

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MILIMANI LAW COURTS
ELC CASE No. 58 OF 2009

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

VERSUS

GEORGE FRED ONYANGO 1ST DEFENDANT

VALERIA AKUKU ONYINO 2ND DEFENDANT

SAMMY MUSILA 3RD DEFENDANT

GEORGE KIMANI NJUKI 4TH DEFENDANT

SAMMY MWAITA 5TH DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit by way of Plaint dated 13th February, 2009 and filed in court on 17th February, 2009 seeking judgment against the five Defendants for:

- (a) A declaration that the Letter of Allotment dated 26th March, 1999 allocating the 1st, 2nd and 3rd Defendants the land parcel referred to as L.R. No. 209/14216 (Nairobi) described in the letter as “UNS. RESIDENTIAL PLOT No. F SOUTH B NAIROBI” is null and void;

- (b) A declaration that the Grant No. IR 93236 registered on 2nd November, 2002 in respect of L.R. No. 209/14216 (Nairobi) in the name of the 1st, 2nd and 3rd Defendants is null and void;**
- (c) Cancellation and/or revocation of the Letter of Allotment dated 26th March, 1999 and the Grant No. IR 93236 registered on 2nd November, 2002 in respect of L.R. No. 209/14216 (Nairobi) in the name of the 1st, 2nd and 3rd Defendants;**
- (d) Cancellation and/or revocation of the title documents and the Transfer to the 4th Defendant in respect of L.R. No. 209/14216 (Nairobi);**
- (e) A permanent injunction restraining the Defendants, their servants and/or agents or tenants from alienating, encumbering, disposing off, wasting and trespassing upon or in any other way interfering with the land parcel referred to as L.R. No. 209/14216 (Nairobi).**
- (f) Mesne Profits.**
- (g) Costs of this suit.**
- (h) Any other relief that this Honourable Court will deem fit to grant.**
2. The Plaintiff pleaded that at all times material to the suit, the land known as L.R. No. 209/14216 in South B Nairobi (the suit property) was government land reserved as residential quarters for government employees. The 1st Defendant was a Senior Lands Officer at the Ministry of Lands Headquarters in Nairobi while the 2nd Defendant was his wife. The Plaintiff averred that sometime in 1997, the 1st and 2nd Defendant trading as Gefrea Agencies together with the 3rd Defendant

allegedly applied to the Commissioner of Lands for allocation of the suit property. On or about 26th March, 1999 the 1st Defendant purporting to act on behalf of the Commissioner of Lands signed a Letter of Allotment of the suit property, describing it as UNS. RESIDENTIAL PLOT No. 'F' SOUTH B NAIROBI, in the names of Gefrea Agencies and the 3rd Defendant.

3. It is the Plaintiff's case that Gefrea Agencies was registered as a business name on 21st December, 1999 long after issuance of the said Letter of Allotment, which the 1st, 2nd and 3rd Defendants allegedly accepted on 14th July, 2000, more than a year later. It is pleaded further by the plaintiff that in August, 2001 the 5th Defendant contrary to provisions of the Government Lands Act, CAP 280 Laws of Kenya (repealed), purportedly issued a title being Grant No. I.R. 93236/1 in respect of the suit property to the 1st, 2nd and 3rd Defendants as tenants in common. The Plaintiff averred that the suit property having been alienated by the Government for a particular purpose was not available for allocation, thus the purported application for allotment, the purported allotment and the issued grant of title are irregular, fraudulent illegal, unlawful and consequently null and void.
4. The Plaintiff further stated that despite the foregoing, the 1st, 2nd and 3rd Defendant went ahead and sold the suit property to the 4th Defendant, however since the Letter of Allotment and grant of Title are nullities, the subsequent transfer is equally a nullity. The Plaintiff set out the Particulars of Fraud, and illegality on the part of the Defendants, jointly and severally as well as particulars of breach of trust and fiduciary duty.

5. It is the Plaintiff's case that as a result of the Defendant's conduct, the 1st, 2nd and 3rd Defendants were charged with various crimes under the Penal Code and the Anti-Corruption and Economic Crimes Act at the *Kibera Chief Magistrates Court in CM Criminal Case No. 4372 of 2006*. The Defendant has been renting out the suit property and continues to earn rent from it to the detriment of the government.
6. In contesting the suit, the 5th Defendant filed a Statement of Defence dated 10th March, 2009. He averred that he was a total stranger to the allegations relating to the purported application for allocation and issuance of the Letter of Allotment to the 1st, 2nd and 3rd Defendant. He denied issuing the title registered as IR 93236 or that the said allotment and issuance of title were tainted with irregularity, fraud and illegality, or that the suit property was unavailable for allocation and put the Plaintiff to strict proof.
7. In addition, the 5th Defendant averred that he acted in his capacity as an agent of known principals being the President and/or the Government of Kenya and any alleged tort should be directed to them. He alleged that the suit is bad in law and unsustainable, it is brought in contravention of express provisions of the law and the reliefs sought do not lie against him. Further that his actions at the material time cannot be separated from his office as the Commissioner of Lands. He averred that the suit against him was time barred and ought to be dismissed with costs.

8. The 3rd Defendant filed his Defence dated 16th March, 2009 denying and distancing himself from the allegations of the Plaintiff. He averred that as a civil servant, in 1987 he was given a Government House referenced as MG 373 in South B on L.R. No. 209/3550 which he resided in until his retirement. That he solely applied to the Commissioner of Lands for allocation of Government Plot No. 209/3550 - Makandu Road - Nairobi South B where the house he occupied stood.
9. By Letter of Allotment dated 26th March, 1999 the 3rd Defendant was offered an un-surveyed Residential Plot No. F South B Nairobi alongside an entity called Geofrea Agencies. He was required to pay KShs. 129,800/- which included costs of buildings on the Land, and he paid. He stated that the Commissioner of Lands confirmed that the plot he had applied for was the one allocated to him as the plot number hitherto existing had changed upon re-surveying and sub-division of Government Land Plots.
10. The 3rd Defendant averred that prior to retirement he inquired about the title which was yet to be issued to him, and was advised by the 1st Defendant who was a Senior Lands Officer to vacate the government house pending issuance of the title documents, with a promise to contact him once the said documents were ready. The office of the Commissioner of Lands never contacted him, however on 16th December, 2005 the Plaintiff's Officers went to record his statement while he was at his rural home in Machakos. It is the said Officers who informed him that the

Title documents had long been issued and the property sold. Consequently, he was charged in Criminal Case No. 4372 of 2006 at Kibera.

11. The 3rd Defendant states that the suit property is his property having lawfully acquired the same, and the allegations of abuse of office by the 1st Defendant cannot affect his right to property. No cause of sanction lies against him, hence the suit herein is incompetent, bad in law and an abuse of the court process.
12. The 2nd Defendant's Defence is also dated 16th March, 2009 where she denied that she and the 1st Defendant were trading as Gefrea Agencies. She also denied either directly or otherwise applying for allocation of the suit property from the Commissioner for Lands. She averred that Gefrea Agencies was a partnership between her and the 1st Defendant, and that the said entity was registered partly in her name without her knowledge or consent by the 1st Defendant. She did not know of its existence and has never been involved in its business prior to the Plaintiff's investigation of this matter. She alleged that she did not take part in the sale of the suit property and her signature on the purported transfer is a forgery. The 2nd Defendant acknowledged being charged in Criminal Case No. 4372 of 2006 at Kibera. She contended that the Plaint is fatally defective and her inclusion herein is malicious.

Hearing and Evidence

13. The hearing of the suit commenced on 23rd March, 2012 with the evidence of Peter Kang'ethe Kahuho testifying as PW1. He testified that he works for the Ministry of Lands as the Secretary Lands, dealing with matters land

administration and management. At all times material to the suit, he was the Assistant Commissioner of Lands (the Commissioner). PW1 testified that at the time, government land that contained a house was not supposed to be allocated to a private individual, and such allocations are now being contested by the Government of Kenya and facing review by the National Land Commission (NLC).

14. PW1 asserted that under the repealed GLA, the Commissioner could, on application, allocate government land on powers delegated by the President, but he could not donate the power to another person. PW1 gave a brief outline of the process of application for and allotment of un-alienated government land, pointing out that where land was allotted to joint applicants, either of them could accept the offer with authority of the other applicants. Where there was no application, there would be no basis to allocate the land. PW1 continued in evidence that thereafter, the Commissioner would write to the Director of Survey to have the Land surveyed and issue a Deed Plan, based on which the title would be prepared and signed by the Commissioner and forwarded to the Registrar's Office for Registration.

15. PW1 then clarified that it is a Senior Plan Records Officer that is required to confirm whether land applied for is available for allocation, and if he finds a house on it, he would not give a report that it is available for allocation. He stated that the procedure for allocation of Government Land is contained in a manual prepared by the Commissioner of Lands. PW1 produced a Circular from the then

Ministry of Works Housing as Exhibit 1. He also testified that he was not sure he had seen the transfer and allocation of the suit property at the time. In conclusion, he indicated that he would further rely on his statement dated 29th September, 2005.

16. PW1 was recalled for cross-examination on 22nd November, 2023. On cross-examination by Ms. Kwamboka for the 3rd Defendant, he stated that he had worked as a Senior Assistant Commissioner of Lands for 10 years. He testified that Plaintiff's Exhibit 5 was an application signed by Gefrea Agencies and Sammy N. Musila. He confirmed that there is no application produced in evidence, but that since he did not have the file used in the process so he cannot say whether the allocation was irregular, yet the file was there when he made his statement.
17. PW1 was on the same date cross-examined by Mr. Machira for the 4th Defendant and he testified that that he was aware that a grant was issued which was signed by the Commissioner. He explained the process of issuance of the grant stating that in this case a letter of Allotment was issued, the stand premium paid and then a grant was issued. Whereas he knew the 1st Defendant, PW1 testified that he did not know the 2nd Defendant. PW1 continued that at the time the 1st Defendant signed the Letter of Allotment, he was a Senior Land Officer and was authorised to sign. That further, it is the 1st Defendant who signed the Letter of Allotment in question, and if the letter had been issued to anyone else but himself there would have been no problem.

18. PW1 responded that it was not in order to allocate government houses. He clarified that the 4th Defendant had not worked at the lands office, but he had bought the suit property at KShs. 1.7 Million, and in doing so had not committed a sin. He testified that the transfer was registered under the RTA and the effect of the transfer is that the property moved from the Transferor to the Transferee. That there is no evidence that the 4th Defendant was guilty of misrepresentation. PW1 further stated that there is a process of validation to government houses at a fee and at page 22 and 23 of the 4th Defendant's bundle the 4th Defendant appears to have paid KShs. 500,000/- towards the same. He stated that he was not aware why the 4th Defendant was being charged as he had no accusations or allegations against him, and further that his title is protected under the law.
19. On re-examination by Ms. Maina, PW1 told this court that as an interested party, the 1st Defendant ought not to have signed the letter allotting the property to himself. He confirmed that the Civil Servants housing scheme was available only to civil servants. He testified that the transfer was signed on 2nd September, 2004 and registered on the same day, yet it ought not have been registered on the same day.
20. PW2 was one Ephantus Mutahi kariuki, an investigator with the EACC, the successor of the Plaintiff, and he also gave a sworn testimony. His testimony is that in 2005, he was assigned a matter touching on government land and a house thereon which is the suit property herein. PW2 testified that the report was made to the EACC by the Ministry of Lands. He stated that he established that the 1st

Defendant allocated the suit property to himself through Gefrea Agencies which was registered on 21st December, 1999 in the names of the 1st and 2nd Defendant, and he produced Plaintiff's Exhibit 2 which is a Certificate of Search. In his investigation he came across a purported approval Form G A 102749/31/GA/XXXV approved on 11th October, 1996 by the Commissioner and he produced it as Plaintiff's Exhibit 3. He also established that the letter of allotment dated 26th March, 1999 was signed by the 1st Defendant and was issued to the Gefrea Agencies, which did not exist as at that date, and the 3rd Defendant.

21. PW2 then testified that the Offer was accepted vide letter dated 14th July, 2000 (produced as Plaintiff's Exhibit 5) forwarding a cheque of KShs. 90,000/- instead of the KShs. 129,800/- demanded in the letter of Allotment. The Department of Lands then wrote to the Director of Survey indicating that the offer had been accepted which letter was produced as Plaintiff's Exhibit 6. At the time, there was a tenant on the property, one Patrick Kiragu allocated the Government House No. MG 373 on the suit property and he produced confirmation of the Allocation as Plaintiff's Exhibit 7.
22. Previously, the house had been allocated to the 3rd Defendant. He also produced a Memo of Registration of Transfer of the suit property to the 1st, 2nd and 3rd Defendant dated 3rd November, 2003 as Exhibit 8, as well as the Grant issued over the suit property to the 1st, 2nd and 3rd Defendants as IR 93236 and registered on 3rd November, 2003 as IR 93236/1 to three as Exhibit 9.

23. PW2 also testified that despite this, the property remained in the inventory of Government of Kenya Buildings as evidenced by a letter from the Office of the President dated 21st April, 2004 produced as Exhibit 10. He produced as Exhibit 11 a letter dated 9th October, 2004 from the Ministry of Lands and Housing, which showed that P.N. Kiragu was allocated the House as a tenant, as well as a letter from the Office of the President from one R.A. Aduda, produced as Exhibit 12, indicating that Patrick Kiragu was still a tenant paying KShs. 9,500/- a month as rent on the suit property. It is PW2's testimony that he also came across a letter dated 15th June, 2005 signed by Mrs. J.M. Okungu, the then Commissioner of Lands, to the 1st Defendant inquiring from him why disciplinary action should not be taken against him for his actions complained in this suit. This letter was produced as Exhibit 13.
24. This witness further testified that the suit property was transferred to the 4th Defendant and the consent to the said transfer was signed by the 1st Defendant (Exhibit 14 is handwritten notes on the said approval), and the transfer dated 1st September, 2004 was registered as IR 93236/2 presented on 2nd September, 2004, Exhibit 15. The Title issued in favour of the 4th Defendant was produced as Exhibit 16. He produced Plaintiff's Exhibit 17 which is a letter from the 1st Defendant dated 25th September, 2005 seeking a pardon and explaining that he had transferred the property innocently. PW2 also stated that by an advertisement in the Daily nation on 28th June, 2005 produced as Exhibit 18, the suit property

was still listed as Government of Kenya property MG 373 (L.R. No. 209/4216-South B).

25. PW2 also produced as Exhibit 19 a letter from the Commissioner of Lands, Mrs. Okungu dated 12th July, 2006 to Justice A.G. Ringera confirming that a caveat had been placed on the suit property. He stated that on completion of his investigations, he recommended that the DPP charge the 1st, 2nd and 3rd Defendants with offences under the Economic Crimes Act, which was done vide *Kibera Chief Magistrate's Court Criminal Case No. 4372 of 2006*. That the 1st Defendant was found guilty and convicted and the court ordered the suit property remains the property of the Republic of Kenya.
26. PW2 produced the Order as Exhibit 20. Consequently, PW2 states that on 25th January, 2009 he wrote to the Defendants herein to surrender the Title Documents for cancellation, the letter is produced as Exhibit 21. However, on 15th July, 2015 he conducted a search at the lands registry in Nairobi and found that the property was still in the 4th Defendant's name, the search was produced as Exhibit 22. He also chose to further rely on his statement dated 22nd July, 2015.
27. PW2 was also recalled for cross-examination on 22nd November, 2022. On cross-examination by Ms. Kwamboka learned counsel for the 3rd Defendant, he testified that he investigated the case at hand and filed a report, which was presented in the criminal court. He told this court that his scope of duties included both criminal and civil issues and stated that the criminal case resulted in conviction of the 1st Defendant. That the 3rd Defendant had been sued for transfer of the suit property

to the 4th Defendant and a forensic document examiner had confirmed that the signature on the transfer belonged to him, although he did not have the examiner's report in court. PW2 confirmed that the application for allotment was by the 1st, 2nd and 3rd Defendants. He stated that the allotment did not follow due process, however Mr. Patrick Irungu Nderitu is a public servant who was regularly allocated the house as a tenant after the 3rd Defendant vacated it upon retirement.

28. On cross-exam by Mr. Machira learned counsel for the 4th Defendant, PW2 stated that the suit property had been transferred to the 4th Defendant by the 1st, 2nd and 3rd Defendants. That he learnt of the request for validation from the Ministry of Housing in 2009 towards the end of the Criminal Case, so this request was an afterthought. PW2 testified that the 4th Defendant was aware that what he was purchasing was not available because there was a tenant in that house. He continued that the 4th Defendant was not charged because there were people culpable.
29. He confirmed that the criminal court directed that the building reverts to the government. That the 4th Defendant did not even pay the entire purchase price as the 1st Defendant said he was only paid KShs. 800,000/- On re-examination by Ms. Maina, the witness affirmed that the 3rd Defendant is one of the people who signed the transfer.
30. On the part of the defence, the 4th Defendant testified as DW1 on 9th February, 2023 and adopted his signed witness statement dated 8th December, 2015. He stated that it is the 1st Defendant who offered the suit property to him, he bought

it and it was transferred to him on 1st September, 2004 and took possession which he still keeps todate. DW1 testified that the 1st and 2nd Defendant were charged in the criminal case, but he is an innocent purchaser for value without notice. He averred that he paid the purchase price of Kshs 1.7million, and paid stamp duty on the transfer. He also told this court that before buying the suit property, he did a search which showed that the grant was registered on 1st November, 2003 in the names of the 1st, 2nd and 3rd Defendants.

31. In an interesting turn, the 4th Defendant also stated that the Plaintiff had removed him from possession, yet he had made improvements on the property and had built 27 bed sitters which he is currently renting out earning about KShs. 200,000/- per month. He informed the court that there are others who were allocated government houses in the area and its not clear if EACC had sued them. He stated that besides the KShs. 1.7 Million purchase price, the government directed those who had bought government houses were to pay a validation fee and which paid to the Ministry of Housing.
32. DW1 testified that the government's intention to re-possess government houses means that they acknowledge the houses had been allocated. He was investigated by EACC but was never charged, and he denied all the allegations of fraud and breach of trust pleaded in the Plaint. DW1 also averred that he is not liable for the illegalities committed by the 1st and 5th Defendants. DW1 prayed for dismissal of the suit against him. He produced the Documents he filed as one Bundle, marked as 4th Defendant's Exhibit 1.

33. On cross-examination by Ms. Maina for the Plaintiff, DW1 said that he entered the sale agreement with the 1st Defendant but he had no evidence of payment of the KShs. 1.7 Million. DW2 testified that he then applied for valuation of the suit property and paid KShs. 3,400/- as stamp duty but he did not include any receipt for the said payment. He stated that he was present when the 1st and 3rd Defendant signed the transfer, which was registered on the same date as the date of issue of the grant. He confirmed that the letter dated 14th March, 2005 showed that there was a rent-paying tenant on the property.
34. Additionally, he testified that he inspected the title and visited the property and there was a tenant in occupation. He testified that he took possession of the property immediately but he did not undertake any change of user. He further said that he had no evidence of the new developments, approved development plans for the same or the purported rent of KShs. 200,000/-. He confirmed that the judgment of the criminal case directed that the suit property remained the property of the government of Kenya.
35. Further on the validation fee, DW1 said that he made the application for validation on 21st January, 2009. He greed as per the receipts attached that he did not pay the total amount of KShs. 3,225,000/-. He further confirmed that the house was listed as one of the Government houses on the Notice produced as Plaintiff's Exhibit 18, and further confirmed that there was someone in the house when he inspected it. He acknowledged that his neighbours also had issues with their properties. In

further cross-examination by Ms. Kwamboka, DW1 testified that he only saw the parties sign the transfer but not the agreement.

36. In re-exam DW1 testified that since the document of transfer was stamped, he did not need to produce a receipt for the same. He confirmed that he was present when the transfer was signed. That he did not take possession immediately because there was a civil servant in the house, and when he told the said occupant that he would be demanding rent, he vacated. DW1 further confirmed that there was already a residential house when he bought and he continues to use the premises for residential purposes. He clarified that he took possession in 2005 while this suit was filed in 2009. He opined that the order issued does not interfere with the current proceedings. He denied receiving any letters from the Plaintiff before filing of this suit.

Submissions

37. On the same day, Counsel for the Plaintiff applied to have the case as against the 5th Defendant closed for non-attendance. Court allowed the application and further directed parties to file written submissions. The Plaintiff filed three sets of submissions dated 17th March, 30th June and 19th July, 2023. On the part of the Defendants, the 4th Defendant filed submissions dated 7th June, 2023 whereas the 3rd Defendant's submissions are dated 30th June, 2023.
38. The Plaintiff's Counsel submitted that the suit property was alienated public property for housing public servants and thus unavailable for allocation or transfer to private individuals. She submitted that the fact that the 4th Defendant was

approached by the 1st Defendant who held title over the property issued by the government did not change the status of the suit property as alienated government property. She relied on case of *KACC vs Paulina Kemuma Anunda & Another (2022) eKLR*.

39. Counsel submitted that the 1st, 2nd and 3rd defendant did not have good title to pass because due process was not followed in the allocation of the suit property to them. Further that they misrepresented the status of the house in the Government Approvals as “un-committed government land”. In addition, the 1st Defendant allocated the suit property to a non-existent entity, being Gefrea Agencies, which was registered 9 months after issuance of the letter of allotment. That aside, the judgment in the Criminal Case No. 4372 of 2006 also declared the suit property to be government property, which judgement is yet to be overturned.
40. Counsel submitted that only the President had power to allocate public land, which power could be donated to the Commissioner of Lands, but the Commissioner could not delegate it to any other person. Under Section 3 of the Government Lands Act (repealed), the power was only delegated for purposes of grants for religious and charitable purposes or other uses as provided under the Act, but not to private individuals. As a result, the 5th Defendant could not purport to register and issue the grant to the suit property, and doing so was sanctioning the acts of the 1st Defendant. The 1st Defendant then could not have any delegated powers from the Commissioner to allocate the land. Counsel submitted that the 5th Defendant must be held liable for issuing the title over the suit property.

Counsel pointed the court to *Norbixin Kenya Limited vs the Attorney General, HCCC No. 1814 of 2002, ELC No. 168 of 2009, KACC vs Bensoft Ltd & 2 Others* and *KACC vs Frann Investments Ltd & 6 Others (2022) eKLR*.

41. On whether the 4th Defendant acquired good title as a bonafide purchaser for value without notice, Counsel submitted that allocation of the suit property and issuance of the Grant were illegal acts that are null and void. Therefore, Counsel submitted, the 1st, 2nd and 3rd Defendant could not pass good title (*KACC vs Paulina Kemuma (supra)*). Further that no evidence has been produced of payment of the purchase price and thus the transfer was only meant to sanitise the title as was the validation process. It was counsel's submission that the 4th Defendant cannot seek protection as an innocent purchaser without notice when he acknowledged in testimony that there was a rent-paying tenant on the suit property at the time he purchased the property (*Funzi Island Development Company Limited & 2 Others vs County Council of Kwale & 2 Others (2014) eKLR*).
42. The Plaintiff also relied on the case of *Munyu Maina vs Hiram Gathiha, Nyeri Court of Appeal 239 of 2009 (2013) eKLR* for the contention that since the root of the title is being challenged, a registered proprietor must go beyond the instrument of title and prove the legality of how he acquired the property. The Plaintiff's Counsel further submitted that carrying out improvements on the suit property did not sanitise the title of the property. Accordingly, the 4th Defendant was not a purchaser for value without notice. The indefeasibility of title only

protects property whose acquisition was legal, proper and regular which is not the case here and the court cannot sanction an illegality.

43. On mesne profits, the Plaintiff submitted that there is no evidence of the alleged rental income of KShs. 200,000/- by the 4th Defendant. That prior to his taking possession, there was a tenant paying KShs. 9,500/- per month as at 14th March, 2005. The 4th Defendant had enjoyed the fruits of the suit property illegally to the government's detriment. Counsel submitted that a person wrongfully deprived of his property is entitled to mesne profits (*AG vs Halal Meat Products Ltd (2016) eKLR*). The Plaintiff claimed KShs. 2,052,000/- calculated on the rent paid of KShs. 9,500/- for 18 years.
44. In the Plaintiff Supplementary Submissions, filed in response to the 4th Defendant's written submissions, Counsel reiterated the arguments in the earlier submissions adding that the title issued to the 1st, 2nd and 3rd Defendants was invalid having been acquired illegally. That in *Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)* the court held that in establishing a bona fide purchaser, the court must go to the root of the title, right from the first allotment. It was submitted that the threshold in criminal and civil cases is different and that is why the 4th Defendant was only called as a witness in the criminal case. That however, being the person in possession of the suit property herein, he is a necessary party in this suit.

45. On the allegations of discrimination, it was submitted that the Plaintiff received a specific report over the suit property on illegal disposal of government property, which report informed its investigations. In addition, no evidence of discrimination had been tabled. As to the allegations on limitation of time, Counsel submitted that Section 42(1)(d) excluded proceedings for recovery of government land. Additionally, the said provision did not apply to corruption and economic crimes cases (*ELC Case No. E087 of 2022, EACC vs Paul Mbatia and Others*). In response to the allegations that it had waived its claim, the Plaintiff submitted that the doctrine of waiver may be terminated by reasonable notice, and filing of this suit was sufficient termination thereof. That aside, the 4th Defendant had not paid the full validation amount and could thus not rely on the said doctrine.
46. The Plaintiff also filed submissions in response to the 3rd Defendant's written submissions reiterating the discussions in the earlier submissions. She additionally argued that the suit against the 1st and 2nd Defendants abated one year after each of them had died and no application to substitute them had been made. She clarified that the case against the 3rd Defendant was his participation in transferring the suit property to the 4th Defendant, and he had not produced any evidence to rebut the assertions that he executed the transfer in question. The 3rd Defendant had produced no evidence that he had paid the stand premium as demanded in the Letter of Allotment.
47. Counsel added that being a co-owner prior to the transfer, the 3rd Defendant was also a necessary party to the suit. He could not claim protection as an innocent

purchaser as he knew the status of the suit property having lived as a tenant thereon, therefore his title to the property did not qualify for indefeasibility as it was acquired un-procedurally. Counsel further reiterated the discussions in the Supplementary Submissions on the threshold of criminal cases vis-à-vis civil cases.

3rd Defendant's Submissions

48. The 3rd Defendant submitted that the judgement in the Criminal Case 4372 of 2006 exonerated him, as did the PW1's testimony that it is the 1st Defendant that signed the Letter of Allotment. That only the 1st Defendant could answer to the illegality of signing a Letter of Allotment contrary to Section 3 and 7 of the Government Land Act (repealed). However, despite directions by the court to substitute the 1st and 2nd Defendant the Plaintiff failed to do so. The 3rd Defendant acknowledged that the power to alienate government land under the repealed Government Land Act was vested in the President and relied on *Nairobi HC Misc. Appl. 1732 of 2004, James Joram Nyaga & Ano. vs Attorney General & Another (2007) eKLR*.
49. It was submitted that whereas the 1st and 5th Defendants had no right to deal with the suit property, the 3rd Defendant is an innocent purchaser and ought not be held liable for their actions. Relying on Section 107 and 108 of the Evidence Act, which provides that he who alleges must prove, the 3rd Defendant submitted that it was not shown that he possessed the property after the purported allotment or how he participated or enabled the fraudulent transactions over the suit property.

Counsel submitted that he was wrongly sued as no cause of action has been demonstrated against him and neither has the Plaintiff demonstrated what relief it seeks from him. He relied on the cases of *Zephir Holdings Ltd vs Mimosa Plantations Ltd*, *Jeremiah Maztagaro & Ezekiel Misango Mutisya (2014) eKLR* and *Kingori vs Chege & 3 Others (2002) 2 KLR 243*.

4th Defendant's Submissions

50. The 4th Defendant's submitted that the Title to the suit property was issued under the Registration of Titles Act (now repealed) which at Section 23(1) as read with Section 24 thereto provides for indefeasibility of Title. This protection of the 4th Defendant's title is further found at Article 40(1), (2) and (3) of the Constitution of Kenya, 2010. It was submitted that the 4th Defendant is a purchaser for value without notice, having conducted due diligence and found that the property belonged to the 1st, 2nd and 3rd Defendants and they relied on the Ugandan case of *Katende vs Haridas & Company Limited (2003)EA* on the definition of a bona fide purchaser. It was submitted that the 4th Defendant bought the suit property under sale agreement and for valuable consideration, and further relied on *Nairobi Permanent Markets Society & 11 Others vs Salima Enterprise & 2 Others (1997) eKLR* and *Elizabeth Wambui Githinji & 29 Others vs Kenya Urban Roads Authority & 4 Others (2019) eKLR*.

51. Counsel for the 4th Defendant submitted that the Plaintiff having alleged fraud had a duty to prove it on a higher standard than a balance of probability (*Vijay Morjaria vs Nansigh Madhusingh Darbar & Another (2000) eKLR*). However,

none of the allegations set out in the Plaint touch on the 4th Defendant and none was proved against him. Further that other than the sale of the suit property herein, there was no evidence produced to connect any suspicious relationship between the 4th Defendant and the other Defendants and this came out in oral evidence of the Plaintiff's witnesses. Counsel submitted that Sections 108 and 109 puts the burden of proof on the Plaintiff, which burden the Plaintiff has not discharged and thus the suit ought to be dismissed and on this point counsel relied on *Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi NYR CA Civil Appeal No. 342 of 2010 (2013) eKLR*.

52. Counsel urged the court to find that the Plaintiff's case is neither factual nor does it have any legal basis for among other reasons that the claim is not genuine; the suit property was sold and transferred with the Plaintiff's sole knowledge; it took the Plaintiff 5 years to file suit with no reason given for the delay; the suit is characterised by multiple illegalities; the 4th Defendant is innocent of all accusations and ought not have been sued herein; the Plaintiff is discriminating against the 4th Defendant in filing the current suit whereas there are 16 similar houses in the same whose letters of allotment were signed by the 1st Defendant herein area yet the Plaintiff has not filed suit against them. Relying on the case of *George Joshua Okungu & Ano. vs Chief Magistrate's Court Anti-Corruption Court at Nairobi & Ano. (2014) eKLR*, Counsel submitted that the law does not allow selective, arbitrary and discriminatory prosecutions of any form.

53. Counsel argued that the plaintiff's suit, in as far as it is based and founded on fraud, is time barred and therefore incompetent and he relied *on Kenya Farmers Association vs Quasar Limited & 5 Others (2021) eKLR*.

54. On the issue of mesne profits, it was submitted that the claim was neither well pleaded nor specifically proved. Counsel buttressed his arguments by citing the case of *Dickson Opola Okumu vs Tom Odhiambo Odari & Another (2019) eKLR* and the case of *Adrian Gilbert Muteshi vs William Samoei Ruto & 4 Others (2013) eKLR*, the court at paragraph 56 held (in part) that:-

“As a general rule, the plaintiff is entitled to recover for such time as he can prove the defendant to have been in possession, provided he does not go back beyond six years, for in that case, the defendant may plead the statute of limitations. Mesne profits are discretion of the court and are granted upon proof of the same...”

55. It was submitted on behalf of the 4th Defendant that the plaintiff, if it had any justification to claim the suit property waived the same especially when the 4th Defendant paid the KShs. 550,000/- validation fee, which was duly accepted by the Ministry of Housing. It was submitted that waiver may be inferred from conduct or acts putting off one's guard and leading them to believe that the other has waived its rights and counsel cited the cases of *Sifa Steel Rolling Mills vs Jubilee Insurance Company Limited (2007) eKLR* and *Serah Njeri Mwobi vs John Kimani Njoroge (2013) eKLR*. In conclusion, counsel urged the court to be guided by Articles 27(1), 47(1), 50(1) and Article 159(2) of the Constitution.

Analysis and Determination

56. I have proceeded to read and consider the pleadings filed, the testimonies of the parties, submissions rendered and authorities relied on by the parties and render my determination premised on the following issues;

- i. *Whether the suit herein is barred by limitation of time;*
- ii. *Whether the suit property was un-alienated government land available for allocation to the 1st, 2nd and 3rd Defendants;*
- iii. *Whether the Defendants acted fraudulently in allocation of the suit property and whether as a result the title thereto is invalid, null and void;*
- iv. *Whether the 3rd and 4th Defendants are innocent purchasers for value without notice;*
- v. *Whether the Plaintiff is entitled to mesne profits; and*
- vi. *What orders this court should issue?*

i. **Whether the suit herein is barred by limitation of time;**

57. The issue of limitation of time has been raised in the 4th Defendant's submissions as well as the 5th Defendant's Defence. It was alleged that the suit, in so far as it is based on fraud, is time barred. In response, the Plaintiff submitted that the Limitation of Actions Act, Cap 22 Laws of Kenya does not apply to matters regarding recovery of government land. Indeed, this court agrees that the issue of limitation does not arise in this suit because **Sections 41 and 42** of the **Limitation of Actions Act** expressly exclude the application of the Act on matters concerning

government land, including proceedings towards recovery of government land.

Section 41 of the **Limitation of Actions Act** provides that:

“This Act does not: -

(a) enable a person to acquire any title to, or any easement over

(i) Government land or land otherwise enjoyed by the Government;

(ii) mines or minerals as defined in the Mining Act (Cap. 306);

(iii) mineral oil as defined in the Mineral Oil Act (Cap. 307);

(iv) water vested in the Government by the Water Act (Cap. 372);

(v) land vested in the county council (other than land vested in it by section 120(8) of the Registered Land Act (Cap. 300)); or

(vi) land vested in the trustees of the National Parks of Kenya; or

(b) affect the right of Government to any rent, principal, interest or other money due under any lease, licence or agreement under the Government Lands Act (Cap. 280) or any Act repealed by that Act.”

58. In addition, **Section 42(1)(d) and (j)** of the Act provides that:-

“This Act does not apply to... (d) proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connexion with any such recovery... (j) a proceeding to recover an amount for which a person is liable under section 51 or 52 of the Anti-Corruption and Economic

Crimes Act, 2003 (No. 3 of 2003) or a proceeding under section 55 or 56 of that Act;”

59. There is no dispute that the cause of action upon which the Plaintiff's suit is founded arose in the year 1999 when the 1st Defendant purportedly signed the Letter of Allotment which allocated the suit property to Gefrea Agencies and the 3rd Defendant. The suit aimed to recover the suit property on behalf of the Government. That being the case the Plaintiff's suit, definitely, is one in respect of which Section 41 and 42(1) of the Limitation of Actions Act apply. Consequently, the cause of action is not barred by limitation as set out in the provisions thereof.

ii. *Whether the suit property was un-alienated government land available for allocation to the 1st, 2nd and 3rd Defendants*

60. The suit property was allocated under provisions of the now repealed Government Lands Act (GLA). Section 3(a) of the GLA provided that:-

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

61. It is the Plaintiff's case that at the time of the purported allocation to the 1st, 2nd and 3rd Defendants, the suit property belonged to the Government of Kenya with a house standing thereon. This is affirmed by the judgment of the *Kibera Chief Magistrate's Court in CMCr No. 4372 of 2006* where the trial magistrate issued

an order that *“house No. MG-373 South B now L.R. No. 209/14216 remains the property of the Government of the Republic of Kenya.”*

62. Further, in support of the Plaintiff's assertion, the 3rd Defendant's statement of defence and affidavit confirmed that the 3rd Defendant lived on the suit house by virtue of being a civil servant. PW2 also produced several documents issued by the relevant Government Ministries confirming that the suit property was designated government civil servants house. For instance, PEX 7, is a letter dated 4th April, 2001 that allocated the house standing on the suit title to Mr. Patrick Kiragu as government quarters.
63. Other documents include PEX 12, a letter dated 14th March, 2005 confirming that the tenant on the suit property was paying rent for Government House No. MG-373, on the suit property. PEX 11 is a letter dated 9th October, 2004 addressed to the 4th Defendants Advocates also pointing out that the suit property belonged to the government and therefore the occupant therein was legally in occupation. Although most of these documents were written way after the alleged allocation to the 1st, 2nd and 3rd Defendants, the evidence adduced suggest the house on the suit land preceded the allocation.
64. The issue was, whether due process was followed in allocation of the suit property which was already alienated to the 1st, 2nd and 3rd Defendants. The Kenyan courts in a multitude of cases have spoken and by stating that land reserved for public utility is not available for further alienation. In the case of *Kenya Anti-Corruption*

Commission v Lima Limited & 2 Others (2019) eKLR, the Court stated as follows:

“The land in dispute was already alienated for public utilities and was fully developed with a High Court Station, district hospital, fire station and Administration Police Camp and therefore it could not be deemed unalienated. The 2nd Defendant therefore had no authority in law to make the alienation and therefore no interest could be conferred upon the 1st Defendant.”

65. I have found that the suit property was meant for public use reserved for housing of civil servants, it was thus not available for allocation to the Defendants or for any private use. Hence the purported allocation to the 1st, 2nd and 3rd Defendants amounted to a second allocation, which was illegal and fraudulent.

iii. **Whether the Defendants acted fraudulently in allocation of the suit property and whether the title thereto is invalid, null and void;**

66. The Plaintiff has contended that the process through which the 1st Defendant allocated the suit property to himself, the 2nd and 3rd Defendants was irregular, illegal, fraudulent, null and void. The Plaintiff has pleaded a total of 16 particulars of the fraud as against the Defendants whether jointly or severally which include issuing a Letter of Allotment without authority to do so, issuing a grant or title to land unavailable for allocation contrary to the Government Lands Act (GLA) and allocating the suit property to a non-existent firm among others.

67. In its endeavour to prove the fraud, the Plaintiff adduced evidence by stating that the 1st Defendant had no capacity to sign the allotment letter. PW1 produced copies of the judgement in the criminal case where the 1st Defendant was convicted on the offence of abuse of office. The criminal finding of guilt perse impute liability on the 1st Defendant(deceased) who was the originator of the allotment letter the subject of this dispute. Although the claim against the 1st Defendant was withdrawn for his demise, the guilt finding remains permanent record of the court and is not discharged by death.
68. The 3rd Defendant pleaded that by a letter dated 5th November 1998, he applied to the Commissioner of Lands to be allocated the suit property in line with the Government's policy and the law of allocating and selling its houses/plots to the employees/servants which house he had occupied for over twelve (12) years. The 3rd Defendant did not adduce any evidence, having failed to file any witness statements on time. The inaction on his part denied him the opportunity to persuade this court to find that his share in the suit title was valid.
69. Despite the omission, the Plaintiff was still obligated under the law to prove the fraud on the standard beyond a balance of probabilities. The Court of Appeal went further to cite Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR (Civil Appeal No. 106 of 2000) Tunoi JA (as he then was) stated as follows;

“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

70. I have considered the oral and documentary evidence presented by the Plaintiff as against the 3rd Defendant. No nexus has been placed linking the 3rd Defendant to the documents produced in regard to the allocation process taking into consideration that the 3rd Defendant was not working with the allocating authority. However, in the letter accepting the offer of allocating produced as PEx. 5, it is the 3rd Defendant who signed the letter. The 3rd Defendant ought to have questioned the validity of the said Letter of Allotment as any reasonable man would, he too did not. He also failed to present evidence to justify why he was signing this letter. Thus, the 3rd Defendant is blowing hot and cold air in regard to his interest over the suit property.

71. Further, the 3rd Defendant's name appear in the transfer documents which transferred the suit property to the 4th Defendant. In his submissions, the 3rd

Defendant stated that he was a purchaser for value but which submission is not supported by any evidence. The statement of defence referred to the 3rd Defendant applying for allocation and stating that he did not know what happened after that since he retired and went home. Infact, he submitted that he was wrongly sued which is interpreted that he has no stake/interest in the suit property. How does he then become an innocent purchaser for a property he has no interest in?

72. The next issue is the status of the claim as against the 4th Defendant's title. The protection under Section 23 of the Registration of Titles Act (repealed) and article 40 of the Constitution operates with respect to a valid title, one obtained legally and which is not challenged on grounds of fraud or misrepresentation. Article 40 (6) of the Constitution clearly provides that **"The rights under this Article do not extend to any property that has been found to have been unlawfully acquired"**.
73. Consequently, where the property is acquired in a procedure marred with fraud and misrepresentation, the title does not enjoy the protection on grounds of indefeasibility. In *Robert Mutiso Lelli v Kenya Medical Training College & 2 others [2021] eKLR*, the Court of Appeal stated:

"We have found that the allocation and issuance of titles to the subject plots to the appellant was irregular and unlawful. And though *Article 40* guarantees the right of every person to acquire property, *Article 40 (6)* qualifies this right to exclude "...any property that has been found to be unlawfully acquired."

74. The Plaintiff demonstrated that the 1st, 2nd and 3rd defendants did not have good title to pass because due process was not followed in the allocation of the suit property to them. However, the 4th Defendant adopted the defence of an innocent purchaser for value without notice. PW2 stated in his evidence that during his investigations, he found out that after the 3rd Defendant retired from civil service in August 2001, the house was allocated to Patrick Irungu Nderitu who moved in on 8th August 2004 and stayed in the suit premises until September 2004 when he received a letter from the 4th Defendant asking him to vacate.
75. That documents produced show the 1st to 3rd Defendants had transferred the suit property to the 4th Defendant on 1st September 2004. That following his investigations, the 1st to 3rd Defendants were charged in Criminal case number 4372 of 2006 which resulted in the conviction of the 4th Defendant. PW2 confirmed that the land was allocated in 1999 to the 1st to 3rd Defendants who became the registered owners some 8 months after the allocation.
76. PW1 in re-exam, said that civil servants housing scheme was only available to civil servants. Both the 1st and 3rd Defendants were civil servants in 1999 at the time the impugned allocation took place. It is admitted by both parties that the 3rd Defendant lived in the suit house and only moved out in the year 2001 when he retired from service. The Plaintiff produced as PEx1 a document referred to as *Ministry of works and Housing Circular No 2/58 which refers to procedure for conving and carrying out board of survey on government buildings*. The

document does not provide details on allocation process to government employees and the witnesses did not say much to help the court in the matter in question.

77. Impropriety is imputed on the 4th Defendant for buying the suit property while knowing there was a government officer occupying the suit house, which is a clear indication of the government's interest in the property. At paragraph 5 of the sale agreement, it is stated that the 4th Defendant *has seen the plot location and the beacons were to be pointed out before completion. Under the special conditions, paragraph A also stated that the Purchaser (4th Defendant) has inspected the location of the property.*
78. To confirm that the 4th Defendant was aware the house was not vacant, immediately upon registration, he issued a notice to vacate. In his written witness statement, the 4th Defendant only refers to inspection of the title as the due diligence he undertook. He further goes to state that he does not work with the Ministry of Lands to have known the correspondences exchanged concerning the suit property. However, the purchaser is not required to be an employee of the Ministry to be able to verify title documents. The 4th Defendant had the option of writing to the relevant government departments for information before executing the sale agreement. There is no evidence of such correspondence.
79. In *Flemish Investments Ltd v. Town Council of Mariakani*, CA No. 30 of 2015, where the appellant, who had fraudulently obtained registration of public property in his name, but claimed to be an innocent purchaser for value without notice, the Court of Appeal stated:

“A bona fide purchaser exercising due diligence would be expected to inspect the property he is buying, to ascertain its physical location, persons, if any, in occupation, developments, buildings and fixtures thereon, among others. If indeed the appellant honestly believed that Plot No. 34 and the cattle dip on it were part of the suit property, he would have rehabilitated the cattle dip as his property, or simply demolished it, not to pester the respondent for its relocation. For a party who was buying a commercial property rather than a ranch, the presence of a cattle dip on the property should have rang alarm bells.”

80. The question of incorrect PDP plans introduced by the Plaintiff is neither here nor there as what was in issue was whether the suit property was available for allocation. Going by the evidence on record by both parties, it comes out clearly that the same had already been committed as a public utility. For instance, the 4th Defendant confirms in his witness statement at paragraph 14 and 16 thus;

“initially the suit premises comprised an old three-bedroom bungalow with servant quarters with an iron sheet roof but after taking possession in the year 2005...”

“initially before I bought the premises and before I made the extensive improvements, the suit premises was fetching a paltry rent of Kshs 9500/= per month.”

83. When the Court of Appeal deliberated on the case of *Dina Management Limited v County Government of Mombasa & 5 others [2021] eKLR*, it found that:

“It is clear to us that the guarantee to protection under Article 40 of the Constitution of Kenya 2010 also existed under section 75 of the repealed Constitution. It is correct to say that the appellant has a right to own property and that it is entitled to its property only to the extent that the said property was acquired and purchased in accordance with the correct procedure and within the framework of the law. In our view, where property is acquired through a procedure against the law, the title cannot qualify for indefeasibility. The land in question was reserved for public use or utility and the access road leading to the said land for entry, use and enjoyment of the original purpose for which the land was created or reserved. Any attempt to deviate or depart from the original purpose, no matter the persons involved and subsequent interests acquired, is defeasible to that extent. In essence, it was not possible or open to any person or entity to alienate it for private use. In our view, the moment a property is reserved for public use, it remains public utility land incapable of giving rise to a private proprietary interest capable of being protected by a court of law.”

81. The 4th Defendant seemed to defend his title over the suit property because it was issued by the Government of Kenya. However, the issuance of title cannot be construed only in its end result as the process of acquisition is material and important especially where it is challenged. In a case like this one, where the very

root of the title has been proved to be been acquired irregularly, registration of the 4th Defendant as the owner was not sufficient.

82. This court is guided by the Court of Appeal decision in *Munyu Maina v Hiram Gathiha Maina [2013] eKLR*, where the court held that:-

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

83. The 4th Defendant cited the Ugandan case of *Katende vs Haridar & Company Limited [2008] 2 E.A.173* where it was held:-

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

- a. he holds a certificate of title;**
- b. he purchased the property in good faith;**
- c. he had no knowledge of the fraud;**

- d. he purchased for valuable consideration;
- e. the vendors had apparent valid title;
- f. he purchased without notice of any fraud;
- g. he was not party to any fraud."

84. The 4th Defendant on the other hand testified that upon being approached by the 1st Defendant, he entered into an Agreement for Sale of the suit property. The agreed purchase price was KShs. 1,700,000/- but has produced no evidence that the said amount was paid. Even when the Ministry of Housing wrote to him to pay the validation fee of KShs. 3,225,000/-, the 4th Defendant can only prove payment of the sum KShs. 550,000/- which can only mean that the purported transaction was not validated.
85. This court agrees with the Plaintiff that the title obtained by the 1st, 2nd and 3rd Defendants and subsequently transferred to the 4th Defendant was improperly acquired. The title issued to the 1st, 2nd and 3rd Defendants over the suit property was null ab initio. Consequently, the 5th Defendant acted illegally and fraudulently, contrary to the provisions of the repealed Government Lands Act (Cap 280), when he issued a Grant to the 1st, 2nd and 3rd Defendants. This fraud is not only documented vide the judgment of the criminal case, but also the letter dated 15th June, 2005, produced as PEX 13, which threatened disciplinary action to be taken against the 1st Defendant for his actions of allocating the suit property herein. Flowing from the foregoing, this court find that both the Letter of

Allotment dated 26th March, 1999 and the title issued thereunder, being Grant No. I.R. 93236 are invalid, null and void.

86. What recourse does the Plaintiff have in relation to the invalid title? Section 80 of the Land Registration Act, 2012 provides that:

“Section 80. Rectification by order of Court

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

(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default.”

iv. **What reliefs can this court issue?**

(a) Cancellation of the Letter of Allotment, the Grant No. I.R 93236 and the transfer to the 4th Defendant

87. The Court of Appeal in *Chemey Investment Ltd vs Attorney General & 2 others (2018) eKLR* categorically stated that:

“Recently in, Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another, CA No. 298 of 2013, this Court explained the situation as follows:

“While we agree with the appellants that title registered under the Registered Land Act was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows... The effect of the above provision is that the court had power to order rectification, save in the case of a first registration, where the registration was obtained by fraud or mistake to which the registered person was party.”

(b) Mesne Profits

88. Under Order 21 Rule 13(1)(b) of the Civil Procedure Rules, this court has power to issue orders payment of mesne profits which have accrued on the property. The Court of Appeal in the case of *Attorney General vs Halal Meat Products Limited [2016] eKLR* considered when mesne profits could be awarded.
89. In the Plaintiff’s Submissions, Counsel calculated mesne profits based on the rent paid by the last government tenant being KShs. 9,500/- per month for 18 years, being the number of years the 4th Defendant has had possession of the suit property

and asked that the sum of KShs. 2,052,000/- be awarded. Until this court made this finding, the 4th Defendant's title had not been declared null and void. Consequently, I decline to punish the 4th Defendant by awarding any mesne profits.

(c) Permanent injunction

90. Flowing from the forgoing analysis, from the date of this judgement, the 4th Defendant who has been and still remains in possession of the suit property is a declared a trespasser within the meaning of Section 3 (1) of the Trespass Act, Cap 294. That being the case, the 4th Defendant cannot continue to occupy or possess the suit property. The Plaintiff is entitled to the issuance of an order of permanent injunction.

(d) Personal liability for breach of fiduciary duty

91. The 5th Defendant entered appearance and filed a defence but did not participate in these proceedings. He failed to offer any evidence to controvert the accusations levelled against him relating to his conduct as the Commissioner of Lands, which inevitably gave rise to this suit. This court holds him liable for breach of duty and breach of the public trust bestowed on him. In the case of *Jones v Swansea City Council (1990) 3 All ER 731* it was held that:

“the essence of the tort as I understand it is that someone holding public office has misconducted himself by purporting to exercise powers which were conferred upon him not for his personal advantage but for the benefit

of the public good or a section of the public, either with intent to injure another or in the knowledge that he was acting ultra vires”.

92. The liability of the 5th Defendant is personal and cannot be transferred to his office. It cannot be said that he was acting in the course of his employment as the terms of his employment did not include acting contrary to the law. Had there been an express relief sought flowing from this breach of trust and fiduciary duty, the court may have considered granting it. However, the Plaintiff did not make any such prayer. This court therefore will stop at the declaration that the 5th Defendant’s action were in breach of its fiduciary duty that was bestowed on him by the office he held.

(e) *Costs*

93. Section 27 provides that costs to follow the event but the Court has the discretion to rule otherwise. On the exercise of discretion by the court to award costs, the *Halsbury’s Laws of England; 4th Edition (Re-issue), {2010}, Vol.10. para 16* states:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”

94. The good reason that justify the departure from the general rule that ‘costs follow the event’ vary from case to case, and the Supreme Court of Kenya in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others {2014} eKLR* observed that:

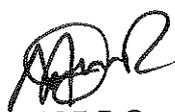
“In the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs...”

95. This instant suit was initiated after the 1st Defendant acting for and on behalf of the 5th Defendant illegally allocated to himself, the 2nd and 3rd Defendant the suit property which was alienated government property since it had a government house standing on it. Later, the 5th Defendant proceeded to issue title in respect of the same while well aware the land was not available for allocation. Consequently, costs should be paid by the 1st and 5th Defendants. However, the 1st Defendant is already dead so costs shall be paid by the 5th Defendant.
96. In the circumstances, and based on the totality of the testimonies of the witnesses and evidence adduced, this court finds that the Plaintiff has proved its case. Judgement is thus entered for the Plaintiff on the following terms:

- (a) A declaration be and is hereby issued that the Letter of Allotment dated 26th March, 1999 allocating the 1st, 2nd and 3rd Defendants the land parcel referred to as L.R. No. 209/14216 (Nairobi) described in the letter as “UNS. RESIDENTIAL PLOT No. F SOUTH B NAIROBI” is null and void;

- (b) A declaration be and is hereby issued that the Grant No. IR 93236 registered on 2nd November, 2002 in respect of L.R. No. 209/14216 (Nairobi) in the name of the 1st, 2nd and 3rd Defendants is null and void;
- (c) The Letter of Allotment dated 26th March, 1999 and the Grant No. IR 93236 registered on 2nd November, 2002 in respect of L.R. No. 209/14216 (Nairobi) in the name of the 1st, 2nd and 3rd Defendants is hereby revoked;
- (d) The Transfer to the 4th Defendant in respect of L.R. No. 209/14216 (Nairobi) and the Title issued thereunder is hereby revoked;
- (e) A permanent injunction be and is hereby issued restraining the Defendants, their servants and/or agents or tenants from alienating, encumbering, disposing off, wasting and trespassing upon or in any other way interfering with the land parcel referred to as L.R. No. 209/14216 (Nairobi).
- (f) The 4th Defendant to surrender vacant possession to the Plaintiff within 45 days hereof. In default, the Plaintiff is at liberty to evict using lawful means.
- (g) Costs of this suit shall be borne by the 5th Defendant.

Dated, Signed and Delivered at Nairobi this 14th day of December 2023


A. OMOLLO

JUDGE