Lands and the said powers were more often than not abused. That is where the gist of this case is founded. The provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods as follows:

S. 7 Title to land may be acquired through:-

- i. Allocations;
- ii. Land Adjudication process;
- iii. Compulsory acquisition;
- iv. Prescription;
- v. Settlement programs;



- vi. Transmissions;
 - vii. Transfers;
 - viii. Long term leases exceeding Twenty one years created out private land; or
 - ix. Any other manner prescribed in the Act of Parliament.
44. Undisputedly, from the surrounding facts and inferences herein, the 1st and 2nd Defendants herein never acquired the suit land pursuant to any these processes as indicated under Section 7 of LA here above. Instead, they acquired the suit land belonging to the Government of Kenya and which was set aside and reserved for public use for purposes of the construction of staff quarters for the KCAA through fraudulent, irregular and wrongful means facilitated by the 3rd Defendant, the then Commissioner of Lands.
45. There is no doubt and I fully concur that title deeds are indefeasible and sacrosanct but only to the extent they are acquired through the laid down proceedings of law. In this case the relevant provisions applicable are Sections 3, 7, 9, and 12 of the GLA. Section 3 of GLA provided that the powers to alienate unalienated Government land was vested in the President of the Republic of Kenya only except in certain cases where such powers had been delegated to the Commissioner of Lands. Section 3 of GLA provides:-
- “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.....”. These instances include Grants for religious, charitable, educational or sport purposes; Town planning exchanges on recommendation of the Town Planning Authority; Sale of Small remnants of land acquired for town planning purposes and left over after satisfaction of such need; use of local authorities for municipal or district purposes; Extension of existing townships leases; temporary occupation of farm lands on grazing licenses; Sale of farms and Plots which have been offered for sale and remain unsold.
46. Section 3 of the Government *Land Act* Cap 280 (now Repealed), the power to alienate un - alienated Government land was vested in the President of the Republic of Kenya only except in certain cases where such power had been delegated to the Commissioner of Lands. However, Section 3 should be read in conjunction with Section 7. The import of this proviso is clear beyond peradventure. It is that the making of Grants or dispositions in or over unalienated Government Land was the exclusive preserve of the President and in so doing he acted personally, unless he expressed delegated the power to so do to the Commissioners of lands. Those instances included religious, charitable, educational or sports purposes, exchanges, sale of small remnants of land acquired for town planning purposes, use of local authorities for Municipal or district purpose, extension of existing township leases, temporary occupation of farm lands on grazing licences, sale of farms and plots which had been offered for sale and remained unsold and so forth.
- If any parcel of land was available for alienation, then the Commissioner of Lands was obliged to dispose them in the prescribed manner as required under the provision of Sections 9 and 12 of the Government *Land Act* would be by public auction.
47. The law for disposal of un-alienated town plots was so elaborate so as to prevent the Commissioner of Lands or the President of the Republic from allocating town plots to their cronies and friends at the detriment of the public. Therefore, based on the above legal position, and the Court fully concurs



with the Counsel for the Plaintiff that the 3rd Defendant could not have issued the Grant to the 1st Defendant under the provision of Section 7 of the GLA provides that:-

“The Commissioner 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 that “nothing contained in the section shall be deemed to authorize the Commissioner to exercise, any of the powers conferred upon the President by Sections 3, 12, 20 and 128 among other Sections”.

Indeed, the interpretation of Sections 3, 7, 9, 12 and 13 of the GLA vis-à-vis the powers of the Commissioners of Lands were given adequate consideration in a plethora of cases which the Plaintiff’s Counsel cited. These were the cases of:- The Town Council of Ol - Kalau – Versus- Ng’ang’a General Hardware, Nbi. Civil Appeal No. 269 of 1977, Champakalal Ramn Shal – Versus- The Attorney General & Another, Mombasa HCCC No. 145 of 1997, Insurance Company of Easy Africa –Versus- The Attorney General & Another Mombasa HCCC No. 135 of 1998 eKLR (2001). James Joram Nyaga & Another – Versus- the Hon Attorney General & Another Nairobi High Court Misc. Civil Application No. 1732 of 2004 eKLR (2007), Milan Kumarn Shah & 2 Others – Versus- City Council of Nairobi Civil Suit No. 1024 of 2005 (OS) Nbi. HCCC 3063 of 1996 Paul Nderitu Ndungu & 20 Others –Versus- Pashito Holdings, Dr. Syedna Mohammed Burhannudin Swaleh & two others – Versus - Benja Properties Limited; Nbi. HCCC No. 73 of 2000, Shiva Mombasa Limited – Versus - Kenya Revenue Authority & Another Mombasa HCCC No. 171 of 2004, eKLR and Kenya Anti Corruption Commission – Versus - James Raymond Njenga & Another Eldoret HCCC No. 61 of 2008 eKLR (2010). In all the above cited cases, the holding by Courts were that the legal mandate and powers by the then Commissioner of Lands on unalienated Government land were limited. The Courts held inter alia:-

Under the provision of Section 9 of GLA suit premise was not available for alienation and the procedures laid under the provision of Sections 12 and 13 of GLA were not complied with in the process of alienating it.

48. By the same token, the title is indefeasible and sacrosanct if the process of allocation of the land was to be done in accordance with the law. The Commissioner of Lands had a duty to cater for public rights while performing his duties. The provision of Section 3 of GLA set out special powers of the President. They were delegated to the Commissioner of Lands in certain defined cases. The provision of Section 3 of GLA was to be read with the provision of Section 7 of the Act. Sections 3, 12, 20 and 128 of Act limits the power of the Commissioner of Land to executing leases or conveyances on behalf of the President and the proviso specifically limits the power to alienate un - alienated land to the President. The Commissioner had no powers to alienate land that which had already been reserved for another purpose or already reserved.

The concept of indefeasibility of title should not un-discriminately be allowed to camouflage unlawful activities towards the acquisition of such title in the process courting disorder and encouraging land grabbing.

To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the “prima facie” evidence of the stated registration. The Certificate of Lease held by the land owner



is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of “The [Land Registration Act](#)” No. 3 of 2012 provides as follows:-

“The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever.....”

This fact is strengthened by the following decisions - “ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and “ELC (Chuka) No. 110 of 2017 – M’Mbaoni M’Thaara – Versus- James Mbaka. And in Civil Appeal 60 of 1992 – ‘Dr. Joseph M. K. Arap Ngok –Versus- Justice Mojjo Ole Keiwua’ where courts has held that:-

‘It is trite law that land property can only come into existence after issuance of a letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.’

49. In order for this Honorable Court to effectively deal with these matters herein, I cannot agree more with the Plaintiff onto these submissions and taking that none of the Defendants challenged or controverted this position at all from their pleadings. I wish to cite the provisions of Section 26 (1) of the [Land Registration Act](#) verbatim provides:-

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

In the case of “Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case the Grant is doubtful suspect or obtained by fraud or forgery un-procedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of [Land Registration Act](#), the Provisions of Section 80 (1) & (2) of [Land Registration Act](#) for the cancellation and rectification of the title comes to play – “Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others” ELC (Kjd) No. 204 of 2017.”

Additionally, in the Court of Appeal case of “Munyu Maina – Versus- Hiram Gathiha Maina (2013) eKLR where court held:-

“When a registered property root of title is under challenge it is not sufficient to damage the instrument of title as a 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 the 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” and Huber L. Martin & 2 others –Versus - Margaret J. Kamau & 5 Others (2016) eKLR comes to play here as in the case of the instant case.

It was common knowledge that the then Directorate of Civil Aviation which was now Kenya Civil Aviation Authority and the Department of Meteorologist offer essential services, are on duty 24 hours and were classified as security organs of the Government as they handled the airspaces of the Country. Consequently, the twenty (20) houses mentioned above were classified as institutional and disciplined forces houses and were removed from the usual pool of government houses which were earmarked for sale. See Plaintiff Exhibit No. 10 and 11).

The 1st, 2nd and 3rd Defendants case was not that they bought the houses which were constructed by the Government. She underscored the fact that like any other private entity, the Government also could own property. Indeed, the Defendants gave an impression that they were allocated the suit property as unalienated Government Land.

During the hearing, the Plaintiff produced a copy of the Grant in favor of the 1st Defendant – Exhibit No. 12 – the Deed Plan for Land Reference No. MN/1/2396. It was part of the Grant which was issued to the 1st Defendant by the 3rd Defendant in the year 2002. It was the same the Deed Plan which the Plaintiff retrieved from the Director of Survey dated 18th February, 1976. The 1st Defendant and 3rd Defendant with the knowledge that it was a Government house therein fraudulently used the same Survey Plan and Deed Plan to prepare a Grant in the year 2002.

50. The Grant in favour of the 1st Defendant was prepared and registered by the 3rd Defendant without the consent or the approval of the Government Departments mentioned herein and the boarding the houses on the suit land for sale at the market value as provided for in the Government *Land Act*, the Government Financial Regulations and Board of Survey Procedures.

The 1st Defendant could not claim he was allocated the suit property lawfully and procedurally without even attempting to show how the same was allocated to him.

51. During the course of the investigation, there was no evidence that the President executed the Grant in favour of the 1st and 2nd Defendant. The 3rd Defendant never showed that evidence. He had no such authority. This was public land and he could not purport to pass any title to the 1st and 2nd Defendants. Besides, the 1st Defendant never showed that he applied to the President of the Republic of Kenya and was allocated the suit property. The Plaintiff never came across any Part Development Plan (P.D.P) Letter of Allotment or a Survey Plan specifically for Parcel of Land No. MN/I/2369. The reason that there was no Part Development Plan and the Letter of Allotment for the suit property at the Ministry of Land was because the 1st Defendant could not be legally allocated the suit property by the Government taking that the said land had already been surveyed and was being used by the public institution to house its members of staff. It was not unalienated Government Land and could not be “Planned” by the Director of Physical Planning for the purpose of issuing a Letter of Allotment. Further, the Counsel stated that the land could not also be surveyed by the Director of Survey on behalf of the Defendants as it had already been surveyed.

The Plaintiff’s averments and the evidence produced before court were unchallenged and uncontroverted by the 1st, 2nd and 3rd Defendants herein. The Defendants could not claim to be innocent allottee or purchasers without notice. The Plaintiff summarized as follows:-

- a. The Government surveyed the suit land in the year 1976 and Deed Plan prepared.



- b. The suit property was reserved, allocated and set aside for use for the construction of houses to be used by members of staff of the Director of Civil Aviation Metrological department and customs.
 - c. The Bungalow and Servant quarters was to be for the Government Staff.
 - d. The houses were still registered as property of the Government of Kenya and not private individuals. They had never been boarded for purposes of selling to private entities or anyone else whatsoever.
52. I am persuaded by the averments by the Counsel for the Plaintiff to invoke the doctrine of Public interest vis-à-vis private interest as devolved into at length in the case of “Nbi Misc. Civil Application No. 158 of 2005 (Supra). Consequently, the 1st Defendant transferred the suit land to the 2nd Defendant who had been holding it since year 2002. The Court agrees with the Plaintiff that as Constructive trustee one received property for his own benefit with the knowledge that it was transferred to him in breach of trust – who willfully shuts his eyes to that obvious fact. The public who were the beneficiaries of the suit property and hence were entitled to it. In the given circumstances, there should be a relief for the restitution of the property which was being held by a Constructive trustee.

It is justified that the Plaintiff had legal capacity “Locus Standi”) to have instituted this suit by virtue of the provision of Section 7 (1) (h) of the Anti - Corruption and Economic Crimes Act, 2003 whereby it gave the EACC the legal mandate to investigate any loss of or damage to any public property and institute Civil proceedings to recover if such property or for compensation.

The title deed being held by the 2nd Defendants was not absolute and indefeasible as the land had already been surveyed and a house constructed to house Government employees. She reiterated that, like any person, the Government could own land and houses for specific purpose. The suit land was not un-alienated Government Land. Therefore, it was not available for alienation to any private entity. The Court holds that there was evidence adduced show that the President of the Republic of Kenya executed the Grant in favour of the 1st Defendant. Indeed, the 3rd Defendant who allocated the suit property to the 1st Defendant never showed any such evidence either. Further, the 3rd Defendant had no authority to allocate the suit property to the 1st Defendant when he was the duly appointed Commissioner of Land in year 2002. He never adduced any evidence to show that the President of the Republic directed him to sign the Grant in favour of the 1st Defendant. I am persuaded by the contention of the Counsel for the Plaintiff that assuming that the President of Kenya allocated the suit land to the 1st Defendant and the 3rd Defendant had executed the Grant on instructions of the President, the same would still be unlawful because the suit property was land that had already been surveyed and reserved for public purpose. It was not available to anyone else apart from the Government of Kenya. The suit property was already being used for a specific purpose. It was un-alienated Government Land. In this case the public interest of the Department of Customs (now KRA) and Directorate of Meteorological and the Public as a whole should take precedence over the right of the 1st, 2nd and 3rd Defendants herein who had unlawfully, illegally and wrongfully benefited from the suit premises since year 2002 which was over 22 years todate.

Issue No. (b) Whether the parties are entitled to the relief sought

Under this sub – heading, and based on the above elaborate analysis the Court finds that the 3rd Defendant, as the then Commissioner of Lands had to be sued in his personal capacity and not the office he held. It is him as a person, and not, the then Commissioner of Land, who issued the grant to the 1st Defendant. Hence, he acted ultra vires. He could not be said to have acted in his own capacity as



the Commissioner of Lands. His action amounted to misconduct in public office. The Commissioner of Land held the suit land in trust of the people of Kenya and in particular K.C.A. A but he elected to abuse that power and office. The land was not un-alienated land and the same could not be allocated to the 1st or 2nd Defendants or any other person at all for private use. The land was and still set aside by the Government for public use and the same was still not available for allocation to the 1st Defendant by the 3rd Defendant or any other person. As a result, the 1st and 2nd Defendants herein while denying the Government of Kenya “Mesne profits” over the said suit property have continued enjoying wrongful personal gains and self-enrichment onto property they acquired fraudulently and illegally with the facilitation by the 3rd Defendant. It is just prudent, just and fair that they be compelled to refund all these financial gains they have enjoyed for over twenty-two (22) years they were in possession of the suit property. It is my view that this will send loud bells to other such characters who are at large hiding under the thick blankets of corruption known as land grabbing. I am compelled to borrow the words of Onyancha J, who stated in the case of “Alberta Mae Galli – Versus- Attorney General & 4 Others (2006) where he had this to say:-

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction using forgery, deceit or any kind of fraud would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the way when such a crook would have the legal capacity or competence to pass to a third party innocent or otherwise a land interest that he does not have even if it were valuable consideration. For my part I would want to think that such a time when this court would be called upon to defend such crooks has not come and shall never come.....”

The Court was spot on in all fours to the surrounding facts and inferences in the instant case.

53. As already defined, misconduct in public office is committed when the holder of that public office acts or omits to act in a way which in contrary to his duty. That duty may be one imposed upon him either at common law or by statute. The conduct should be applicable during and even after one has left or vacated the said public office. There should be no limitation of time on liability for actions committed by a public officer in his personal capacity.
54. In the instant case, the Court holds that the 3rd Defendant acted contrary to his statutory duties. The 3rd Defendant was personally liable to the loss of the suit property belonging to the Government of Kenya which other Defendants were likely to suffer in the event that the Court ordered that the title deed issued to the 1st Defendant was a nullity. It was for this reason that the Plaintiff had sued the 3rd Defendant in his personal capacity and not the office he held. I fully concur with the Counsel for the Plaintiff while supporting her case on this point cited the cases of: “Rhyl Urban Amusement Limited (1959) AKER where Court stated:-

“If therefore, the Minister does something which is an ultra Vives act, it is not the act of the Minister at all”

55. And in the “Kenya Anti - Corruption Commission – Versus - Bhangra Limited & Another Civil Application No. 185 of 2009 eKLR (2009) Court of Appeal held that:-

“The finding by the Superior Court that the non joinder of the Commissioner of Lands renders the suits a non - starter, that is to say, incompetent, is definitely prejudicial to the pending suits”.



Thus, the action of the 3rd Defendant were not actions of the office of the Commissioner of Lands, as he had no authority under the law to allocate the suit land to the 1st Defendant. He acted in his own personal whim and not of the said office. He was rightfully joined in the suit. The further purpose of joining the Commissioner of Lands was to avoid a situation where he would have condemned unheard – that is to accord him/her the opportunity of being heard on the question of the capacity of the alienation being challenged. It would be a breach of natural justice to attempt to resolve the issue behind his back and absence (See the case of Pashito Holdings & Another Supra). It's not the office of the Commissioner of Land which was liable but the person himself/herself who held it.

56. In the case of:- "Kenya Anti - Corruption Commission – Versus - Judith Marylyn Okungu Appl. No. 187 of 2007 eKLR (2007)" Court held:-

“It was right for the Plaintiff to have sued the Defendant in his personal capacity for wrongs committed while in office”-.

Hence, the right person to sue was the person who acted illegally and outside his statutory powers while effecting alienation of public land. He was the person who would know why he acted unlawfully or in the manner in which he acted. Such a person did not deserve to be covered by suing the incumbent/ office or even tax payers' funds to defend his action. If found liable he should also personally bear the costs of the suit.

56. Furthermore, I have noted that the Plaintiff had enjoined the former Commissioner of Lands in his private capacity in this suit on the basis of the Tort of Misfeasance in office otherwise referred to as abuse of office and for which the Applicant submitted should be personally held liable rather than the office of the Commissioner of Lands.

57. The meaning of “Tort of Misfeasance in office” was stated in the case of:- “Ref – Versus - Deputy Governor of Parkhurst Prison & Others (1992) 1AC58 which stated:-

“A prison officer who acts in bad faith by deliberately subjecting a prisoner to restraint which he knows he has no authority to impose may render himself personally liable to an action for false imprisonment as well as committing the Tort of Misfeasance in Public Office”. Lacking authority of the Governor, he also lacks the protection of Section 12 (1). But if the officer deliberately acts outside the scope of his authority, he cannot render the Governor or the Home office vicariously liable for his tortuous conduct”

58. This legal position was also upheld in the House of Lords' decision in the case of:- “Three Rivers District Council and Other –Versus - Governor and Company of the Bank of England (No. 3) 2000 3 ALL ER1. On the basis of action for the Tort of Misfeasance in office “lies in the Defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to an individual or individuals”.

Therefore, the obvious consequences of a tort was to give rise to a course of action against the Tort feisor, a public officer who dishonestly disregarded his plain duty or who did not honestly attempt to do it, acts at peril and if injury resulted he was liable for it. In the instant case, the Government would have been liable only if the Commissioner of Land acted within the confines of the applicable statutes. The 3rd Defendant was personally liable in the given circumstances. But if the Commissioner of Lands ignores or acts outside the scope of the statutes authorizing his action, then, the liability must squarely fall upon his shoulders – where he breaches or reflects to follow the law/applicable statutes.



59. If the actions of the 3rd Defendants were a nullity, the title which was issued to the 1st Defendant and subsequently transferred to the 2nd Defendant was null and void. The provision of Article 40(6) of Constitution of Kenya and Section 23 of the Registration of the Titles Act Cap 281 (now amended) could not protect that which was a nullity ab-initio.

Finally, I fully agree that the suit by the Plaintiff was not statutory barred under the provisions of Section 42 of the Limitation of Action Act Cap 22 by introducing Sub - Section 1(k) and (2). It was not in dispute that the Plaintiffs sought to recover a lost public property. Hence, the provision of Section 7 of the *Limitation of Actions Act* does not apply to this case. The Plaintiff's action was pursuant to the provisions of ACECA and not the Government Lands Act per se. the Plaintiff's action was also based on the provisions of the Registration of Titles Act among other statutes. The public interest in this case and balance of convenience tilted in favor of granting the orders prayed for in the Plaintiff. The 3rd Defendant has to be penalized for his acts of omission and commission whether he has left the office or not is immaterial. I am sure this should serve as a prime lesson to all other public officers who have previously and currently occupying these public offices. For these reasons, the suit should be allowed as prayed from the Plaintiff filed on 9th June, 2009

Issue No. (c) who will bear the costs?

60. The Black Law Dictionary defines "Cost" to mean, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

The proviso under the provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow the events. It is trite law that the issue of Costs is the discretion of Courts. In the case of "Reids Hewett & Company – Versus – Joseph AIR 1918 cal. 717 & Myres – Versus – Defries (1880) 5 Ex. D. 180, the House of the Lords noted:-

“The expression “Costs shall follow the events” means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word ‘event’ should be read distributive and the costs of any particular issue should go to the party who succeeds upon it.....”

61. Additionally, the Supreme Court fortified this position in the case of “Jasbir Singh Rai & 3 others – Versus - Tarlochan Singh Rai & 4 Others [2014] eKLR thus:

“so, the basic rule of attribution of costs is: costs follow the event. But it is well recognized that this principle is not to be used to penalize the losing party: rather it is for compensating the successful party for the trouble taken in prosecuting or defending the suit...The object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case. Costs are a means by which a successful litigant is recouped for expenses to which he has been put in fighting the action.

62. Based on this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. The outcome in the instant case is the Plaintiff herein has succeeded in establishing its case. For that very fundamental reason, therefore, the costs of this suit will be borne by the 1st, 2nd and 3rd Defendants herein.



Vi. Conclusion and Disposition

63. Ultimately, having conducted such an elaborate and indepth analysis of the framed issues herein, the Honorable Court is fully satisfied that indeed the Plaintiff has been able to establish its case against the 1st, 2nd and 3rd Defendants on a balance and the preponderance of probability. Hence, for avoidance of doubt, more specifically I order:-
- a. That Judgment be and is hereby entered in favour of the Plaintiff and against the 1st, 2nd and 3rd Defendants jointly and severally with costs.
 - b. That an order be and is hereby made directing the Registrar of Titles to henceforth cause the cancellation and/or revocation of the Certificate of Title and the records in the registry to all that parcel Known as Land Reference No. MN/1/2396 – MN/1/2415 and suit property MN/1/2396 illegally registered in the names of the 2nd Defendant pursuant to the provisions of the Section 121 and 122 of the Government *Land Act*, Cap. 280 (Repealed), Section 23 (1) & (2) and 24 of the Registered Title Act Cap 281 (now repealed), Sections 79(1)(2) and 80(1) & (2) of the *Land Registration Act*, No. 3 of 2012 and in tandem with the recommendation contained in the Presidential Commission of Inquiry on Irregular and Illegal Acquisition of Public Land (The Ndung'u Commission)
 - c. That an order be and is hereby made to have the Registrar of Title Mombasa hence forth to register all that property known as Land Reference Nos. MN/1/2396 – MN/1/2415 and suit property Land Reference No. MN/1/2396 into the names of the Kenya Civil Aviation Authority and/or the Government of Kenya.
 - d. That an order directed to the Registrar of Title Mombasa to issue Certificates of title for all that property known as Land Reference Nos. MN/1/2396 – MN/1/2415 and suit property Land Reference No. MN/1/2396to into the names of the Kenya Civil Aviation Authority and/or the Government of Kenya.
 - e. That an order made herewith for the 1st, 2nd and 3rd Defendants to pay the general damages and Mesne Profits for a sum of Kenya Shillings Thirty Million Kshs. 30,000,000/= for the loss of user for the suit property covering all that period of the 22 years they had been in its illegal possession and/or occupation from the year 2002 to date within the next sixty (60) days from the date of the delivery of this Judgment hereof.
 - f. . That an order be and is hereby made for the 3rd Defendant herein, by then the duly appointed as the Commissioner of Lands in the Ministry of Lands and Settlement, a Public officer to personally pay a sum of Kenya Shillings Five Million (Kshs. 5,000,000/=) for the liability, abuse of office and breach of tort of misfeasance in office within the next sixty (60) days from the date of the delivery of this Judgment hereof.
 - g. That costs of the suit to be borne by the 1st, 2nd and 3rd Defendants.

It is so ordered accordingly

JUDGEMENT DELIVERED, SIGNED AND DATED AT MOMBASA THIS 16TH DAY OF FEBRUARY, 2023

HON. JUSTICE MR. L.L NAIKUNI, (JUDGE)

ENVIRONMENT & LAND COURT AT, MOMBASA

In the presence of:



- a. M/s. Yumnah, the Court Assistant.
- b. M/s Songole Advocate for the Plaintiff.
- c. No appearance for the 1st Defendant.
- d. No appearance for the 2nd Defendant
- e. No appearance for the 3rd Defendant

