



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI CITY

COURT NAME: MILIMANI ENVIRONMENT AND LAND COURT

CASE NUMBER: ELCC/E129/2022

CITATION: GIRAFFE VIEW ESTATE LIMITED VS ETHICS AND ANTI-CORRUPTION COMMISSION AND NAIROBI CITY COUNTY AND 5 OTHERS

JUDGMENT

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. E129 OF 2022**

**GIRAFFE VIEW ESTATE LIMITED.....PLAINTIFF**

**VERSUS**

**ANTONIE GERAD JEMEAU.....1<sup>ST</sup> DEFENDANT**

**DISMUS ARORI.....2<sup>ND</sup> DEFENDANT**

**TYLOR ADFORCE EA LIMITED.....3<sup>RD</sup> DEFENDANT**

**NAIROBI CITY COUNTY GOVERNMENT.....4<sup>TH</sup> DEFENDANT**

**NATIONAL LAND COMMISSION.....5<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....6<sup>TH</sup> DEFENDANT**

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

**JUDGMENT**

1. The plaintiff is a company formed to manage an estate known as Giraffe View Estate on behalf



of its share holders who are residents and registered owners of various sub lessees in parcel L.R, 2250/70 in Karen. It filed this suit through a plaint dated 4.4.2022 contending that an adjustment property L.R. 2270/71 (hereinafter, the suit parcel) is public land which has fraudulently, illegally and un-procedurally been alienated in favour of the 1<sup>st</sup> and the 2<sup>nd</sup> defendant.

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

**i) A declaration that the Grant, Transfer and or disposition of public land known as of LR No. 2250/71 measuring about 0.02900 hectares situate along Mukoma Road in Karen within Nairobi city County to the 1<sup>st</sup> Defendant was illegal, unlawful, unprocedural, fraudulent and corrupt hence a nullity and void abinitio.**

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

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

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

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



**vi) Costs of this suit**

**vii) Any other relief that his Honourable Court deems fit.**

1. The suit is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants vide their statement of defence dated 20.9.2022 where they aver that the suit property has never been public land. They contend that the plaintiff has no legal claim over the suit property and wants to fraudulently take over possession of the same for their personal use.
2. The 3<sup>rd</sup> defendant did not enter appearance in this matter.
3. The 4<sup>th</sup> defendant filed a statement of defence dated 29.5.2023 averring that the suit land is public land reserved for a health facility, the same having been surrendered by the 3<sup>rd</sup> defendant. It contends that the said land is not available for allocation to private individuals.
4. The 5<sup>th</sup> defendant filed a statement of defence dated 29.9.2022 denying the claim of the plaintiff, but did not tender any evidence during the trial.
5. Similarly, the 6<sup>th</sup> defendant filed a statement of defence dated 20.2.2023 but did not tender any evidence.
6. The Interested party filed a statement of claim dated 14.9.2023 contending that the suit land is reserved for public use by the 4<sup>th</sup> defendant, hence the same was not available for allocation. It is averred that the suit property was acquired through a surrender following a subdivision scheme plan of parcel 2250/8/6 belonging to the 3<sup>rd</sup> defendant. The Interested party therefore prays for judgment to be entered in the following terms;

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

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

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

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

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

**f) Costs of the suit.**

*Case for the Plaintiff*

1. The case for the plaintiff was advanced by one witness namely **Benedict Clay (Pw1)** and was supported by the 4<sup>th</sup> defendant as well as the interested party. Pw1 introduced himself as a



director of the plaintiff and he adopted his witness statement dated 30.3.2022 as his evidence. He also produced the 8 documents in their list dated 4.4.2022 as Plaintiff's Exhibits 1-8. His evidence is that the plaintiff is a company which was established to manage the affairs of Giraffe Estate whose residents including Pw1 are owners of subleases of parcel **2250/70**, and that the plaintiff is the registered owner of the reversionary interest in the aforementioned parcel of land.

2. Pw1 gave a historical background of the dispute contending that the 3<sup>rd</sup> defendant was the registered owner of the large **parcel 2250/8** measuring 21 acres (the mother title) situated in Langata in Nairobi County. That around year 1974, the 3<sup>rd</sup> defendant applied and obtained approval from the 4<sup>th</sup> defendant to subdivide the mother title into 4 parcels namely; L.R NOS **2250/69, 2250/70, 2250/71 and 2250/8/6**. Parcel **2250/70** was then subdivided into 10 plots which were sold to the plaintiff. Parcel 2250/8/6 was surrendered by the 3<sup>rd</sup> defendant as public land reserved for a road. Similarly, parcel **2250/71** was also surrendered as public land reserved for construction of a public utility for the welfare of the public including the residents adjacent to the said plot. To this end, Pw1 availed various documents to support their claim including a copy of the title for parcel **2250/70** whose last entry indicates that the reversionary interest in the said parcel is registered in favour of the plaintiff.
3. That the plaintiff has fenced off the said suit parcel **2250/71** to guard it from land grabbers and trespassers, pending the actual utilization of the suit parcel by the 4<sup>th</sup> defendant.
4. Pw1 avers that in December 2017, the 3<sup>rd</sup> defendant attempted to take over the suit property by lodging a claim of historical land injustice against the 4<sup>th</sup> defendant, prompting the plaintiff to file the case; **Judicial Review ELC NO. 44 OF 2018**, of which, the court delivered a decision on 28.5.2020 to the effect that the suit land was public land.
5. That despite the fact that the suit land is public land reserved for a public purpose, the plaintiff discovered that on or about 22.3.2021, the 1<sup>st</sup> defendant purported to obtain a 99 year leasehold of the suit property with effect from 1.4.1996 through a Grant issued on 31.5.2021. That the 1<sup>st</sup> defendant then threatened to forcefully take over the suit property.
6. Pw1 further states that the 4<sup>th</sup> and 5<sup>th</sup> defendants who are custodians of public property have neglected and or absconded public obligation to protect public property and utilize the same since 1974 and have connived with the 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> defendants to unlawfully, illegally, irregularly, unprocedurally, fraudulently and through corrupt schemes alienated the suit land in favour of private persons.
7. That in light of the foregoing, the plaintiff lodged a complaint with the Interested party through a letter dated 28.3.2022, that is why they have joined the said entity in these proceedings.
8. On cross examination by the 4<sup>th</sup> defendant, Pw1 reiterated that the suit property had been surrendered for public utility.
9. On cross examination by the Interested party, Pw1 averred that he complained to the interested party because the 1<sup>st</sup> and 2<sup>nd</sup> defendants had attempted to take over the suit property by appearing at the gate of the plaintiff's estate where they had an official search certificate indicating that they were the registered owners of the suit land. He reiterated that the suit land was surrendered as public land and he was able to identify the surrender document at page 30 of the interested party's bundle of documents.
10. On cross examination by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, Pw1 stated that before the surrender, the suit land was owned by the 3<sup>rd</sup> defendant. He is aware that the land has never been utilized. He is not aware that the National Land Commission (NLC) had taken over the said land, and he is not aware of any ruling delivered by NLC. He is aware that a title was issued to the 1<sup>st</sup> and 2<sup>nd</sup> defendants.



*Case for the Interested Party*

1. The case for the Interested party was advanced by two witnesses (DW1 & DW2). Dw1 is Aloise Matoke who works with the County Government of Nairobi (4th defendant) as a Deputy Surveyor in the department of Built Environment and Urban Planning. He adopted his witness statement dated 14.9.2023 at page 9-11 of the interested party's trial bundle as his evidence. He produced the documents at page 75-78 of the same bundle as their D- exhibit 1.
2. His evidence is that the interested party requested the 4<sup>th</sup> defendant to avail particulars relating to various parcels including the suit land **2250/71**. That as per their records, their department of City Planning and Architecture had received a letter from NLC, indicating that NLC had received an application from the 3<sup>rd</sup> defendant requesting the suit land to revert back to it ( 3<sup>rd</sup> defendant) as it was not utilized for its intended purpose after surrender of over 20 years ago. The NLC wanted comments from the 4<sup>th</sup> defendant.
3. Dw1 recalls that he was requested by his Chief officer to attend a public hearing at NLC in regard to the suit land, of which Dw1 gave the position of the 4<sup>th</sup> defendant that the said land was public land and could not be surrendered back to the 3<sup>rd</sup> defendant.
4. That on 12.2.2015, the 3<sup>rd</sup> defendant wrote to the 4<sup>th</sup> defendant indicating that the suit land was indeed surrendered but had remained undeveloped and was making a request for the said land to revert back to them. That by a letter dated 19.3.2015, the 4<sup>th</sup> defendant declined the request, indicating that there was no time limit for the 4<sup>th</sup> defendant to utilize the suit land.
5. That on 8.4.2015, the 3<sup>rd</sup> defendant still did another request, this time round to the Minister for Urban Planning and Housing to have the decision of the 4<sup>th</sup> defendant rescinded, reviewed or set aside, of which the 4<sup>th</sup> defendant again emphasized that the land was for public utility and the Chief officer of health was directed to take possession of the said land.
6. Dw1 emphasized that parcel **2250/71** is a county public utility land as far as their records are concerned.
7. On cross examination by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, Dw1 averred that there was an approval of subdivision given to the 3<sup>rd</sup> defendant with a condition for surrender of some portion of the land. That once surrendered, the land belonged to the 4<sup>th</sup> defendant and was to be used for a health centre. However, the health centre was not constructed.
8. He reiterated that indeed the 3<sup>rd</sup> defendant did write to the 4<sup>th</sup> defendant on 8.4.2015 requesting for the suit land to revert back to them for the reason that it was not utilized for the intended purpose. He avers that there was a memo directing the Chief health officer to take possession of the suit property.
9. **DW2** is one **Mulki Omar** an investigating officer of the Interested Party and an advocate of the High Court of Kenya. He adopted his witness statement dated 16.9.2023 as his evidence and he produced the 27 documents in their trial bundle as their exhibits. He avers that he was tasked to investigate allegations of fraudulent transactions relating to the suit parcel **2250/71**. To this end, he conducted investigations through interviews, recording of statements and collection of documents.
10. That from the Director of Land administration, he gathered information that the suit land was a resultant subdivision of the mother title owned by the 3<sup>rd</sup> defendant. That on 24.3.1994, an instrument of surrender was registered between the 3<sup>rd</sup> defendant and the Commissioner of Lands for public utility purpose. However, after the surrender, the land was allocated to Dosana Holdings Limited and Janato Limited through a letter of allotment dated 18.1.1996.
11. That on 6.7.2000, the ministry of lands issued a letter indicating that the suit land was surrendered to the government hence there was no proper allocation, hence the letter of allotment was withdrawn.



12. That a search dated 21.3.2022 indicates that the suit parcel is registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as from 31.5.2021 with an I.R.NO. 234176. However, the said I.R. NO. was corresponding to a different parcel altogether that is L.R.NO.5908/812.
13. Dw2 also found a letter dated 19.9.2011 in which the 3<sup>rd</sup> defendant was writing to the Commissioner of Lands requesting for reversion of the suit land to them. However, the 4<sup>th</sup> defendant (by then the City Council of Nairobi) had affirmed that the suit parcel was for public utility and that the same could not be surrendered back to the 3<sup>rd</sup> defendant. Another request made by the 3<sup>rd</sup> defendant to the ministry of lands to set aside the decision of the 4<sup>th</sup> defendant bore no fruits.
14. Dw2 further stated that the 4<sup>th</sup> defendant also availed survey records relating to the suit parcel to him indicating that Survey plans were received at survey of Kenya on 22.4.1993 and assigned computation number 29371. The survey was processed and approved on 26.4.1993 for subdivision of the mother parcel 2250/8. He added that the suit parcel **2250/71** was surrendered as public land and registered as such on 24.3.1994, and the same was not available for allocation to third parties.
15. On cross examination by the plaintiff, Dw2 stated that the director of the 3<sup>rd</sup> defendant was one Frank Howett who allegedly died in the year 2013, but the agreement for sale of the suit parcel **2250/71** dated 15.1.2021 is between the 1<sup>st</sup> and 2<sup>nd</sup> defendants on one hand and Frank Howett on the other hand. He reiterated that the suit parcel was surrendered on 24.3.1994.
16. Dw2 further states that in the Judicial Review case No 44 of 2018 concerning the suit property, the 3<sup>rd</sup> defendant was the 2<sup>nd</sup> interested party, thus by year 2021 when the sale agreement for the suit land was being drawn, the 1<sup>st</sup> and 2<sup>nd</sup> defendants were aware that the suit parcel was public land.
17. On cross examination by the 1<sup>st</sup> and the 2<sup>nd</sup> defendants, Dw2 stated that they received a complaint from plaintiff's advocate stating the suit property was public land but there was a search certificate bearing the names of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as the registered owners. Dw2 further stated that when land is alienated as public land and it is not utilized, it remains public land for the Government to do as it pleases.
18. Dw2 also reiterated that the IR NO in the title held by the 1<sup>st</sup> and 2<sup>nd</sup> defendants corresponds to a different parcel No. 5908/813.

*Case for the 1<sup>st</sup> and 2<sup>nd</sup> defendants*

1. The case of the above defendants was advanced by the 1<sup>st</sup> defendant as Dw3 and 2<sup>nd</sup> defendant as Dw4. **Dw3, Antonine Gerald Jemeau** adopted his witness statement dated 30.11.2023 as his evidence . He also produced the 5 documents in their list dated 24.1.2024 as their exhibits 1-5. His evidence is that he worked for the 3<sup>rd</sup> defendant from year 1978 until year 2013 when its director died. That sometimes in year 2002, the 3<sup>rd</sup> defendant had financial difficulties, but the director, Frank Howet, urged him to continue working, intimating that he would dispose off some land in order to pay him. He was then given a Power of Attorney by lawyers of Mr. Frank and was told to pursue the disposal of the parcel in order to pay accruing debts.
2. He avers that since he had all the necessary documents, he followed up the matter with the ministry of lands before the death of Frank and was therefore issued with a title. He was to dispose off the land in order to pay outstanding debts to 3<sup>rd</sup> parties including the 2<sup>nd</sup> defendant.
3. On cross-examination by the plaintiff, Dw3 stated that he worked for the 3<sup>rd</sup> defendant whose director was one Frank Howet who died on **15.5.2013**. He avers that the suit parcel **2250/71** was a subdivision of the larger 22 acres parcel, and that the plaintiff's land was also part of this larger parcel.



4. Dw3 admits that he was part of the agreement dated 15.7.2021 where he was claiming to be the donee of a Power of Attorney from Frank Howet, but the said Power of Attorney which was given to him before the death of Frank has no stamp of registration. He was told to sell the land, and that is what he tried to do in the agreement of year 2021.
5. Dw3 further avers that it is one Dulcie Spencer a sister of Frank Howet who got the title for him as she had been trying to get the title from the ministry before the death of Frank. She apparently died in December 2021.
6. Dw3 is aware that the mother title belonged to the 3<sup>rd</sup> defendant, and that the suit parcel was transferred to the Government in year 1994, however, as the land was idle, the 3<sup>rd</sup> defendant got it back. He was given the said land by the 3<sup>rd</sup> defendant as compensation for his duties and severance pay.
7. On cross examination by the 4<sup>th</sup> defendant, Dw3 stated that he is aware of the surrender of the suit land to the Government, but Frank requested the land to revert back to him. He is also aware that the 4<sup>th</sup> defendant responded to Frank's request indicating that the land was public land.
8. On cross examination by the Interested party, Dw3 stated that the mother title consisted of 22 acres, of which the conditions for subdivision was the surrender of a portion thereof. However, Frank found a portion which was not surrendered and was undeveloped and he applied for the same from the ministry, and he was given back the land by the time he died in year 2013. He contends that having had the title by year 2013, the 3<sup>rd</sup> defendant could not have been asking for the same in year 2015.
9. **Dw4, Dismas Ondieki Arori** introduced himself as someone who does mining and he adopted his witness statement dated 30.11.2023 as his evidence. He avers that before Frank died, he called him telling him that he had a piece of land he was to give the 1<sup>st</sup> defendant to dispose off for purposes of paying debts including the sum of Ksh 8.7 million owed to Dw4 by Frank. That was the basis upon which he signed the agreement dated 15.1.2021, and was also the basis of his name appearing in the title.
10. On cross examination by the plaintiff, Dw4 stated that he was contacted by the 3<sup>rd</sup> defendant, specifically by Frank and the 1<sup>st</sup> defendant to supply them with mining materials known as side pox. He supplied the same between year 2009-2011, and was owed the sum of Ksh 8.7 million. In 2011, Frank called him, telling him that he gave the 1<sup>st</sup> defendant a piece of land to sell to recover the debt.
11. That when Frank died, Dw4 inquired from the sister of Frank as to how he was to be paid, that is when she told him that they do the agreement. He avers that in the said agreement of 15.6.2021, the 1<sup>st</sup> defendant was exercising his authority as a donee of a Power of Attorney. He understands that Frank died in year 2013.
12. He went on to state that it was Frank Howet, his sister and the 1<sup>st</sup> defendant who called him in year 2018 (Dw4 corrected the year to be 2008) to talk about the land, but he knows nothing about the surrender of the land.
13. Dw4 further stated that he first saw the title in his name in year 2022, but as far as he is concerned, he was to get his money and not the title, hence the title can be cancelled.
14. On cross-examination by the interested party, Dw4 stated that the land is located at Karen, that he has no interest in the said land as it is not his land and that what he wants is his money from the 1<sup>st</sup> defendant as he is the one who took him to that company.

### *Submissions*

1. The submissions of the plaintiff are dated 17.10.2024 where it is argued that the suit property

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

2. It was submitted that the 3<sup>rd</sup> defendant could not sustain or pass any interest in the suit land. Thus the acquisition of a title by the 1<sup>st</sup> and 2<sup>nd</sup> defendants is a nullity and unlawful in terms of the provisions of Article 40 ( 6) of the Constitution, and should hence be cancelled. To this end, the plaintiff has cited a raft of authorities including; **Dina management limited v. County Government of Mombasa & 5 Others (Petition8 (E010) of 2021) (2023) KESC 30 (KLR) (Constitution and Human Rights) (21April 2023) (Judgment), Munyu Maina v Hiram Gathiha Maina (2013) Eklr, Samuel Kamwere vs Land Registrar, Kajiado (2015) eklr.**
3. The submissions of the Interested party are dated 29.10.2024, where they echo the arguments proffered by the plaintiffs, emphasizing that having surrendered the suit land to the government, the 3<sup>rd</sup> defendant could not have claimed it back. To buttress their arguments, the Interested Party too has relied on several authorities including; **Kenya Anti Corruption Commision v Frann Investment Limited & 6 Others (2020) Eklr, Chemey Investment Ltd v Attorney General & 2 others( 2018) Klr.**
4. The submissions of the 4<sup>th</sup> defendant are dated 24.10.2024 where they too echo the arguments proffered by the plaintiff and the interested party, emphasising that once surrendered and set aside for a particular public purpose, the suit land was not available for re-allocation. The 4<sup>th</sup> defendant has similarly relied on a number of authorities including; **Misc Civil suit no. 273 of 2007 Republic v Comissioner of Lnds & 4 Others , Exparte Associated Steel Limited.**
5. The submissions of the 1<sup>st</sup> and 2<sup>nd</sup> defendant defendants are dated 29.10.2024 where they contend that the suit land is private land, having been so alienated by the National Land Commission in their favour. It was further argued that during subdivision, the 3<sup>rd</sup> defendant had allocated the suit land to the 1<sup>st</sup> and 2<sup>nd</sup> defendants as payment for their dues, but its director unfortunately died. Nevertheless, he had applied for the land to revert back to him as it was never utilized for its purpose.
6. In support of their arguments, the 1<sup>st</sup> and 2<sup>nd</sup> defendants have cited several authorities including; **Republic v Commissioner of Lands & 4 others Exparte Associated Steel Motors ( 2014) eklr, Laban OmuhakaOtumbula v Truphosa Okutoyi ( 2019) eklr.**
7. The submissions of the 6<sup>th</sup> defendant (the Attorney General) are dated 19.11.2024. A perusal of the same reveals that this entity is submitting on factual issues (see paragraph 10, 17-19, 22 etc in the body of submissions), yet this entity did not proffer any evidence. It is unacceptable for the 6<sup>th</sup> defendant to purport to adduce evidence in the platform of submissions. In the circumstances, the said submissions are hereby disregarded.

## DETERMINATION

1. There is no controversy that the suit property **L.R.NO.2250/71** came to be from the subdivision of the larger mother parcel **2250/8** measuring about 22 acres which was owned by the 3<sup>rd</sup> defendant. There is also no controversy that the plaintiff occupies an adjustment





property **L.R. No. 2250/70** also arising from the subdivision of the mother title. It is also quite apparent that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have a certificate of title for the suit property **L.R. NO.2250/71** with effect from 1.4.1996, but the date of issuance of the title is not known as the second page of the title was not availed. The two defendants however have a lease for the suit property issued on **31.5.2021**.

2. The question therefore falling for determination is whether the suit land is public land or whether it is private land owned by the 1<sup>st</sup> and 2<sup>nd</sup> defendants, and what reliefs are available.
3. The definition of public land is to be found under **Article 62 (1) of the constitution** and includes; *“unalienated government land and land which no individual or community ownership can be established by any legal process. Article 62 (2) thereof stipulates that:*

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

1. **Article 62 (4)** provides that;

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

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

**“Under Section 2 of GLA, unalienated land was defined as Government land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment”**

1. The evidence proffered by PW1, Dw1 & 2 was that the suit property was surrendered to the government during the subdivision of the mother title parcel 2250/8 in 1994. The instrument of surrender has been availed by the interested party (page 30 of their bundle), which shows that the 3<sup>rd</sup> defendant was surrendering the suit parcel to the government.
2. The document at page 33-40 of the same bundle captures historic details of the mother title with its resultant subdivisions. Entry no 20 shows that the mother title was transferred to the 3<sup>rd</sup> defendant on 17.5.1972. Entry no. 28 dated 2.8.1993 captures approval of subdivision of the mother title resulting in parcel 2250/69 transferred to Scot on 2.8.1993 at entry no 29, entry 30 is not legible, entry 31 reads; **“ Surrender to the Government of the Republic of Kenya in respect of L.R.NO.2250/71 on 16.12.1993.”**, while the next entry relates to parcel **2250/70**.
3. The 2<sup>nd</sup> defendant stated that he doesn't know about the surrender, but again, he also doesn't appear to know how the suit land came to be. And even though his name is on the title, he avers that his interest was to be paid money owed to him by the 3<sup>rd</sup> defendant. He has no interest in the suit land.
4. As for the 1<sup>st</sup> defendant, he stated that he was well conversant with the history of the land. During cross examination, he stated thus;

**“I know that the land had been transferred to the government in 1994....”**

1. Another point for consideration is the decision made in the case Judicial Review **Milimani**



**ELC NO.44 OF 2018 R V NLC Exparte Giraffe View Estate ltd, County Government of Nairobi & 5 Others Interested Parties** where the Exparte applicants ( current plaintiff) had sought orders inter-alia, to stop the National Land Commission from hearing a complaint lodged by the current 3<sup>rd</sup> defendant amongst others to the effect that the suit land was never surrendered to the Government. In a decision dated 28.5.2020, the court found that **“the suit properties ( read parcels 2250/71 and 2250/8/6) are public properties.....”**

2. The above decision has not been set aside in any manner.
3. This far, it is clear that the suit land was public land, the same having been surrendered by the 3<sup>rd</sup> defendant during the subdivision of its mother parcel **2250/8**.
4. The next question is did the suit land revert back to the 3<sup>rd</sup> defendant after the surrender?. Still on cross examination, the 1<sup>st</sup> defendant had stated that;

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

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

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

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

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

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

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

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



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

TAYLOR ADFORCE (EA)

DIRECTOR

F.H HOWITT

P.O. BOX 43165

NAIROBI

REF: PLOT NUMBER 2250/71

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

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

Signed

SAMMY WEKESA

FOR PERMANENT SECRETARY

CC. The Permanent Secretary

Director of Administration

Chief Land Registrar

1. The above letter does not indicate under which law the 3<sup>rd</sup> defendant was given a go ahead to commence the titling process. What more, there is no iota of evidence tendered by the 1<sup>st</sup> and the 2<sup>nd</sup> defendants to demonstrate how the process culminating in the issuance of title to them was conducted.
2. It is worthy to note that the 1<sup>st</sup> defendant has the exact date when the director of the 3<sup>rd</sup> defendant, Frank Howet died. It was on 15.5.2013. If that be the case, on what basis did the two defendants proceed to make an agreement dated 15.1.2021, 8 years later!
3. The 1<sup>st</sup> defendant contends that he was the donee of the Power of Attorney given to him by Frank as at the time he was making the agreement to sell the land to himself in year 2021. However, that alleged Power of Attorney was null and void in view of the fact that the alleged donor was deceased. In the case of **Meru & 3 others v Meru (Civil Appeal 9 of 2018) [2023] KECA 1600 (KLR) (27 October 2023) (Judgment) Neutral citation: [2023] KECA 1600 (KLR)**, the Court of Appeal stated thus;

**“On whether the power of attorney survives the death of the donor, there is consensus by both courts below that the power of attorney is extinguished upon death of the donor. We**

**agree with that finding” .**

1. This far, it is crystal clear that there is no evidence of the suit land reverting back to the 3<sup>rd</sup> defendant or to his allegedly donee of a Power of Attorney. It follows that the issuance of a title to the 1<sup>st</sup> and 2<sup>nd</sup> defendants was unlawful, illegal and un-procedural.
2. The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. This position is buttressed by the provisions of **Article 40 ( 6 ) of the Constitution** which stipulates that;

**“The Rights under this Article do not extend to any property that has been found to have been unlawfully acquired”**

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

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

1. I conclude that the title held by the 1<sup>st</sup> and the 2<sup>nd</sup> defendants is not protected under the laws of Kenya.
2. What then is the relief available?. In seeking the cancellation of the aforementioned title, the plaintiff avers that all the transactions carried out on the suit property post the surrender are a nullity. I do agree. In the case of **Republic vs Minister For Transport & Communication & 5 Others Ex Parte Waa Ship Garbage Collector & 15 Others Mombasa HCMCA No. 617 of 2003 [2006] 1 KLR (E&L) 563**, cited in **Kenya Anti-Corruption Commission v Online Enterprises Limited & 4 others [2019] eKLR Maraga, J** (now retired Chief Justice) expressed himself as follows:

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

1. This far, I come to the conclusion that the title issued to the 1<sup>st</sup> and the 2<sup>nd</sup> defendants should be nullified.
2. It is however disheartening to see that the entities which are the custodian of land records and are obligated to protect public property (read the **Attorney General** and the **National Land Commission**) maintained a studious silence, fence sitting during the trial , failing to avail their records relating to the suit property, with the Attorney General and only making a robust presence at the platform of submissions!.
3. I must also point out that although the 1<sup>st</sup> and 2<sup>nd</sup> defendants had proffered a joint defence, it became clear during the trial that the person who was involved in the transactions relating to the suit property was the 1<sup>st</sup> defendant. He admitted that much. The 2<sup>nd</sup> defendant maintained



a position that he had no interest in the suit property, as all he wanted was to be paid his debts. He also stated that he was shown the title by the 1<sup>st</sup> defendant in year 2022, and according to him, that title can be cancelled.

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

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

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

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

**iv) An order of permanent injunction is hereby issued restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants whether by himself or through his servants, agents, employees, assigns or anybody claiming under them from entering or in any way dealing or interfering with the property known as LR No. 2250/71.**

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

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

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Litano for Plaintiff

Ms. Umayi for 4<sup>th</sup> Defendant

Ms. Warini for 5<sup>th</sup> Defendant

Ms. Kubai for 6<sup>th</sup> Defendant

Ms. Kwanya holding brief for Mange for 1<sup>st</sup> & 2<sup>nd</sup> Defendants

Kemunto holding brief for Mercy Biwott for the Interested Party

SIGNED BY: HON. LADY JUSTICE L. MBUGUA





THE JUDICIARY OF KENYA.  
MILIMANI ENVIRONMENT AND LAND COURT  
ENVIRONMENT AND LAND COURT  
DATE: 2025-02-12 15:24:01

