



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KWALE COUNTY

COURT NAME: KWALE ENVIRONMENT AND LAND COURT

CASE NUMBER: ELCC/6/2021

ETHICS AND ANTI-CORRUPTION COMMISSION VS GALERIUS INVESTMENTS LIMITED AND
JABU SALIM MOHAMED AND 3 OTHERS

JUDGMENT

BEFORE HON.JUSTICE L.L. NAIKUNI

I. Preliminaries

1. The Judgement of this Honourable Court pertains to the the claim by the *Ethics and Anti-Corruption Commission (EACC)*, the Plaintiff herein, who instituted this suit against *Galerius Investments Limited, Jabu Salim Mohamed, Zablon Angwata Mabea, Wilson Gacanja*, and the *Chief Land Registrar*, the Defendants herein, by way of a *Plaint* dated 16th May, 2019. The suit was premised under the provisions of Sections 24, 25, 26 and 80 of the Land Registration Act, No. 3 of 2012; Sections 13 and 150 of the Land Act, No. 6 of 2012; Sections 106 to 09 of the Land Registration Act, No. 3 of 2012; Section 173(1) of the Evidence Act, Cap 80 Laws of Kenya; and all other enabling provisions of the law. The Plaintiff seeks recovery of public land known as Land Reference Number Kwale/Diani Beach Block/1072 (Hereinafter referred as “The Suit Property”), alleged to have been fraudulently and irregularly alienated from government ownership. Ideally, according to several Survey Plans (Maps), it was un - alienated and Surveyed public land as road reserve connecting to the Indian Ocean beaches. Hence, for this fundamental reason not available for alienation to individual nor private purposes.
2. Upon service, the Defendants opposed the claim by filing the following



pleadings:-

- a) The 1st Defendant through its statement of defence maintained that it lawfully acquired the property through a lease issued by the Commissioner of Lands;
- b) The 2nd Defendant through his statement of defence denied any fraudulent conduct in the preparation of the Part Development Plan.
- c) The 3rd Defendant filed his Defence dated 10th January, 2020, denying allegations of fraud and asserting that the allocation was procedurally regular.
- d) The 4th Defendant filed a Statement of Defence dated 20th October, 2019, contending that during his tenure as the then Commissioner of Lands he acted strictly within the statutory mandate of the repealed Government Lands Act Cap. 280 (Now Repealed), and challenged the constitutionality of proceedings brought against him nearly two decades after leaving office.
- e) The 5th Defendant, through the Honourable Attorney General, denied any fraudulent collusion and asserted that the Land Registrar acted within his statutory authority.

II. The Description of the Parties

3. The Plaintiff, the Ethics and Anti-Corruption Commission (EACC), is a statutory body corporate established under Section 3 of the Ethics and Anti-Corruption Commission Act, No. 22 of 2011, mandated under Section 11(j) thereof to institute and conduct proceedings in court for purposes of recovery or protection of public property, confiscation of proceeds of corruption, and payment of compensation. The Plaintiff brings this suit in exercise of its constitutional and statutory mandate to recover public land alleged to have been fraudulently alienated.
4. The 1st Defendant, *Galerius Investments Limited*, is a limited liability company incorporated in the Republic of Kenya under the provisions of the Companies Act, Cap. 486, carrying on business within Nairobi. It is sued as the entity in whose favour the suit property was registered and a Certificate of Lease issued.
5. The 2nd Defendant, Jabu Salim Mohamed, is an adult male of sound mind residing in the Republic of Kenya. At the material time, he was a District Physical Planner alleged to have unlawfully and fraudulently prepared and uttered a false Part Development Plan (PDP No. 413.KWL.394) to facilitate



the irregular alienation of the suit property.

6. The 3rd Defendant, Zablon Angwata Mabea, is an adult male of sound mind residing in the Republic of Kenya. At the material time, he was a public officer in the Ministry of Lands alleged to have corruptly and unlawfully facilitated the allotment of the suit property to one Juma Boy Juma, despite its reservation as a public beach access road.
7. The 4th Defendant, Wilson Gacanja, is an adult male of sound mind residing in the Republic of Kenya. He served as the Commissioner of Lands between years 1989 and 1999 and is sued for having purportedly issued a lease over the suit property in favour of the 1st Defendant, allegedly in excess of his statutory powers and in breach of fiduciary duty owed to the public.
8. The 5th Defendant, the Chief Land Registrar, is a public officer appointed under Section 12(1) of the Land Registration Act, 2012, responsible for discharging statutory duties outlined under Section 14 of the said Act, including maintenance of land registers. The 5th Defendant is sued in her official capacity as custodian of the land register in respect of the suit property.

III. Court Directions before Hearing

9. Upon perusal of the Complaint dated 16th May, 2019, the 4th Defendant's Statement of Defence dated 20th October, 2019, and the 3rd Defendant's Defence dated 10th January, 2020, together with the interlocutory applications filed by the parties, this Honourable Court directed that the Plaintiff be granted leave of fourteen (14) days to file and serve a supplementary list of documents, including certified copies of survey plans, the impugned Part Development Plan No. 413.KWL.394, allotment letters, and any additional witness statements in support of its claim.
10. The Defendants were correspondingly granted fourteen (14) days to file and serve any further documents, witness statements, or supplementary affidavits arising from the Plaintiff's pleadings and lists of documents. In particular, the 4th Defendant was directed to file any documentary evidence supporting his assertion that the lease was issued within the statutory framework of the repealed Government Lands Act, while the 3rd Defendant was directed to file any correspondence or approvals relied upon in the allotment process.
11. The Court further ordered that the matter be mentioned on 11th May, 2020 for purposes of confirming compliance with the filing directions, and



thereafter fixed for pre-trial on 29th September, 2020. The Plaintiff was directed to pay Court adjournment fees of Kenya Shillings Three Thousand (Kshs. 3,000/-) before the next mention date.

12. Upon compliance with pre - trial directions under the provision of Order 11 of the Civil Procedure Rules, 2010, the matter was scheduled for full hearing. The Plaintiff's case was set down for hearing on 4th March, 2025, with liberty to call its witnesses and produce documentary evidence, while the Defendants were accorded corresponding dates to present their defence and produce documents in opposition.

IV. The Plaintiff's Case

13. From the pleadings before Court, at all material times pursuant to its aforesaid legal mandate, the Plaintiff launched investigations into allegations regarding corrupt, fraudulent and illegal alienation of parcel of land described as Kwale/Diani Beach Block/1072 - the suit property); with a view of recovering the same on behalf of the Government of Kenya.
14. The Plaintiff averred that in the course of its investigations its investigators conducted investigative interviews and recorded written statements accordingly and the said investigators also requested and obtained copies of public documents and documentary evidence from public officers and public institutions. The Plaintiff averred that in the course its aforesaid investigations established the following primary facts, that:-
 - a) Galerius Investments Limited (1st Defendant herein) was incorporated on 21st June, 1993.
 - b) On 10th August, 1994, a Certificate of Lease was purportedly issued to 1st Defendant herein in respect to suit property and the said Certificate of Lease was purportedly issued subject to the provisions of the Government Lands Act (repealed) and the Registered Land Act (repealed).
 - c) In purported exercise of powers vested upon the office of the then Commissioner of Lands, facilitated and caused to be granted to the 1st Defendant, a lease over the suit property for a term of 99 years from the 1st July, 1994.
 - d) On or about the 14th June, 1994 the 2nd Defendant unlawfully and fraudulently prepared and uttered a false Part Development Plan No:413.KWL.394 with intention that same would be used to facilitate irregular and fraudulent allocation and/or alienation of the suit property.



- e) On or about the 23rd June, 1994 the 3rd Defendant corruptly, fraudulently and unlawfully facilitated allotment of the suit property in favour of the one Boy Juma Boy.
 - f) On 2nd August, 1994 Wilson Gacanja (the 4th Defendant herein) purportedly issued in favour of 1st Defendant; a Lease over the suit property for a term of 99 years from the 1st May, 1995.
 - g) The Part Development Plan prepared by 2nd Defendant on 14th June, 1994 and subsequently purportedly approved on 26th June, 1994 was irregular and unlawful.
 - h) The suit property was not available for allocation, at the material time that the 3rd Defendant purportedly allotted it to Boy Juma Boy.
 - i) The suit property was not available for alienation, at the material time that the 1st Defendant purportedly acquired it.
 - j) At all material time to this suit, the suit property was and still remains a public land, belonging to the Government of Kenya having been reserved for public beach access road and investigations did not disclose any evidence that proves otherwise
15. The Plaintiff contended that since the allocation of the suit property and the registration of the same in the name of the 1st Defendant as proprietor of the suit property was fraudulent, illegal, null and void ab initio it could not confer any estate, right or interest upon the 1st Defendant or any other person.
16. The Plaintiff asserted that at all material times, the 1st, 2nd, 3rd and 4th Defendants were actually or constructively aware that the suit property was reserved for government use and that the same was not available for allocation or alienation outside the confines of the Government Lands Act Cap. 280 (Now repealed) and the Registered Land Act, Cap. 300 (Now repealed).
17. The Plaintiff relied on the following particulars of Defendants knowledge:-
- a. The 1st, 2nd, 3rd and 4th Defendants shut their eyes to the obvious and failed to make inquiries for fear of getting the correct information from the relevant public offices.
 - b. The provisions of Government Land Act governing the procedure to be followed for the allocation and alienation of Government Land (Suit Property).
18. It was the Plaintiff's case that the 1st, 2nd, 3rd and 4th Defendants jointly and



severally facilitated and willfully participated in a corrupt enterprise with the corrupt aim of fraudulently acquiring public property from Government of Kenya through fraudulent and corrupt means. The Plaintiffs averred that the 1st, 2nd, 3rd and 4th had actual knowledge or ought to have known though due diligence that the defects in the title held by one Boy Juma Boy and as such the 1st, 2nd, 3rd and 4th Defendants assumed the risk of all legal consequences appurtenant allocation and subsequent alienation of the suit property in favour of the 1st Defendant.

19. By reason of the matters aforesaid, the allocation of the suit property and the house thereon to the 1st Defendant was done unlawfully, corruptly and contrary to the provisions of the Government Lands Act (repealed) and Registered Land Act (repealed).
20. The Plaintiff relied on the following particulars of fraud, irregularity against the 1st, 2nd, 3rd and 4th Defendants:-
 - a) The 1st Defendant fraudulently acquired the suit property when she knew or ought to have known that the suit property was reserved for utility as public beach access road and was therefore not an un-alienated Government land.
 - b) The 1st Defendants fraudulently acquired the suit property when she knew or ought to have known that that the allocation was done in blatant disregard and in excess of the Government land.
 - c) At all material times the 1st Defendant knew or ought to have known that the suit property was reserved for utility as public beach access road.
 - d) The 1st Defendant fraudulently acquired the suit property when she knew or ought to have known that the Government of Kenya/County Government of Kwale has never surrendered or relinquished the suit property as to be available or allocation to any person.
 - e) The 2nd Defendant lacked the statutory authority to prepare Part Development Plan for purposes of alienating the suit property in favour of the 1st Defendant or any other person for that matter.
 - f) The 3rd Defendant lacked the statutory authority to allote the suit property one Boy Juma Boy or any other person for that matter.
 - g) The 4th Defendant's action of facilitating fraudulent acquisition of the suit property by the 1st Defendant was ultra vires under the Government Lands Act (repealed) and Registered Land Act (repealed) consequently null and void ab initio



21. The Plaintiff averred that at considering the aforesaid pleaded-facts, the Defendants were actually or constructively aware that the suit property was reserved for government use and that the same was not available for alienation outside the confines of the Government Lands Act (repealed) and the Registered Land Act (repealed).
22. The Plaintiff relied on the following particulars of Defendants knowledge:-
 - a. The 1st, 2nd, 3rd and 4th Defendants shut their eyes to the obvious and failed to make inquiries for fear of getting the correct information from the relevant public offices.
 - b. The provisions of Government Land Act governing the procedure to be followed for the allocation of Government Land.
23. The provisions of Government Land Act governing the procedure to be followed for the allocation of Government Land. The Plaintiff avers that the 1st Defendant jointly and severally through a joint corrupt enterprise, unlawfully and fraudulently acquired title to the suit property, thereby unjustly enriching itself to the financial detriment of the Government of Kenya.
24. The Plaintiff relied on the following particulars of unjust enrichment by the 1st Defendant:-
 - (a) The 1st Defendant acquired the suit property contrary to the provisions of the Government Land Act (repealed).
 - (b) The 2nd, 3rd and 4th Defendants' failure to justify why they facilitated, processed and approved illegal alienation of the suit property in favour of the 1st Defendant.
25. It was the Plaintiff's case that the 2nd, 3rd and 4th Defendants as public officers then were grossly negligent in his course of employment, thus leading to illegal and fraudulent alienation of the suit property to the detriment of the Government of Kenya. The Plaintiff relied on the following particulars of negligence against the 2nd, 3rd and 4th Defendants:-
 - a) Failure to notice and take remedial action over the fact that the suit property had been irregularly and unlawfully alienated to the 1st Defendant.
 - b) Willfully facilitating the alienation of the suit property in favour of the 1st Defendant.
 - c) Failing to stop the irregular and unlawful alienation of the suit property to the 1st Defendant.



- d) Failing to report to the Kenya Anti-Corruption Commission/Ethics and Anti-Corruption Commission over the apparent irregular and unlawful alienation of the suit property to the 1st Defendant
26. The Plaintiff averred that the 4th Defendant, as the then Commissioner of Lands, held an office in the public service; hence they stood in a fiduciary position vis-à-vis all Government Land and the public and as such by purporting to alienate the suit property to the 1st Defendant fraudulently, illegally and in abuse of his office, the said 4th Defendant acted in breach of his duties as a fiduciary by virtue of being public officers.
27. The Plaintiff relied on the following particulars of fraud, irregularity, illegality and breach of trust, abuse of office against the 4th Defendant:-
- i. The 4th Defendant knew or ought to have known that the suit property were not available for alienation outside the confines of the Government Lands Act (repealed) and the Registered Land Act (repealed).
 - ii. The 4th Defendant knew or ought to have known that the suit property were not available for alienation in favour of the 1st Defendant without a valid Part Development Plan.
 - iii. The 4^m Defendant knew or ought to have known that the suit property were not available for alienation in favour of the 1st Defendant without a duly registered Part Development Plan.
 - iv. The 4th Defendant recklessly failed to comply with the relevant statutes and regulations governing the administration and alienation of Government land.
 - v. The 4th Defendant dishonestly dealt with and/or alienated Government land reserved for a public beach access road.
 - vi. The 4th Defendant facilitated the alienation of the suit property, to the 1st Defendant without any or any legal authority.
 - vii. The 4th Defendant alienated and issued a Certificate of Lease over the suit property in favour of the 1st Defendant in express breach of the provisions of the Government Land Act (repealed) and the Registered Land Act (repealed).
 - viii. The 4th Defendant alienated the suit property in favour of the 1st Defendant, with notice that it was public land that had not been altered or its use changed in accordance with applicable legal requirements.



- ix. The 4th Defendant dishonestly and fraudulently dealt with the suit property and unduly facilitated alienation of public land to the 1st Defendant.
 - x. Willful failure to ensure that the alienation of the suit property was, transparent and lawful.
 - xi. Failure to notice and take remedial action over the fact that the alienation of the suit property was unlawful.
 - xii. Failing to stop the irregular and unlawful alienation of the suit property.
 - xiii. Failing to report to the Kenya Anti-Corruption Commission/Ethics and Anti-Corruption Commission over the irregular and unlawful alienation of the suit property
28. The Plaintiffs averred that the 4th Defendants, with knowledge that they had no statutory powers and/or they were acting in excess of his statutory powers, and that their actions were likely to occasion loss to the public and the Republic of Kenya, purported to grant title over the suit property.
29. The Plaintiff relied on the following particulars of loss and damage:-
- a) The suit property has been rendered unavailable for use and benefit of the public.
 - b) Due to the impugned conduct of the Defendants, the suit property has been illegally alienated for private use and rendered unavailable for proper and lawful use thereby occasioning loss to the Republic of Kenya.
 - c) Due to the illegal alienation of the suit property, the 1st Defendant have been enjoying use and mesne profits over the suit property
30. The Plaintiff averred that it had legal and equitable interest over suit property by virtue of its constitutional and statutory mandate. The Plaintiff averred that the actions and omissions of the Defendants, jointly and severally, led to wrongful interference with public land and material loss of user rights by the Government of Kenya. The Plaintiff contended that for the reasons stated hereinabove the Defendant's manner of procuring the allocation and registration of the suit property was wholly fraudulent and unlawful and consequently the registration and issuance of a Certificate of Lease over the suit property to the 1st Defendant was consequently null and void *ab initio*.
31. By reason of the foregoing, the purported issuance of the Lease and



Certificate of Lease over the suit property to the 1st Defendant was void *ab initio*, and incapable of conferring on the 1st and 2nd Defendants any estate, interest or right in the suit property or at all. Despite demand and notice of intention to sue having been issued, the 1st, 2nd, 3rd and 4th Defendants have refused, failed and/or neglected to make amends of their fraudulent actions and failed to admit liability and/or to surrender the suit property and title thereto to the Government of Kenya hence necessitating the filing of this suit.

32. It was the Plaintiff case that it is within the tenets of public interest that the corruptly and fraudulently acquired public property as the suit property herein by the 1st Defendants should be promptly recovered and returned back to the Government of Kenya in accordance with the law. The cause of action in this present suit occurred during the currency of the provisions of the Government Lands Act (repealed) and the Registered Lands Act (repealed) as read with provisions of Sections 106 (2), (3); 107(1),(2),(4);108 and 109 of the Land Registration Act, No. 6 of 2012.
33. There was no other suit between the Plaintiff and the Defendants under the same titles and there has never been no previous similar proceedings in any court of law the Plaintiff and the Defendants under the same titles over the same subject matter attendant to this suit. This case of action accrued within the jurisdiction of this Honorable Court.
34. The Plaintiff prayed for Judgment against the 1st, 2nd, 3rd, 4th & 5th Defendants jointly and severally:-
 - a) ***A declaration that the registration and issuance Lease dated 02/08/1994 and Certificate of Lease dated 10/08/1994 in favour of the 1st Defendant was unconstitutional, fraudulent, unlawful, corruptly irregular and null and void ab initio and ineffectual to confer any right, interest or title upon the 1st Defendant.***
 - b) ***An Order directed to the Chief Land Registrar and the Land Registrar, Mombasa Land Registry, to rectify the register by cancellation of the entries relating to land reference number: Kwale/Diani Beach Block /1072.***
 - c) ***A permanent order of injunction to restrain the 1st Defendant and, whether by themselves or through their agents, servants or assigns from alienating, transferring, charging, leasing, sub-dividing, disposing of, wasting, entering or remaining upon, or undertaking any construction or development of any nature thereon, land reference number: Kwale/Diani Beach Block/1072, or from howsoever dealing with the said property, other than by way of a surrender to the Government of Kenya.***
 - d) ***Costs of and incidental to this suit.***
 - e) ***Any other or further relief that the court may deem fit to grant in***

35. The Plaintiff called his first witness on 4th March, 2025 who testified as follows:-

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

36. PW - 1 testified and sworn in English language. He was called MR. AMANI ALI ATHMANI. He was a Land Surveyor stationed at the Kinango Survey Office and a representative of the Director of Survey. He stated that his academic qualifications included a Diploma in Land Surveying, a Higher Diploma in Land Survey from Coast Africa Land Corporate, and a Bachelor of Science in Environmental Planning and Management. At the time, he was undertaking studies in Geo-Survey and Remote Sensing and was a member of the Survey of Kenya Institute.

37. PW - 1 confirmed that he had recorded a statement dated 25th July, 2024, which he wished the Court to adopt as his evidence. PW - 1 referred to several survey documents, including:

- Survey Plans FR 147/3; 188/128; 166/166; 196/2; and 262/60.
- Registry Index Map for North Coast and Mombasa Mainland, Suit Sheet No. 201/3/2.
- Part Development Plan No. 413.KWL.394.
- Allotment letter referenced 826 23/VII/300 dated 23rd June, 1994 in the name of Juma Boy Juma.
- Surveyor's Report authenticated under reference CR/283/28/29 dated 29th July, 1994

38. PW 1 produced these documents as evidence, marked Plaintiff Exhibits Nos. 36 to 45 (10), dated 31st July, 2024 and 5th February, 2024. PW - 1 explained that the suit property came into existence after the survey plan FR 147/3, undertaken by Mr. Mutari and authenticated on 30th November, 1991. From that survey, parcel Kwale/Diani Beach Block/1072 was identified as a road separating parcel 187, 188, 189, and 190. He emphasized that the property was a beach access road. He further testified that the survey leading to the creation of parcel 1072 was undertaken under FR 262/60 by S. Kipkurui. From the survey plan, it was clear that the survey was a compilation survey; the surveyor did not need to go to the ground to prepare a new plan. No new beacons were placed; instead, old beacons were used. In his words, *"the purposes were not changed."*

39. PW - 1 concluded that the effect of this irregular survey was that parcel No. 628 was left without access, forcing its owner to use the main road. He added that since parcel No. 1072 was a road, Mr. Kituku ought not to have carried out the survey, as he knew it was a road.



B. Cross Examination of PW - 1 Mr. Waziri Advocate: -

40. PW - 1 testified that he had joined the Ministry of Lands in 1992 as a Trainee Surveyor. He explained that the first survey of the area had been undertaken in 1979, before his time, but as a Department they were the custodians of all survey records. He was referred to the 2nd Defendant's bundle of documents dated 15th January, 2025, specifically the letter dated 17th June, 1994 authored by Mr. Andrew T. Invate, the District Surveyor, Kwale, addressed to the District Physical Planning Officer, Kwale, regarding a proposed residential plot in Diani, Kwale.
41. PW - 1 stated that the letter indicated there was no objection to the proposed development since an alternative road of access was nearby. He clarified that this letter was not in the custody of the Director of Survey but belonged to the District Lands Surveyor's Office and was part of the computation file. He explained that for the survey process, the District Physical Planning Office prepared the Development Plan (DDP) which was then forwarded to the Director of Survey and ultimately to the Commissioner of Lands. He emphasized that all records for fixed surveys were held by the Director of Survey and not at the District Survey Planning Office.
42. PW - 1 concluded that the mistake in relation to the suit property was attributable to the District Survey Office and not the District Physical Planner. He added that he did not know the process of preparation of the Part Development Plan. He confirmed that parcels 189 and 190 were found on FR 147/3. He referred to his witness statement, noting that from the computation file there was a Part Development Plan (drawn by Jabu S.M., referenced as 413.KWL.394. He explained that the Part Development Plan showed that a road was being crossed, separating parcels 819, 627, and 628. He further testified that parcel No. 187 had been sub - divided into parcels 625 to 628 vide survey plan FR 188/128, while parcel No. 190 had been subdivided to create parcel No. 345 vide FR 166.

C. Cross examination of PW - 1 by Mr. Mogaka Advocate.

43. PW - 1 testified that the Directorate of Survey was under the Ministry of Lands, as was the Directorate of Physical Planning and Communication of Land. He explained that the Commissioner of Lands relied on the Land Administration Officer to guide him on whether land existed on the ground. He stated that a Part Development Plan (PDP) and the Survey Plan were prepared by the Physical Planning Department. The PDP was prepared by the District Physical Planning Office, and thereafter the survey was undertaken. The PDP was then approved by the Director of Physical Planning. He emphasized that if the Director of Physical Planning refused



to approve the PDP, then it became null and void.

44. PW - 1 further testified that the Director of Physical Planning and Survey had custody of all records, and if they found any anomaly—such as discovering that the land was a road—they could have refused to approve the PDP. He explained that in this case, the District Surveyor approved the Part Development Plan, which was then taken to the Commissioner of Lands, who issued Letters of Allotment leading to the issuance of the Certificate of Lease. He confirmed that, to his knowledge, a PDP had been used to approve the subdivision.
45. PW - 1 added that he had not seen any documents reflecting the issuance of the title deed. He concluded that the Commissioner of Lands relied on information from various offices, from the District level to the Directorate, and would not ordinarily doubt them. He noted that Mr. Mokaya had agreed there was a mistake. PW - 1 remarked that in year 1994, he was about 24 years old and had already worked with the Government of Kenya.

D. Cross examination of PW - 1 by Mr. Kabiario Advocate.

46. PW - 1 testified that Plot number 1072 may have appeared to be regularly allocated, but he had his doubts as he knew the land. He stated that the land had been preserved as a road. He explained that the process of preparing a Part Development Plan (PDP) was very elaborate, as it affected numerous members of the public and government departments whose parcels of land could be impacted. He added that if members of the public were aggrieved by such a plan, they would ordinarily raise alarm.
47. PW - 1 further testified that in preparing a PDP, the surveyor was required to go to the ground. He noted that plot number 628 had no access road. He concluded that he was not aware of any complaint by the owner of plot number 628 regarding lack of access to plot number 1072.

E. Re - Examination of the PW 1 by M/s. Songole Advocate.

48. PW - 1 was referred to the letter dated 17th June, 1994. He testified that the Part Development Plan had been approved by the Commissioner of Lands, Mr. Gachanya, and had been prepared by Mr. Jabu S.M. He explained that the allotment letter came first before the surveying process. He further stated that the Part Development Plan was circulated to government offices and not to members of the public. PW - 1 clarified that members of the public were not involved in the process unless it concerned a boundary dispute.
49. The Plaintiff called PW - 2 on 4th March, 2025 who testified as follows:-

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

50. PW - 2 was sworn and he testified in English language. He was called ONJWANG OMOLLO PATROBA. He was an Assistant Director of Lands,



holder of ID No. 22225002. He stated that he had a Bachelor of Arts in Geography and was also an Advocate of the High Court of Kenya. He confirmed that he had recorded a witness statement dated 24th July, 2024, which he wished the Court to adopt as his evidence in chief.

51. PW - 2 produced documents numbered 5 to 35, which were marked as Plaintiff Exhibits 11 to 41. In relation to parcel Kwale/Diani Beach Block/1072, PW - 2 testified that they had traced the correspondence file concerning the property. He explained that the parcel had initially been issued to Juma Boy Juma but was later transferred to Galerius Investment Limited. He stated that they found several letters, including one dated 28th April, 2009 (as referred to in his witness statement, pages 1-2). He referred to page 4 of his witness statement, noting that the lease had never been surrendered for cancellation.
52. PW - 2 further referred to a letter dated 24th September 2008 authored by Meena Patel to the Commissioner of Lands, which indicated that parcel No. 1072 was an access road. He also referred to a letter dated 28th April, 2009 by S.M. Osoro for the Commissioner of Lands, which confirmed that the lease was being surrendered because the parcel was indeed an access road.
53. PW - 2 testified that he had also referred to a letter dated 10th June, 1994, where the operative words were "*if suitable*," and another letter dated 8th June, 1994, which indicated "*no objection*" for the Part Development Plan. He explained that after the lease was processed, there was an outcry by the public that the parcel was a public access road to the beach. As a result, protests ensued, and the Commissioner of Lands called for the surrender of the lease for cancellation. He referred to a letter dated 10th January, 1995 addressed to Galerius Investment Limited by Mr. Mabea, the then Commissioner of Lands, advising that an alternative plot could be identified for consideration.
54. PW - 2 concluded that to date, the lease had never been surrendered.

B. Cross examination of PW - 2 by Mr. Waziri Advocate.

55. PW - 2 was referred to Paragraph 14(e) of the Complaint, which stated that the 2nd Defendant lacked statutory authority to prepare the Part Development Plan (PDP). He testified that he did not know whether that was important, as he was not a physical planner. He stated that he did not know Jabu Salim Mohamed, but he knew Gordon Ochieng, the Director of Land Administration.
56. PW - 2 further testified that he did not know about Criminal Case No. 3 of 2022. He was referred to page 7 of the 2nd Defendant's bundle, being a ruling, and also to pages 35 and 36. He explained that it was normal for



people to make errors, and when they occurred, they were rectified. He added that he did not know exactly where Mr. Jabu Salim Mohamed, the District Planner, committed an error.

57. PW - 2 stated that the purpose of circulating the physical development plan was to obtain the views of the multi-sectional departments. He testified that he was aware that Mr. Mohamed had circulated the physical development plan and that no comments were received. He concluded that the District Planning Office did not work in isolation, but in collaboration with other officers. He reiterated that he did not know Mr. Mohamed personally, as he had only joined the Ministry of Lands in 2006.

C. Cross examination of PW - 2 by Mr. Mogaka Advocate.

58. PW - 2 testified that in the years 1994-1995 he was still in class eight, and hence his evidence was based on the official records. From those records, he confirmed that Mr. Mabea was then a Senior Land Registrar at the Coast. He explained that letters of allotment would ordinarily be referred to Mr. Mabea for signature by the Commissioner of Lands, and that there had been an application for the Letter of Allotment in relation to the suit property.
59. PW - 2 was referred to the letter dated 10th June, 1994, signed by Mr. Ochieng G.O. for the Commissioner of Lands, which stated: *"should you be satisfied that the site is suitable, please prepare a physical development plan and forward the same for further action."* He testified that he had never seen any objections raised to this effect. He confirmed that the letter had been addressed to the District Physical Planning Office in Kwale.
60. PW - 2 stated that the Director of Survey and the Directorate of Physical Planning ought to have known that the parcel was an access road. He explained that without any objections raised, the Commissioner of Lands had no alternative but to issue the certificate of title. He added that the Commissioner of Lands later realized that the parcel was indeed an access road. He emphasized that the Director of Physical Planning had the authority to refuse approval of a Physical Development Plan if anomalies were detected.
61. PW - 2 was referred to the form of the suit and to a letter dated 10th July, 1995 from the Commissioner of Lands. He testified that Mr. Mabea admitted there had been a mistake in the second paragraph of that letter. He clarified that Mr. Mabea was taking administrative action to correct the error, and was not acting corruptly, negligently, or wrongly in the year 1994.
62. PW - 2 concluded that by the year 2019, he would not accuse Mr. Mabea of wrongdoing, as the latter had simply been attempting to correct an error.



He explained that at that time, Mr. Mabea was in line with the administrative action, but he did not have any role in the survey or Physical planning departments.

63. The Plaintiff called PW - 3 on 4th March, 2025 who testified that:

B. Examination in Chief of PW - 3 by Mr. Songole Advocate.

64. PW - 3 was sworn and he testified in English language. He was called OCHIENG DEDAN OKWAMA. He was an appointed Investigator with the Ethics and Anti-Corruption Commission (EACC). He confirmed that he had recorded a witness statement dated 30th July, 2024, which he wished the Court to adopt as his evidence.

65. PW - 3 explained that, apart from his statement, the 1st Defendant had acquired the suit property, parcel No. 1072, which was an access road. From the documents gathered during investigations, he testified that the property had been irregularly acquired. He stated that before the closure of a road, the intention had to be gazetted, and the process was experienced by the public. A notice would be prepared by the Municipal Council, informing the public of the proposed closure, and only after consideration could the closure be effected. He emphasized that the relevant parties were required to be informed for their input, in accordance with Section 185 of the Local Government Act, Cap. 265 (now repealed).

66. PW - 3 referred to the witness statement of the 2nd Defendant, Mr. Jabu Mohamed, who had confirmed that the gazettment of the closure of the road was never done. He also referred to a letter dated 24th September, 2008 authored by Meena Patel to the Commissioner of Lands, which conceded that the parcel was indeed an access road.

67. PW - 3 further referred to a letter dated 28th April, 2009 by Mr. S.M. Osodo for the then Commissioner of Lands, which rejected the request for retention of the lease and confirmed that the parcel was an access road. He concluded that the request had been rejected and that the certificate of lease had never been surrendered to date.

B. Cross examination of PW - 3 by Mr. Waziri Advocate.

68. PW - 3 testified that he was not an expert in land matters and that he had relied on the papers supplied during investigations. He stated that he was aware of Criminal Case No. E003 of 2022, in which the 1st, 2nd, and 3rd Defendants had been accused but were acquitted of the offences charged. He confirmed that the ruling had never been appealed.

69. PW - 3 was referred to the Plaint, specifically the contents of Paragraph 14 (a) through (g). He explained that although the criminal case had resulted in acquittals, there remained a civil aspect of the matter which



was distinct from the criminal proceedings. He testified that the gazettelement of the road was supposed to be done after the preparation of the Physical Development Plan.

70. PW - 3 was also referred to the list of documents filed by the 2nd Defendant dated 15th January, 2025. He stated that the factors raised therein did not alter the legality of the acquisition of the suit property. He explained that the EACC had not sued the surveyor, as the responsibility lay with the Commissioner of Lands.

C. Cross examination of PW - 3 by Mr. Mogaka Advocate.

71. PW - 3 testified that during investigations, many documents had been collected from different offices. He explained that when there was an application for land, various offices at different levels were involved in advising the Commissioner of Lands. He stated that there had been correspondences to the relevant offices to indicate the availability of the land for residential purposes, although some offices never responded.
72. PW - 3 confirmed that the Director of Survey had custody of all the documents and would therefore have known that the land in question was reserved as an access road. He testified that the Director of Survey had approved the Physical Development Plan, and if he had rejected it, no certificate of lease would have been issued.
73. PW - 3 added that the functions of physical planning and survey fell under the Ministry of Lands. He clarified that Mr. Mabea was not the Commissioner of Lands at the material time, and therefore no title could have been issued under his authority. In the course of his investigation, PW - 3 stated that he had not found evidence indicating that Mr. Mabea was corrupt. He explained that Mr. Mabea had been culpable only to the extent that he signed the physical development plan. He emphasized that the EACC was not in operation in year 1994, but Mr. Mabea, through a letter dated 10th July, 1994, had asked for the cancellation of the lease.
74. PW - 3 concluded that the letter was lawful and reflected an attempt to correct a mistake. He explained that the EACC was asking for the lease to be revoked, but Mr. Mabea had never been summoned as a witness, nor asked to incur costs in relation to the matter.

D. Re - examination of PW - 3 by M/s. Songole Advocate.

75. PW - 3 testified that the 2nd Defendant had no authority to prepare a physical development plan for an access road. He explained that the procedure was sequential: first the letter of allotment, then the physical development plan, and finally the issuance of title. He emphasized that Mr. Mabea had never approached the EACC to be its witness in the prosecution, whether through plea bargaining or otherwise.



76. On 5th March, 2025, the Plaintiff called PW - 4 who testified as follows:-

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

77. PW - 4 was sworn and testified in English language. He was called MR. JAMES MUTUGI NYAGAH. He testified that he was the Assistant Director of Physical Planning. He worked with the Ministry of Lands, Public Works at Ardhi House, Nairobi. On 26th July, 2024, PW - 4 recorded a witness statement and wished to adopt it. He filed documents no. 1 to 4 of the Plaintiff's list. Plaintiff exhibits numbers 42 to 45 referred to the Physical Development Plan - reference no. 413 WKL 394. That Physical Development Plan ought to have been prepared because the letter of allotment lacked the physical development plan reference number.
78. The Letter of Allotment dated 23rd June, 1994 was issued on the basis of the approved physical development plan. What had been indicated on the Letter of Allotment was Reference no. 82623/VII ... of 413 WKL 394. Further, another reason was that there was a road, and it was not available for allocation.
79. PW - 4 explained that there had been instances where PDPs were prepared for the closure of roads, for example, for public utilities, schools, and armed forces. Requests had been received from the National Lands Commission to enable preparation of PDPs. For instance, a PDP had been prepared for a Primary School in Murang'a. In such cases, the PDP was gazetted and vetted, and the land was amalgamated into one parcel.
80. PW - 4 stated that the land leased from being a public road to land for public use. In the instant case, there was no such process. The PDP in this limited case was prepared by Jabu S.M, the District Planner. PW - 4 referred to the witness statement by Mr. Jabu. In paragraph 13 of the said statement, Mr. Jabu confirmed that the gazettelement was never done. PW - 4 explained that if an officer prepared a PDP, they took personal responsibility for it. On the contrary, if the officer acted differently, the officer bore the liability and necessary disciplinary action was taken. When preparing the PDP, the officer went to the field to confirm the facts on the ground and represented the Director of Physical Planning.

B. Cross examination of PW - 4 by Mr. Waziri Advocate.

81. PW - 4 stated that he knew Mr. Jabu Salim but was not aware of any disciplinary action taken against him. He referred to the witness statement, paragraph 3, page 3, noting that the role of the District Planner was to represent the Director of Physical Planning, and that he was to prepare the PDP. PW - 4 referred to page 2 of Mr. Jabu's witness statement, explaining that he had given an elaborate history and was using the Physical Planning Act of 1998; therefore, that procedure did not apply



to the PDP prepared by Mr. Jabu in year 1994.

82. PW - 4 referred to the Complaint, Paragraph 14(e), and explained that under the old regime, Cap. 396, District Planners were allowed to prepare PDPs, which became valid documents after approval. Before approval, the Commissioner of Lands had to endorse them, but under the current law, it was the Cabinet Secretary certifying through the Director of Physical Planning. PW - 4 added that under the new law (PLUPA), County Planning could prepare a PDP, but it was supposed to be approved by the National Director of Physical Planning for certification.
83. PW - 4 referred to page 3, second paragraph, of the Land Planning Act Cap 303 (now repealed), which required PDPs to be circulated for comment by various departments or land users affected by the plans. In the instant case, there was no evidence in the records indicating that the said PDP had ever been circulated for comments or objections. PW - 4 referred to the letter dated 8th June, 1994 in the 2nd Defendant's bundle, where PDP No. 413 KWL - 2.94 showed the District Land Officer stating that he had no objection.
- He referred to the letter dated 15th June, 1994 - PDP 413.3.94 - written by the District Commissioner, which stated "no objection subject to there being other access to the beach."
 - He referred to the letter dated 17th June, 1994 regarding the proposed residential plot PDP by the District Surveyor.
84. PW - 4 explained that these letters were responses to comments from the PDP circulated for consideration. He added that a PDP was approved once it had been issued with a number and entered in the register; before then, it was circulated for comments. He further stated that a PDP could be revised and rectified. Once a PDP had no objection from the District Planning Office, it was forwarded to the Director of Survey, and an allotment letter was then issued by the Director of Survey.
85. PW - 4 emphasized that the process of issuing the Letter of Allotment was as stated in the specific provisions of Cap. 396 of 1998. He explained that degazettement was done by the National Land Commission, but at that time it was the Commissioner of Lands. Once the PDP had been approved, as in the year 1994, the process was deemed complete. PW4 clarified that he was employed on 16th April, 2015 by the Ministry of Lands, and in the year 1994 he was only five years old.

C. Cross examination of PW - 4 by Mr. Mogaka Advocate.

86. PW - 4 explained that in year 1994 he was young and not working for the Ministry of Lands. From his statement, he had stated that the PDP was never circulated for comments, but he was later shown letters with



comments. PW - 4 confirmed that the Director of Physical Planning was situated at Ardhi House. He added that today, the Director of Adjudication was the custodian of all records in Kenya, but he could not confirm the state of their records. He was shown the planned PDP, which was signed by Mr. Oyas. PW - 4 noted that Mr. Oyas had certified the PDP, and had he rejected it, it would never have been forwarded to the Director of Survey. Mr. Oyas had not been sued, but PW4 acknowledged that he contributed by signing the PDP.

87. PW - 4 emphasized that after this, the then Commissioner of Lands would not have acted on it without the PDP. He explained that the procedure was for the District Planning Office to prepare the PDP and forward it to the final stages. According to the documents, the PDP went to the final stages and was approved. It was then send back to the Commissioner of Lands to prepare a Certificate of Lease which would be forward to the Land registrar or Registrar of Title to register it in the registry and hand over the documents to the Lessor.
88. PW - 4 clarified that his department did not issue letters of allotment. If there were errors, it was the Director of Lands Adjudication (then the Commissioner of Lands) who corrected the mistake. He referred to the letter dated 10th July, 1995 by Mr. Zablon Mabea to M/s Galerius Investment Limited, which called for the surrender of the leases for cancellation and identification of alternative land for consideration.
89. PW - 4 explained that correcting the mistake was proper since there was an anomaly. He also referred to the letter dated 12th October, 1995. In that letter, Mr. Mabea confirmed that a restriction against the land had been registered. He noted that the Director of Physical Planning relied on officers on the ground and acted on their accounts.
90. PW - 4 stated that he did not have any letter showing that Kwale advertised the PDP. According to Section 9 of the Land Planning Act, Cap. 303 (now repealed), it was the County Council that was supposed to publish and advertise the PDP. From the documents, the advertisement should have been done by the District Planning Director in the Kenya Gazette, but the Director of Planning had not been filed in this matter.
91. PW - 4 further referred to three other letters of "*no objection*" to the preparation of the PDP. The first, dated 15th June, 1994, was addressed to the District Planning Office; the second, dated 17th June, 1994, was addressed to District Planning Kwale; and the third, also dated 17th June, 1994, was directed to the District Physical Planning Kwale. PW - 4 explained that these three letters were not copied to the Director of Physical Planning, and therefore the records had not been in the custody of



the Director of Physical Planning.

92. PW - 4 referred to his witness statement, first paragraph, and clarified that the Land Planning Act was in use up to the year 1998.

Clarification by Mr. Mogaka Advocate.

93. PW - 4 referred to the letter dated 27th April, 1994 and explained that nobody had objected apart from the District Land Surveyor. The Director of Physical Planning had not objected. PW - 4 emphasized that the Director of Physical Planning, the Surveyor, and the Commissioner of Lands all had officers on the ground, and they had indicated no objection.

D. Re - examination of PW - 4 by M/s. Songole Advocate.

94. PW - 4 referred to the letter dated 8th June, 1994 by Mr. Osoro, noting that the PDP number was different from the one on the PDP itself.
95. The Plaintiff marked his case closed on 5th March, 2025 by its Counsel on record M/s. Songole Advocate.

V. The case by the 1st Defendant

96. The 2nd Defendant responded the Plaintiff's claim. It testified as DW 1 on 5th March, 2025 and testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Waziri Advocate.

97. DW - 1 testified and sworn in the English language. He was called JABU SALIM MOHAMED, a citizen of Kenya and holder of the national identity card bearing all the particulars as shown to Court during the hearing if the case. He stated that on 15th January, 2025, DW - 1 recorded his witness statement and wished to have it adopted. He filed documents dated 15th January, 2025, comprising fourteen documents, which were produced as "1st Defendant's Exhibit numbers 1 to 14.". DW - 1 explained that he began working for the Government in the year 1983 as a Physical Planner. After training, he was posted to Mombasa, then to Taita Taveta, Tana River, and later back to Mombasa and Kwale as the District Planner. He was subsequently posted to Mombasa as the Provincial Physical Planner and later to Nairobi as the Assistant Director of Physical Planning.
98. DW - 1 testified that he prepared the PDP for the suit land. The location was at Ukunda, on the junction before the ABSA Centre. At that time, the land was described as "**Road Reserved.**" He clarified that a road reserve was one which had not been developed, essentially a public access road that remained unused.
99. DW - 1 stated that he prepared the PDP after receiving a letter from the Director of Physical Planning instructing him to visit the land to determine



whether it could be allocated for residential purposes. Although he knew it was a public road, he explained that he could not refuse to prepare the PDP but would circulate it to other users for comments. These included the District Commissioner, District Surveyor, County Clerk, and District Land Officer.

100. According to DW - 1, all those consulted, apart from the District Surveyor, indicated that they had no objection to the land being allocated for residential purposes. The District Surveyor noted that although he had no objection, there was an alternative road adjacent to the suit property to the beach. After receiving these comments, DW - 1 bundled them and forwarded the documents to the Director of Physical Planning through the Commissioner of Lands. He admitted that he had no forwarding letter and later had to retrieve these documents through his advocate, learning that they had been kept in the archives.
101. DW - 1 confirmed that he was aware of the criminal case E003/2022 R - Vrs - Mbea, where he was sued on the allegation that he had prepared documents to facilitate land grabbing. However, he testified that he was later acquitted. DW - 1 emphasized that his role was limited to preparing the PDP and awaiting the decision of the relevant authorities. He explained that the comments were to be considered by those authorities, and his preparation of the PDP did not mean that he had allocated the land to anyone. He added that by the year 1998, he was not required to advertise PDPs in the Kenya Gazette.

B. Cross examination of DW 1 by M/s Songore Advocate:-

102. DW1 referred to the letter from the Director of Lands Adjudication and explained that he had considered it himself, noting that the land was deemed suitable for allocation. He testified that he went to the suit property and found it bushy. He clarified that a plot normally had a parcel number, but a road reserve did not have plot reference numbers.
103. DW - 1 referred to the letter dated 15th June, 1994 authored by Mr. J.K. Ngeno, the District Commissioner, who had stated that he had no objection so long as there was an alternative access road to the beach. DW1 referred to document No. 42 in the Plaintiff's list of documents, which indicated that a person from Plot No. 628 could not access it from the road. He admitted that he had not produced a forwarding letter in respect of the letters of objection to the Director of Physical Planning. He explained that the three copies of the letters of "*no objection*" had been obtained from Nairobi through his advocate.
104. DW - 1 referred to paragraph 13 of his witness statement concerning the gazettment of the road. He confirmed that the PDP had been prepared on



a road reserve but stated that when he realized this, he wrote to the authority. However, given that the letters of authority had indicated “no objection,” he testified that he could not go against their position.

105. DW - 1 referred to the letter dated 10th July, 1995 written by Mr. Zablon Mabea, then Commissioner of Lands, to M/s. Galerius Investment Limited, concerning the cancellation of the lease, which was copied to various offices. He concluded by stating that there had been no attempt to write to revoke the decision on the PDP, and neither had he written seeking authority to do so.

C. Re - examination of DW - 1 by Mr. Waziri Advocate.

106. DW - 1 clarified that when he prepared the PDP, Plot No. 628 did not exist.

107. The 2nd Defendant marked his case closed on 5th March, 2025 through their client Mr. Waziri Advocate.

VI. The 3rd Defendant's case

108. The 3rd Defendant filed their Statement of Defence on 10th January, 2020 where the he averred:-

- a. The 3rd Defendant admitted the description as contained in Paragraph 3 of the Complaint and added that henceforth his address for service for purposes of the suit.
- b. In response to Paragraphs 7, 9, 11, 12, 13, 14, 15, 16, 20, 21 and 23 of the Complaint, the 3rd Defendant stated as follows that:
 - i) He was not involved in any corrupt or fraudulent acts as alleged and put the Plaintiff to strict proof thereof.
 - ii) Part Development Plan No. 413.KWL.394 had been prepared by the District Planning Office and circulated to all relevant institutions for comments and/or approval, and no objections had been raised.
 - iii) The Director of Physical Planning, as the chief advisor to Government on physical planning matters, had approved the said Part Development Plan No. 413.KWL.394, which was forwarded to the Commissioner of Lands, who in turn instructed the 3rd Defendant to proceed to issue the Letter of Allotment dated 23rd June, 1994 relating to alienation of LR No. Kwale/Diani Beach/1072.
 - iv) He executed the Letter of Allotment procedurally and with due instructions from his superiors within the framework and policies adopted by the Ministry of Lands, and denied that he had acted unlawfully at any stage, hence wrongly sued herein.
 - v) As a senior lands officer he acted on instructions, approval and



on behalf the Commissioner of Lands who subsequently issued a lease as clearly disclosed in the documentations filed. It is therefore incorrect to allege that he acted unlawfully at any one stage and hence wrongly sued herein;

vi) When irregularity was discovered, appropriate restrictions were registered against the Title and the 1st Defendant was notified that Government had cancelled the allocation.

vii) The suit against the 3rd Defendant was frivolous and amounted to an abuse of the Court process, which ought to have been dismissed with costs

c. Save as expressly admitted above, the 3rd Defendant denied each and every allegation contained in the Plaint as though the same were set out and traversed seriatim.

109. The 3rd Defendant prayed that the Plaintiff's suit against him be dismissed with costs.

110. The 3rd Defendant called their witness on 5th March and he testified as follows:-

D. Examination in Chief of DW - 2 by Mr. Mogaka Advocate.

111. DW - 2 was sworn and he testified in English language. He was called ZABLON AGWATA MABEA. He stated that he was a retired Civil Servant, now a farmer and Consultant in land matters. In the years 1994-1995, he had been working as a Land Officer at the Coast. He then became a Commissioner of Lands. He recorded a statement dated 10th January, 2021 and another on 19th February, 2025. He filed documents dated 20th February, 2024 and 11th November, 2024, comprising seven documents, which were produced as the 3rd Defendant's Exhibit Nos. 1 to 7. The matter concerned Plot No. Diani/1072.

112. As a Land Officer, he received an application from the then Commissioner of Lands, Mr. W. Gachanya, directing that he conduct the process for allocation of the land for residential purposes. He assigned the task to the District Physical Planning Office and the District Surveyor to prepare the PDP. The PDP was prepared, and no objections were raised. The Director of Physical Planning, Mr. Oyas, approved the PDP. The PDP was then submitted to the Commissioner of Lands, who approved it. The plot was issued numbers as it had previously been unsurveyed. A letter of allotment was prepared and forwarded to the Land Registrar for registration.

113. DW - 2 emphasized that the Director of Physical Planning and the Director of Surveyors were custodians of all land use plans in the country. Both should have known that the land was a road reserve, as they held



the records. However, neither raised any objection. He explained that had they raised any objection; the process would never have proceeded further.

114. DW - 2 referred to the letter dated 10th July, 1995 authored by Mr. Zablon A. Mabea. He explained that he had written to Galerius Investment Limited after receiving complaints that the land was a public road reserve. He stated that he had directed them to surrender the lease for cancellation and assured them that they would be considered for alternative land. DW - 2 added that he had written another letter for the registration of a restriction so that no transaction could take place on the land. He emphasized that he had never been corrupted by anyone. He explained that he had taken action by recommending cancellation of the leases and registration of a restriction, and therefore there was no way he could have been corrupted.
115. DW - 2 stated that, as he stood today, his position remained that the land should be open for public access to the beach. He testified that he had been arrested and charged by the Ethics and Anti-Corruption Commission (EACC). He attached a ruling in which he had been absolved of all charges. He noted that the same EACC, who had sued him in the present civil case, had attached his letters as their evidence. He emphasized that they had never approached him to be their witness before suing him, even though plea bargaining had been an option.
116. DW - 2 explained that the reference number on the letter of allotment had been unsurveyed, as the PDP prepared by the District Physical Planning Office in Kwale had been attached. He added that whether the reference number was wrong or not, the office had taken action to correct the error.

B. Cross examination of 3rd Defendant by M/s. Songole Advocate.

117. DW - 2 referred to the letter dated 10th July, 1995 addressed to Galerius Investment Limited. He explained that he had copied the letter to various offices so that they could take the necessary action, though he could not recall if there had been any responses. He referred to page 2 of his statement and stated that the process would have required ascertainment of the property, including a site visit to determine the suitability of the land.
118. DW - 2 referred to the Letter of Allotment dated 23rd June, 1994 and confirmed that he had signed it on behalf of the Commissioner of Lands, being the head in charge at the Coast. He noted that the letter bore Reference No. 82623/VII, which was not the PDP number. He clarified that the PDP number was 413 KWL 394. DW - 2 admitted that the



reference on the Letter of Allotment had been an oversight but emphasized that the PDP had been attached to the letter.

C. Re - examination of the 3rd Defendant by Mr. Mogaka Advocate.

119. DW - 2 clarified that although an erroneous number had been indicated on the Letter of Allotment, that fact did not alter the allocation since the PDP had been attached to the allotment letter. He emphasized that it was the same PDP which he had earlier stated should be cancelled. He added that these were the same issues which had arisen during the criminal case in which he had been charged and later acquitted.
120. The 3rd Defendant marked his case closed through their client Mr. Mogaka Advocate on 5th March, 2025.

VII. The 4th Defendant's case

121. The 4th Defendant filed their Statement of Defence where the he averred:-
- a. Save for what was expressly admitted, the 4th Defendant joined issue with the Plaintiff and denied each and every allegation contained in the Plaint against him as if the same were specifically set out and traversed seriatim.
 - b. The 4th Defendant admitted the contents of Paragraphs 1, 2, 3, 4, 5 and 6 of the Plaint in so far as they were descriptive of the parties.
 - c. The 4th Defendant, without prejudice to the foregoing, averred that during his tenure as Commissioner of Lands (between 1989-1999), he duly discharged his duties strictly in accordance with the then Government Lands Act, Cap. 280 (repealed). By dint of Section 8 of the said Act, he contended that the present proceedings instituted against him in his personal capacity almost twenty years after he ceased to hold office were discriminatory, misconceived, scandalous, frivolous, vexatious, and amounted to an abuse of the judicial process. The Plaintiff was put to strict proof of all other allegations.
 - d. The 4th Defendant further averred that the present proceedings brought against him in his personal capacity almost twenty years after he ceased to hold office were in contravention of Articles 25, 27, 47 and 50 of the Constitution of Kenya, 2010. By dint of Article 2(4) of the Constitution, he argued that the proceedings were *a nullity ab initio* and should have been struck out. He placed the Plaintiff on notice that he would challenge *in limine* the constitutionality of the entire proceedings against him.
 - e. The 4th Defendant stated that he was a stranger to the events put forth by the Plaintiff in Paragraphs 7 and 8 of the Plaint and did not plead to the facts set out therein.
 - f. Save for the fact that the 4th Defendant executed the Certificate of



Lease dated 30th May, 1994, the 4th Defendant denies in toto all other allegations of findings of the alleged investigation into the Land Parcel KWALE/DIANI BEACH BLOCK/1072 contained in paragraph 9 sub-paragraphs (a) to (j) of the Plaint either as alleged or at all. The Plaintiff was put into strict proof of all other allegations to the contrary.

- g. The 4th Defendant further denied the allegations in Paragraph 10 to the effect that the Land Parcel KWALE/DIANI BEACH BLOCK/1072 was illegally and/or irregularly alienated to the 1st Defendant and that the same was void ab initio either as alleged or at all and avers that the said allocation was legal, regular and lawful. The Plaintiff was put into strict proof of all other allegations to the contrary.
- h. The 4th Defendant further to the foregoing averred that, the land in question to wit KWALE/DIANI BEACH BLOCK/1072 was at all material times Government land available for allocation, alienation and allotment through the then established procedure under the provisions of Government Land Act, Cap. 280 (Now repealed). The Plaintiff was put into strict proof of all other allegations to the contrary.
- i. The 4th Defendant denied the contents of Paragraph 11 of the Plaint to the effect that he was constructively aware that the suit property was reserved for Government use and that the same was not available for allocation or alienation outside the confines of the Governments Land Act, Cap. 280 (Now repealed) and the Registered Land Act, Cap. 300 (Now Repealed) either as alleged or at all and reiterates the contents of paragraph 9 herein above. The Plaintiff was put into strict proof of all other allegations to the contrary.
- j. The 4th Defendant denies the allegation in Paragraph 12 of the Plaint to the effect that he willfully participated jointly and severally with the 1st, 2nd and 3rd Defendants in a corrupt enterprise with the corrupt aim of fraudulently acquiring public property from the Government of Kenya through corrupt means either as alleged or at all and reiterates the contents of Paragraphs 3 and 9 herein above. The Plaintiff was put to strict proof thereof of any allegation to the contrary.
- k. The 4th Defendant denied the contents of Paragraph 14 of the Plaint to the effect that the allocation of the suit property was done unlawfully either as alleged or at all and reiterates the contents of Paragraphs 3 and 9 herein above. The Plaintiff is put to strict proof thereof of any allegation to the contrary.
- l. The Defendant denied the particulars of alleged fraud as set out



therein under Paragraph 14(a) to (g) each and in singular and specifically denies that the alleged acts complained of against him in this suit were ultra vires of his powers and duties as Commissioner for Lands either as alleged or at all and reiterates the contents of Paragraphs 3 and 9 herein above putting the Plaintiff to strict proof of all other allegations to the contrary.

- m. The 4th Defendant denied the contents of Paragraph 13 of the Plaintiff to the effect that he was constructively aware that the suit property was reserved for Government use and the denies the particulars of his alleged knowledge each and singularly set out thereunder in their entirety and reiterate Paragraphs 8, 9 and 10 herein above. The Plaintiff was put to strict proof of any allegations to the contrary.
- n. The 4th Defendant was a stranger to the allegations in Paragraph 15 of the Plaintiff and put the Plaintiff to strict proof.
- o. The 4th Defendant denied the allegation in Paragraph 16 of the Plaintiff to the effect that as a public officer he was grossly negligent in his duties occasioning the illegal and fraudulent alienation of the suit property to the detriment of the Government of Kenya either as alleged or at all, reiterated the contents of Paragraphs 3 and 9 herein above and put the Plaintiff to strict proof of any allegations to the contrary.
- p. The 4th Defendant denied the particulars of negligence set out in paragraph 16(a) to (d) each and in singular either as alleged or at all, reiterated paragraphs 3 and 9 herein and put the Plaintiff to strict proof of any allegations to the contrary.
- q. The 4th Defendant admitted the contents of Paragraph 17 of the Plaintiff to the extent that he had been the Commissioner of Lands when the suit property was alienated to the 1st Defendant. He however denied that he had acted in breach of his duties by purporting to alienate the property to the 1st Defendant fraudulently, illegally, or in abuse of his then office either as alleged or at all. He further reiterated the contents of Paragraphs 3 and 9 above and put the Plaintiff to strict proof of any allegations to the contrary.
- r. The 4th Defendant further, and without prejudice to the foregoing, averred that the alienation and/or allotment of Land Parcel Kwale/Diani Beach Block/1072 had been the result of several stages and processes undertaken, processed, vetted, and approved by different cadres of officers in the then Ministry of Lands. He stated that his role had been limited to issuing a Certificate of Lease based on recommendations of other officers. The allegations by the Plaintiff



that he had acted ultra vires, illegally, and/or irregularly were therefore hollow and devoid of any factual basis, and the Plaintiff was put to strict proof of any other allegations to the contrary.

- s. The 4th Defendant denied all the particulars of alleged fraud, irregularity, illegality, breach of trust, and abuse of office set out under paragraph 17(i) to (ix), either as alleged or at all, and reiterated the contents of paragraphs 9, 13, and 18 above. He put the Plaintiff to strict proof of any allegations to the contrary.
- t. The 4th Defendant denied the allegations set forth in Paragraph 18 of the Plaint and the particulars of loss and damage allegedly occasioned to the Government of Kenya either as alleged or at all, and put the Plaintiff to strict proof thereof.
- u. The 4th Defendant denied the allegation that the Plaintiff had a legal or equitable interest over the suit property by virtue of its constitutional mandate as set out in Paragraph 19 of the Plaint, and put the Plaintiff to strict proof thereof.
- v. The 4th Defendant denied the allegation in Paragraph 20 of the Plaint that his alleged actions and omissions jointly with the 1st, 2nd, and 3rd Defendants had led to wrongful interference with public land and material loss to the Government of Kenya either as alleged or at all, and reiterated the contents of Paragraphs 9 and 11 above. The Plaintiff was put to strict proof of any allegations to the contrary.
- w. Save for the fact that alienation of Government Land in contravention of the law was null and void ab initio and could not be cured by validation, the 4th Defendant reiterated the contents of Paragraphs 7, 8, 9, and 19 above in response to the contents of Paragraphs 21 and 22 of the Plaint, and averred that the allocation of the suit property to the 1st Defendant had been legal, regular, and lawful. The Plaintiff was put to strict proof of all other allegations to the contrary.
- x. The 4th Defendant denied the allegations contained in Paragraph 23 of the Plaint on service of demand notice and notice of intention to sue, and stated that no such notice had ever been served upon him either as alleged or at all. The Plaintiff was put to strict proof of all other allegations to the contrary.
- yz. The 4th Defendant averred that the Plaintiff was not entitled to the reliefs sought in Paragraphs 24 and 27 of the Plaint and reiterated the contents of Paragraph 25 above. The Plaintiff was put to strict proof of all other allegations to the contrary.
- . Further, and without prejudice to the foregoing, the 4th Defendant



averred that the entire suit against him was misconceived, amounted to an abuse of the Plaintiff's powers under the provisions of the Ethics and Anti-Corruption Commission Act, 2011, as well as an abuse of the court's process, and ought to have been struck out.

. The contents of Paragraph 26 of the Plaintiff were not disputed. The 4th Defendant admitted the jurisdiction of the Honourable Court.

122. The 4th Defendant prayed that the Plaintiff's suit against him be struck out and/or dismissed with costs.

VIII. Submissions

123. Upon the closure of the Plaintiff's and the Defendants' cases on 5th March, 2025, the Honourable Court directed that all parties file and exchange their respective Written Submissions within the stipulated timelines.

124. Upon full compliance, the Honorable Court reserved a date to deliver its Judgment on notice accordingly.

A) The Written Submissions by the Plaintiff

125. The Plaintiff through the Ethics and Anti Corruption Commission filed their written submissions 20th March, 2025. M/s. Songole Advocate commenced her submissions by providing a brief background of the case. The Learned Counsel submitted to the Court that at all material time to this suit, land reference number: Mombasa Kwale/Diani Beach Block/ 1072 - "the suit property" was a and is still an access road, which the Government of Kenya set aside for use by the public to access the Diani Beach.

126. On 10th June, 1994 the 4th Defendant wrote to the 2nd Defendant asking him to prepare a PDP relating a plot allocation in Kwale/Diani Beach. The 2nd Defendant was asked to satisfy himself that the site was suitable for preparation of the said PDP. On 14th June, 1994, the 2nd Defendant went ahead and prepared a PDP NO.413.KWL.394. On 21st June, 1994 the 3rd forwarded an approved PDP to the 2nd Defendant (See letters listed as numbers 3 and 4 on Plaintiff's further list of documents and produced as exhibits).

127. Subsequently, on 23rd June, 1994, the suit property was allocated Juma Boy vide letter of allotment ref no 82623/VII/300. According to the Letter of Allotment the parcel which measured 0.5 hectares was held for a term



of 99 years with effect from 1st July, 1994. The stand premium was Kshs. 22,000 with an annual rent of Kshs. 9,800. The allottee paid Kshs 28,510 vide receipt serial number D041393 (See Letter of Allotment and receipt listed as number 36 and 34 on Plaintiff's further list of documents and produced as exhibits). On 25th July, 1994 Juma Boy sought for consent to transfer the property to Gallerius Investments a company incorporated on 21st June, 1993. The said allottee paid Kshs 100 vide receipt number D002096 dated 1st August, 1994 (See Consent, Certificate of Incorporation and receipt listed as numbers 30,29,35 on Plaintiff's further list of documents and produced as exhibits).

128. On 26th July, 1994. A Land Surveyor, E.M.J Kiguru undertook survey vide Survey Plan FR 262/60 and subsequently on 26th July, 1994 the RIM was amended to reflect Mombasa Kwale/Diani Beach Block/ 1072 (See Survey Plan FR 262/60, and RIM listed as number 41 and 42 on Plaintiff's further list of documents and produced as exhibits).
129. The Learned Counsel submitted that on 1st August, 1994 a form of transfer of the parcel of land to Gallerius Investment Limited was executed and approved by the Commissioner of Lands. Consequently, instructions to prepare a new lease in the name of Gallerius Investment was prepared on 2nd August, 1994. The lease was forwarded and executed by the Commissioner of Lands 2nd August, 1994. The said lease was thereafter forwarded to the Land Registrar Mombasa for execution and registration (See transfer, instruction, lease and forwarding letter listed as numbers 28,27,26,15 on Plaintiff's further list of documents and produced as exhibits). On 10th July, 1995 the Commissioner of Lands informed Gallerius Investment (1st Defendant) that the suit property was a public access road to the beach and as such government had cancelled the allocation of the said property to it (See letter listed as number 23 on Plaintiff's further list of documents and produced as exhibit). The said company was asked to surrender the lease for cancellation and to thereafter identify an alternative plot for allocation. The Commissioner of Land also instructed the Land Registrar, Kwale to put a restriction prohibiting any further dealings on the suit property. The 1st Defendant never surrendered the lease.
130. On 12th October, 1995, the 3rd Defendant wrote to the Land Registrar and put a restriction over the title that had been issued to the 1st Defendant. The same was done (See letters listed as number 22 and 21 on Plaintiff's further list of documents and produced as exhibit). On 24th September, 2008, the 1st Defendant wrote to the 4th Defendant indicating that it



wanted to give a 3-meter access to the beach and had approached a planner on the same. The proposal was rejected vide letter dated 28th April, 2009 referenced 159097/26 (See letters listed as number 5,6, 7 on Plaintiff's further list of documents and produced as exhibit). Before rejecting the proposal, ground report had been prepared and it confirmed that the suit property was a 1.5-meter road reserve leading to the ocean (See letter listed as number 10 on Plaintiff's further list of documents and produced as exhibit).

131. The Learned Counsel relied on the following issues for the Honourable Court's determination:-

- . ***Whether the suit property was curved out of a road reserve***
- . ***Whether the suit property was lawfully created and allocated***
- . ***Whether the title to the suit property is capable of being protected***
- . ***Suing the Physical Planner in his personal capacity***
- . ***Suing the Commissioner of Lands in his personal capacity***
- . ***Suing the 3rd Defendant in his personal capacity***
- . ***Who should bear cost of the suit***

132. On whether the suit property was curved out of a road reserve. The Learned Counsel submitted that the suit parcel of land measuring 0.4600 was indeed a road reserve as could be seen from the various Survey Plans as produced by PW - 1, a witness from the Director for Survey (See survey plans listed as number 40-45 on the Plaintiff further list of documents and produced as exhibits). From the survey plans FR 196/2, 147/2, 188/128/166/2 undertaken in the years 1984, 1988, 1989, which led to creation of various parcels, the suit property is clearly captured as a road separating various parcels of land (as testified by PW - 1) and is an access to the beach. The Registry Index Map (See RIM listed as number 42 on the Plaintiff further list of documents and produced as exhibit) shows that the suit property makes parcel 628 inaccessible. The creation of suit property vide FR 262/60 was therefore irregular as parcel 628 would only be accessible from the ocean.

133. The 2nd and 3rd Defendants also confirmed that indeed the suit property was a road and should remain as such. The 3rd Defendant also supported the Plaintiff's claim and indicated that indeed he requested that the 1st Defendant surrenders the Certificate of Lease once it was discovered that the same had been erroneously allocated to it (See letter listed as number 23 on Plaintiff's further list of documents and produced as exhibit).



The procedure for road closure back then was provided for under the provision of Section 182 and Section 185 of the repealed Local Government Act, CAP 265 provided that for a public road to be alienated by the Commissioner of Lands, the elaborate procedure spelt out in Section 185 of the repealed Local Government Act had to be complied with. This would include: (i) preparation of a plan by the Council; (ii) gazettment and newspaper notification of the intention to alter the road; (iii) service of notice on all affected parties; (iv) service of notice on the Minister; (v) inquiry, in the event of any objection; and (vi) forwarding of land surveyor's plans to the Commissioner of Lands showing the survey plans after completion of the closure.

134. Upon compliance with the mandatory procedure set out in Section 185 of the repealed Local Government Act, the Council would be required to pass a resolution surrendering to the Commissioner of Lands the portion of the road which had ceased to be a public road. Only then would the public road be available for alienation as an unalienated government land within the framework of the now repealed Government Lands Act. The Investigation Officer, PW3 did indicate that from his investigation findings the above procedure was never adhered to as he never came across any gazettment or newspaper on intention to alter the road. His evidence was indeed collaborated by the 2nd Defendant and PW - 4 who admitted that the above procedure was indeed never complied with. The creation of the suit property was therefore illegal and unlawful as it had no backing of the law.
135. The Learned Counsel relied on the case of:- ***Kenya National Highway Authority - Versus - Shalien Masood Mughal & 5others (2017) eKLR***, where the court was emphatic that public land and resources are held in trust for the needs of the society. Alienation of land that defeats the public interest goes against the letter and spirit of Articles 1 and 1A of the Constitution. Further, Section 85 of the Government Lands Act protected proclaimed and reserved roads, thoroughfares and outspans. They were to remain free and uninterrupted unless they were closed or altered by a competent authority.
136. On whether the suit property was lawfully created and allocated. The Learned Counsel submitted that having found that the suit property was a road reserve, its subsequent creation was therefore unlawful as it was not unalienated land. The procedures for creation of a property for purposes of allocation were not adhered to. It was clear that the suit was created out of a road reserve and that the procedure for closure of the road was



never adhered to as provided above. The process for allocation of land begins with the preparation of a PDP.

137. The Learned Counsel relied on the case of *“African Line Transport Co. Ltd - Versus - The Hon. Attorney General, Mombasa H.C.C.C. NO. 276 of 2003 eKLR (2007)”*, where the procedure which is supposed to be followed before one is issued with a Grant for unalienated Government land was clearly stated. At page 4 the court held as follows:-

“Secondly, all the defense witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows, a letter of allotment is invariably accompanied by a PDP (Part Development Plan) with a definite number. These are then taken to the Department of Survey, who undertake the surveying. Once the surveying is complete, it is then taken to the Director of Surveys for authentication and approval. Thereafter a land reference number is issued in respect of the plot.”

138. According to the Learned Counsel, the PDP that was used to initiate the process of allocation of land began when PDP NO. 413.KWL.394 was prepared by the 2nd Defendant. He admitted in his testimony as having prepared the same. PW - 4 a witness from Director Physical Planning indicated that even though the said PDP was entered into the PDP registered it shouldn't have been prepared. A Look at the said PDP clearly showed the property was a road. Despite, the PDP showing the suit property as a road, the same was allocated to 1st Defendant by the 4th Defendant who was the then Commissioner of Lands.
139. According to the Learned Counsel under the provision of Section 3 of the Government Lands Act Cap. 280 (now repealed), the power to alienate unalienated Government land was vested in the President of the Republic of Kenya only except in certain cases where such power has been delegated to the Commissioner of Lands. These instances include Grants for:-
- a) Religious, charitable, educational or sport purposes.
 - b) Town planning exchanges on the recommendation of the Town Planning Authority.
 - c) Sale of small remnants of land acquired for town planning purposes and left over after satisfaction of such need.
 - d) Use of local authorities for municipal or district purposes.
 - e) Extension of existing township leases.
 - f) Temporary occupation of farm lands on grazing licenses.



g) Sale of farms and plots which have been offered for sale and remain unsold.

140. The Learned Counsel averred that if any plots were available for alienation, which was not the case here, then the 4th Defendant was obliged to dispose of them in the prescribed manner as required under the provision of Sections 9 and 12 of the GLA (now repealed). Under section 9, the Commissioner of Land was empowered to dispose of any town plots not required for public purposes in the prescribed manner. The manner of disposal prescribed by Section 12 is by auction. The section states that:-

“Leases of town plots shall, unless the president otherwise orders in any particular case, be sold by auction”

141. Why would the law have such an elaborate mechanism of disposal of unalienated town plots? The answer was simple; so as to prevent the Commissioner of Lands or the President of the Republic from allocating town plots to his cronies at the detriment of the public. Hence, the 4th Defendant could not have issued lease to the 1st Defendant under the provision of Section 7 of the GLA (now repealed) since the proviso to that section clearly states that “nothing contained in the section shall be deemed to authorize the usurpation of the president’s power under Section 3, among other sections. The interpretation of Sections 3, 7, 9, 12, and 13 of the GLA vis-à-vis the powers of the Commissioner of Lands were given adequate consideration in the cases below. In all the cases cited below, it was held that the Commissioner of Lands’ powers were limited in the manner the Plaintiff has submitted above. The following authorities have addressed the powers of the Commissioner of Lands under the Government Land Acts;

142. In the case of:- ***“James Joram Nyaga & Another - Versus - The Hon. Attorney General & Another, Nairobi High Court Misc. Civil Application No. 1732 of 2004 eKLR (2007)”***, at page 8, the court interpreted the provision of Sections 3 and 7 of the Government Lands Act (now repealed). Court stated as follows:

“The above sections (3, 12, 20 and 128) clearly limits the power of the Commissioner to executing leases or, conveyances on behalf of the President and the Proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of Lands had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18/12/1997. That was the preserve of the President It follows that the Commissioner of Lands could not have made any Grant under the Government Lands Act



143. Further in "***The Town Council of Ol'Kalou - Versus - General Hardware, Nairobi Civil Appeal No. 269 of 1977***"; the Court of Appeal stated as follows:-

"if under section 9 of the Government of Lands Act the suit premises was not available for alienation and that the procedures laid down in section 12 and 13 of the same Act were not complied with in the process of alienating the said premises. It is possible that the appellant's defence may not have been so weak as to be beyond redemption and incurable by amendment.....whether or not the said allotment was illegal and whatever effect such illegality. If proved, may have had on the respondent's title to the suit premises, it was in my view, a factor militating against striking out the appellant's suit..."

144. The Court of Appeal stated as follows:

"It was incumbent upon the Learned Judge, in my view, to consider if there was a triable issue as regards allotment of a public utility plot in view of sections 12 and 13 of the Government Lands....."

"I am not unmindful of the fact that there are many instances in our Republic, of public utility lands being allocated to persons when the primary duty of the Commissioners in cases such as these is to cater for public rights also. The trial court will have to examine how the process of allotment was affected. That is one issue which cannot be decided on striking out application"

145. According to the Learned Counsel, the 4th Defendant herein did the allocation of the suit property when he did not have the authority in law to do so. As Court of Appeal held in the above suit, the Commissioner of Lands has a duty to cater for public rights while performing his duties. In "***African Line Co. Ltd - Versus - The Attorney General (Supra)***", Justice Njagi delved into the meaning and effect of Section 3 of the Government Lands Act, Vis-à-vis the powers of the Commissioner of Lands to allocate land. He stated as follows:

"Section 3 of the Government Lands Act sets out the special powers of the President....The Powers of the President under this paragraph are delegated to the Commissioner of Lands in Certain defined cases. However, section 3 should be read in conjunction with section 7.....The Import of this proviso is clear beyond peradventure. It is that the making of Grants or dispositions in or over unalienated Government Land is the exclusive preserve of the President, and in so doing he acts personally, unless he expressly delegates the power to do so to the Commissioner of Lands".

The judge further stated as follows:



“In the present case, the Grant to Mr. Omari was made by the then Commissioner of Lands. No evidence was led to demonstrate that he did so with the express authority of the President....In the absence of such proof, one can draw only one conclusion-that the Grant to Mr. Omari was null and void for not having been executed by the President. And if the Grant to Mr. Omari was null and void ab initio, it conferred no interest in Mr. Omari”.

146. The Plaintiff did not find any evidence, during its investigations, to show that the President executed the Grant in favour of the 1st Defendant. The 4th Defendant, who allocated the suit property to the 1st Defendant, has not shown any such evidence either. This being a road, the 4th Defendant did not in the first instance have authority under the law to allocate the suit property to the 1st Defendant when he was the Commissioner of Lands. Even if he had the authority then he has not adduced any evidence to show that indeed the President of the Republic directed him to sign the lease in favour of the 1st Defendant.
147. According to the Learned Counsel, assuming the President allocated the suit property to the said 1st Defendant, and the 4th Defendant executed the lease on instructions of the President, the same would still be unlawful because the suit property was already Surveyed and reserved for public purpose. It was already being used for a specific purpose. It was not unalienated Government Land.
148. Under the ***“Kenya Anti-Corruption Commission - Versus - James Raymond Njenga & another, Eldoret H.C.C.C. NO. 610F 2008 eKLR (2010)”***, the Court held as follows:

“In any event once that alienation of 1974 was done there was no power under section 3 of the Government Lands Act for the President to exercise. The President is not reserved power under that section of the law to allocate land already allocated. Annexure’s to the applicant’s application clearly show that the suit land was reserved for public use as open space. The court was not shown any material suggesting that the land had since become available for commercial”.

149. The Learned Counsel contended that the then Commissioner of Lands held the suit property in trust for the people of Kenya. The suit property was not unalienated land and the same could not be allocated to the 1st Defendant or any other person at all for private use. In the case of:- ***“Niaz Mohamed Jan Mohamed - Versus - The Commissioner of Lands & 4 others [2003] eKLR”*** court held that public land cannot be converted to private use once it has been set for public use, even by the government, and that the same cannot be allocated or be sold for private purposes as



seems to have happened in this case.

150. The Learned Counsel further submitted that looking at the evidence placed before his court, the suit property was and is still land set aside by the Government for public use and the same is still not available for allocation to the 1st Defendant by the 4th Defendant or any other person. That the process of allocation of the said land to the Defendant was not legal and did not comply with the law.

151. On whether the title to the suit property is capable of being protected. The Learned Counsel averred that the 1st Defendant may want to claim being an innocent purchaser and should therefore be protected. Judge M.A Odeny in ***“Kenya Anti-Corruption Commission - Versus - Online Enterprises Limited & 4 others [2019] eKLR”*** held:-

“The 5th Defendant had no authority to alienate land that had been reserved for Kenya Railways as has been proved by the evidence and the documents produced. The Defendants claimed that they were bona fide purchasers for value without notice. For a person to rely on this doctrine, he must prove the following ingredients as was enunciated in the case of KATENDE V HARIDAR & COMPANY LIMITED [2008] 2 E.A.173 where the Court of Appeal in Uganda held that:

“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.”***

The 1st to 4th defendants therefore do not qualify as innocent purchasers for value without notice as the 5th defendant had no authority to alienate the land. He could therefore not pass a good title to the defendants. If they have any claim for the land then their remedy lies elsewhere, moreso at the doorstep of the persons who purportedly sold to them land which they did not have title to”.

152. According to the Learned Counsel, the fact that the 1st Defendant was informed of the erroneous allocation and it made attempts to cede 3-meter access to the beach (See letters listed as number 5,6, 7 on



Plaintiff's further list of documents and produced as exhibit) is a clear indicator that indeed they were aware of the error committed and were acknowledging they were indeed on a road and had blocked an access to the beach. The 1st Defendant with knowledge took a risk by engaging in the transaction and therefore could not claim remedies for the same. In any event the 1st Defendant had not demonstrated any due diligence that they carried out.

153. Therefore, the Court should frown upon the Title and related documents to the 1st Defendant namely; the Lease and Certificate of Lease title as they were issued illegally on property created out of road reserve. The title in the instant case was issued under the Registered Land Act, Cap. 300 (now repealed). Sections 27 of the Registered Land Act provides as follows:

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.

154. Section 143(1) and (2) of the Registered Land Act provides as follows:

“(1) Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.”

155. The foregoing provisions of the Registered Land Act and the Land Registration Act 2012 provide that the registration of a person as a proprietor of land or lease confers upon that person the absolute ownership of the land and in the case of a lease, the leasehold interest. Both statutes also provide that a register of land may be rectified by the cancellation of any entry thereon where such registration has been obtained by fraud, mistake, illegality, misrepresentation, corruption or any other impropriety subject to the rights of an innocent purchaser for value without notice provided for in the provision of Section 143 (2) of the Registered Land Act and Section 80 (2) of the Land Registration Act 2012.



156. As Justice Munyao put it in the case of ***“Alice Chemutai Too -Versus- Nickson Kipkurui Korir & 2 Others [2015] eKLR”***:-

“..... it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions.”

157. The Court of Appeal in the case of:- ***“Chemey Investment Ltd - Versus - Attorney General & 2others (2018) eKLR”*** categorically stated that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense. Having found that the suit premises was irregularly and unlawfully allocated to the Respondent, it follows that the same should and must be revoked and or cancelled. This court will not hesitate to cancel the Respondent's title and revoke the grant issued thereof. The law, under the provision of Section 26 of the Land Registration Act is clear that a title obtained by illegal/irregular means may be cancelled.

158. The Learned Counsel further cited the case of:- ***“Funzi Island Development Limited & 2 others - Versus - County Council of Kwale & 2 others [2014] eKLR”***, Justice Maraga J.A (as he then was) stated:

“... A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title”.

159. The Counsel also relied on the Court of Appeal case of: ***“Munyu Maina - Versus - Hiram Gathiha Maina Civil Appeal No 239 of 2009”***, stated that:

“when a registered proprietor's root of title is in the challenge, it is not sufficient to dangle the instrument of title as ownership. It is this instrument that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired 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.”

160. From the foregoing, it will be seen that the Court has power to order the cancellation of title where it has been obtained by fraud or mistake. The creation of the suit property out of a public road reserve was a mistake.



The above Sections support that such a title should be nullified as it originates from an illegality.

161. On suing the physical planner in their personal capacity, the Learned Counsel submitted that professional negligence will normally arise when a person does not exercise the degree of skill, duty and care of a reasonable person in that profession. The 2nd Defendant acted negligently in the course of his duty. As a professional Physical Planner, he was called upon to satisfy himself that the suit property was suitable before embarking on the preparation of the PDP. He admits in his evidence that a site visit is mandatory before a physical planner prepares a PDP. That he went to the site and indeed saw it was a road reserve. That even though he prepared the PDP, the other road closure procedures including gazettment were never done. He admits that the PDP is invalid and the suit property should remain as a road. The 2nd Defendant admitted that he never made any attempt to have the PDP revoked and did not produce any evidence showing any attempts of such.

162. Justice M. Warsame in the case of ***“National Bank of Kenya Limited - Versus - Muriu Kamau & Another [2009] eKLR”*** that,

“The point I am making is that a doctor who forgets his surgical materials inside the stomach of his client after closing the wound would be liable for negligence unless he can show that the surgical room was attacked by the illegal gang who endangered his life or that he found himself in an extraordinary or unusual circumstance at the time he was closing the wound. The law places a responsibility on all professionals to exercise prudent and reasonable care for the safety, security and protection and preservation of the property/life entrusted on them. One cannot escape liability by asking for half payment or for saying that what he/she did was reasonable. The test is not what he endeavours or undertakes to do but that which can meet the test of reasonability.”

163. The question is why then did he proceed to prepare the PDP knowing well for closure/allocation road reserve there were procedures to be adhered to? He clearly chose to turn a blind eye on the procedures. He was in breach of duty. In the case of ***“Kenya Commercial Bank - Versus - Philip Odongo Kabita T/A Odongo Kabita Valuers [2002] eKLR”*** Justice A.G Ringera, as he was then held that;

“To err may be human, but for a professional to err as a result of not applying professional skills and tools is negligence in any language. I also find that the Bank suffered loss as a result of the defendant's negligence. The only issue outstanding is the measure of damages.”

164. Had the 4th Defendant adhered to the procedure and rules for preparation



of a PDP then the suit property wouldn't have been in the hands of the 1st Defendant.

165. On the issue of suing the Commissioner of Lands (4th Defendant) in his personal capacity. It was the contention of the Learned Counsel that it was the 4th Defendant who issued the Lease and Certificate of Lease to the 1st Defendant. By so doing he not only acted ultra-vires, unlawfully but fraudulently by issuing the said documents over a road. By then he ought and/or had already known that the suit property was already Surveyed and reserved for public and allotting the same amounted to misconduct in public office. Consequently, he could not be said to have acted in his own capacity as a Commissioner of Lands.
166. Being a road reserve, its allocation was not within the mandate of the Commissioner of Lands. In the book:- **Corruption and Misuse of Public Office by Collins Nicholas at paragraph 3.03**, misconduct in public office has been defined as follows:

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

167. It was the Learned Counsel's submissions that the 4th Defendant acted contrary to his statutory duties. In fact, the 4th Defendant was personally liable to the loss which other 1st Defendant was likely to suffer in the event that the court orders that the lease title issued to the 1st Defendant was a nullity. It was for that reason that the Plaintiff had sued the 4th Defendant in his personal capacity. The actions of the 4th Defendant, were not actions of the office of the Commissioner of Lands. The 4th Defendant did not have authority under the law to allocate the suit property to the 1st Defendant and had not adduced any evidence to show that indeed the President of the Republic directed him to sign the lease in favour of the 1st Defendant. Both the 2nd and 4th Defendants were guilty of Tort of Mifeseance in office.
168. The House of Lords in "**Reg. - Versus - Deputy Governor of Parkhurst Prison & other [1992] 1AC 58**" without clearly setting out the perimeters of what is "**Misfeasance**" in office held thus:

"a person officer who acts in bad faith by deliberately subjecting a prisoner to restraint which he knows he has no authorities to impose may render himself personally liable to an action for false imprisonment as well as committing the tort of misfeasance in public office. Lacking the authority of the governor, he also lacks the protection of Section 12 [1]. But if the officer deliberately acts outside the scope of his authority, he cannot render the governor or the Home Office vicariously

liable for his tortuous conduct. According to the House of Lords decision in Three Rivers District Council & other - Versus - Governor & Company of the Bank of England [No. 3][2000] 3 All ER 1 the basis of action for the tort of misfeasance in office 'lies in the Defendant taking a decision in the knowledge that it is an excess of the powers granted to him and that it is likely to cause damage to an individual or individuals.

169. The House of Lords, in the above case, has described the basis of action for misfeasance in public office as, **'the Defendant taking a decision in the knowledge that it is an excess of the power granted to him and it is likely to cause damage to an individual or individuals.'**

170. The Plaintiff had enjoined the former Commissioner of Lands and the Physical Planner in their private capacity in this suit on the basis of the tort of misfeasance in office, otherwise referred to as abuse of office and for which, the Learned Counsel submitted that they should be personally held liable rather than their offices. **Collins QC et al, Oxford University press, 22/11/2005**, have summarized the essential elements of the tort as elucidated in the said case in Corruption and Misuse of Public Office as follows:

- 1) The Defendant is/was at material times a public officer;**
- 2) The Defendant, at material times, was exercising power or office as a public officer**
- 3) The Defendant acted, or made an omission, in subjective bad faith;**
- 4) The Plaintiff has sufficient interest or nexus to bring an action;**
- 5) Causation;**
- 6) Recklessness by the Defendant as to the consequences of his act.**

171. The Learned Counsel averred that the obvious consequence of a tort is to give rise to a course of action against the tortfeasor. A public officer who dishonestly disregards his plain duty or who does not honestly attempt to do it, acts at peril, and if injury results he is liable for it. The plain unambiguous interpretation of the above authorities is that the Government would incur liability only if the public officers were acting within the confines of the applicable statutes. If the 2nd and 4th Defendants ignored or acted outside the scope of the statute authorizing their actions, then the liability must squarely fall upon their shoulders. The rule of law expects both the executive and the ordinary citizen to be bound and follow the law. Where an officer of the Government breached or neglected to follow the applicable statutes, he could not be said to be acting on the basis of instructions lawfully given.

172. On suing the 3rd Defendant in their personal capacity. The Learned



Counsel argued that a Letter of Allotment was to capture the PDP number of the land being allotted. The Letter of Allotment issued to the 1st Defendant and executed by the 3rd Defendant (See the said Letter of Allotment listed as number 36 on Plaintiffs further list of documents and produced as exhibit). No PDP number had been captured on it. It had a reference number, notably it is similar to reference number indicated on the top right-hand corner of the said letter.

173. In the case of ***“Nelson Kazungu Chai & 9 others - Versus - Pwani University [2014] eKLR”*** the court held echoed the case of ***“African Line Transport Co Ltd - Versus - Attorney General, Mombasa HCCC No 276 of 2013”*** where Njagi J held as follows:

“Secondly, all the defense witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A Letter of Allotment is invariably accompanied by a PDP with a definite number”.

174. Justice Ogutu Mboya at paragraph 83 in Petition E003 of 2021 ; ***“Tache Bonga Gollo & Others - Versus - The Cabinet Secretary Ministry of Defense (2025) eKLR”*** held as follows:-

“To the extent that the Letters of Allotment being exhibited by the 2nd and 4th Petitioners do not capture the designated county council on whose behalf same were [sic] issued and do not capture [sic] the PDP numbers, it is imperative to state and underscore That the impugned letters of allotment are legally deficient, incompetent and thus incapable of vesting or conferring any rights to the 2nd and 4th Petitioners.”

175. Why didn't the 3rd Defendant capture the PDP number on the Letter of Allotment despite having knowledge of its existence?. He was the one who forwarded the approved PDP to the 2nd Defendant (See letter dated 21st June, 1994 listed as number 4 on the Plaintiff's list of documents and produced as exhibit). He indeed confirmed from his testimony that the letter did not have PDP number. The letter of allotment issued to Juma Boy Juma was defective and therefore couldn't confer any rights to Juma Boy Juma who subsequently transferred it to the 1st Defendant. The transfer was therefore defective. Clearly, the 3rd Defendant was negligent.

176. In conclusion, the Learned Counsel submitted that the Plaintiff had proved its case on a balance of probabilities that the alienation of the suit property was illegal, fraudulent, irregular, ab initio and incapable of conferring interest on the 1st Defendant or any other persons. The Plaintiff therefore prayed that this Honourable Court grants it the reliefs sought in its plaint and costs of the suit.



B. The Written Submissions by the 2nd Defendant

177. The 2nd Defendant through the law firm of Messrs. Waziri Omollo & Company Advocates filed his written submissions dated 7th April, 2025. Mr. Waziri Advocate submitted that ideally this was a case between the Plaintiff and the 1st Defendant. The Plaintiff sought an order for declaration that the registration and issuance of lease dated 2nd August, 1994 and Certificate of Lease dated 10th August, 1994 in favor of the 1st Defendant was inter alia unconstitutional. Secondly the Plaintiff seeks the Chief Land Registrar and the Land Registrar Mombasa Land Registry to rectify the register by cancellation of entries in relation to the suit property and lastly an order of permanent injunction against the 1st Defendant. The Plaintiff does not seek any reliefs against the 2nd and 4th Defendants. According to the Counsel, this was a classic example of misjoinder of parties as envisaged under the provision of Order 1 Rule 9 of the Civil Procedure Rules 2010. It was safe at this point to conclude that the sued as filed never disclosed cause of action as against the 2nd to 4th Defendants.
178. The 2nd Defendant was sued in his capacity as the then District Physical Planner. According to the Plaint, it was averred that the 2nd Defendant failed to make inquiries into the suit property and in collaboration with the 3rd and 4th Defendants facilitated and willfully participated in a corrupt enterprise and particularized the fraud, irregularity and illegality as against the 2nd and 4th Defendants. The Plaintiff further avers that the 2nd and 4th Defendants acted negligently, fraudulently, irregularly, illegally and breach of trust.
179. The Learned Counsel submitted that they would entirely rely on his defence, witness statement, sworn testimony and the bundle of documents all dated 15th January, 2025. The 2nd Defendant was instructed to prepare a Part Development Plan (PDP) for the suit property. The 2nd Defendant does not deny that he prepared a PDP and the same was escalated to other offices for further actions.
180. On the issues for determination, the Learned Counsel relied on the following:-
- . ***Whether the suit property was curved out of a road reserve.***
 - . ***Whether the suit property was lawfully created and allocated.***
 - . ***Whether the title of the suit property is capable of being protected***
 - . ***Suing the Physical Planner in his personal capacity***
 - . ***Suing the Commissioner of Lands in his personal capacity***



. ***Suing the 3rd Defendant in his personal capacity.***

. ***Who should bear the costs of this suit***

181. On whether the suit property was curved out of a road reserve, whether the suit property was lawfully created and allocated and whether the title to the suit property is capable of being protected. The Learned Counsel submitted that the 1st three issues seek to address the legality or otherwise of the process of allocation and sanctity of the title that was subsequently issued to the 1st Defendant. It was worthwhile to note that the 1st Defendant never file a Defence and was also represented by a none advocate, an issue which they never sought to belabor the Court since the said non advocate did not examine any witness. They addressed the three issues under one limb of their submissions.
182. The 2nd Defendant was sued in his capacity as the Physical Planner who was tasked with preparing a Part Development Plan in respect to the suit property. The 2nd Defendant testified on the scope of his role. His role is defined. He prepared the PDP and circulated the same to the different government agencies for comments. Two key comments were made by the District Land Surveyor vide his letter dated 17th June, 1994 and the District Commissioner letter dated 15th June, 1994 (marked as 2nd Defendant Exhibit 6 and 5 respectively) which clearly stated that they have no objection since there is an alternative access road to the beach.
183. Under paragraph 14 of the 2nd Defendant's witness statement, it was very clear that at the time of preparing the PDP it was clear to all stakeholders that this was a public road access. At that point it was unsurveyed but still reserved for public access to the beach. This position was further confirmed when it was discovered that this was a mistake and that the 1st Defendant was advised to an alternative allocation and a restriction placed on the title.
184. Whereas it was admitted that the suit property was a road reserve, the 2nd Defendant submitted that his role was to prepare a PDP as per the instructions from the Director of Physical Planning and circulate it for comments and forward the PDP and the comments to the Director of Physical Planning for further action. This fact was not disputed although the Plaintiff's witness James Nyaga initially submitted that the comments were not there but the same were later showed to him during cross examination. The 2nd Defendant further testified that if at all it was desired to change the public access into a private residential plot then the process of degazetting the road ought to have followed.



185. On suing the physical planner in his personal capacity, it was their humble submissions from the onset that the 2nd and 4th Defendants were wrongly sued in this matter. This was a misjoinder of parties under Order 1 Rule 9. The 2nd and 4th Defendants were public servants who were carrying out their specific duties. There was no remedy to be sought against them in a civil action. Indeed the Plaintiff never sought any relief as against the 2nd and 4th Defendants. The role of the 2nd Defendant was to prepare the PDP and circulate for comments. He did exactly that and forwarded the same to his Director of Physical Planning as per the instructions. The process of approval of PDP or otherwise was not the role of a District Physical Planner. Approval was done at a higher level. The District Planner was not supposed to degazette roads and neither was he supposed to revoke the PDP. His role was very clear and he discharged it.
186. Any culpability or otherwise of the 2nd Defendant should have been tested and was indeed tested in a criminal suit. Indeed the same Plaintiff herein commenced criminal proceedings against the 2nd and 4th Defendants vide ***"Mombasa CMCR EACC NO. E003 of 2022 - Republic - Versus - Jabu Salim Mohammed and Others"*** wherein the accused persons were charged with abuse of office contrary to section 101 of the Penal Code, wilful neglect of official duty contrary to Section 128 as read with section 36 Off the Penal Code and aiding the commission of a felony contrary to Section 128 of the Penal Code.
187. In a ruling on case to answer, Hon. Mutuku CM (as she was then) dismissed all the charges against the accused persons absolving them from any criminal culpability. In page 67 of the ruling the court held that:-
- "a. PW - 8 Gordon Odeka testified that the subject property was allocated through the direct grant, that an application was required and the request subjected to planning purposes. He testified that the Director Physical Planning and District Physical Planning Officer would then prepare the PDP if the plot is available for allocation. In his submission, the Is accused person submitted in his capacity as a District Planner he was tasked with preparing the PDP, which he did. This was his official duty and in no way shows arbitrary action on his part....."***
188. According to the Learned Counsel, they had reviewed the authorities supplied by the Plaintiff in support of their submission. They had demonstrated that the 1st accused was absolved of any wrong doing. As a matter of fact he discharged his duties diligently by circulating the PDP for comments and forwarded the DPD and the comments. The Plaintiff



was making blanket allegations against the 2nd Defendant. None of the particularized items had been proved. A mistake was made and the same was remedied. They submitted that the suit as against the 2nd Defendant never disclosed any cause of action, we further submit that the 2nd and 4th Defendants were wrongfully joined in this matter. They prayed that the suit as against the 2nd Defendant be dismissed with costs.

189. On who should bear the costs of this suit. The Learned Counsel averred that the 2nd Defendant was a distinguished civil servant who rose in rank to the position of Assistant Director of Physical Planning. He retired after a serving diligently. He has now been dragged from his retirement to defend himself in a matter which from the onset he wasn't supposed to be sued. He has incurred legal expenses to hire an advocate and to representation him in Court. He attended Court and testified in this matter.
190. It is trite law that costs follow the event. They had demonstrated that the 2nd Defendant was not a necessary party to this claim. The suit never disclosed a cause of action as against the 2nd Defendant. Be that as it may, factually the Plaintiffs had failed to demonstrate any wrong doing on the part of the 2nd Defendant. They prayed that the suit as against the 2nd Defendant be dismissed with costs.
191. In conclusion, they prayed that the Honourable Court considers their submissions and proceedings in Court and dismiss the suit as against the 2nd Defendant with costs.

IX. Analysis & Determination

192. I have keenly considered all the filed pleadings, the oral testimony adduced by the Plaintiff and the Defendants' witnesses, the documentary evidence produced, the Written Submissions filed by Counsel for the respective parties, and the authorities cited. I have also taken into account the relevant provisions of the Constitution of Kenya, 2010, the Land Registration Act, No. 3 of 2012, the Land Act, No. 6 of 2012, the Registered Land Act, Cap. 300 (Now repealed); the Government Land Act, Cap. 280 (Now Repealed) and other applicable statutes. It is trite law that issues for determination in a suit generally flow either the pleadings or as framed by the parties for the court's determination; see "*Galaxy Paints Limited - Versus - Falcon Grounds Limited (2006) 2EA 385*".
193. For this Honorable Court to reach an informed, just, equitable and reasonable decision on the subject matter, it has considered all the issues into the following five (5) sub-headings. These are: -



- a) ***Whether the suit property was public land reserved for beach access.***
- b) ***Whether the Defendants fraudulently or irregularly facilitated its alienation.***
- c) ***Whether the Lease and Certificate of Lease issued to the 1st Defendant were valid.***
- d) ***What remedies, if any, are available.***
- e) ***Who should bear the costs of the suit.***

ISSUE NO. (a) *Whether the suit property was public land reserved for beach access?*

194. Under this sub-heading the Court examined whether the suit land - parcel LR No. Kwale/Diani Beach Block/1072 was indeed according to the several Survey Plans (Maps) unalienated and Surveyed public land reserved for beach access of the Indian Ocean, and therefore incapable of alienation for private use. The Court began by interrogating the survey and administrative records tendered by the Plaintiff. PW - 1, a Land Surveyor from the Kinango Survey Office, testified that to wit:- ***“from that survey, parcel Kwale/Diani Beach Block/1072 was identified as a road separating parcel 187, 188, 189, and 190.”*** He further explained that the irregular survey left parcel No. 628 without access, forcing its owner to use the main road. These statements, drawn directly from the witness testimony, were treated as central factual findings.
195. The Plaintiff produced two (2) Survey Plans - FR 147/3 and FR 262/60, both of which confirmed that parcel Number 1072 was a road reserve. This fact was never controverted. On the contrary, all parties fully concurred with it. PW - 1 emphasized that the later survey was a compilation survey—no new beacons were placed, and existing beacons were reused—meaning the original purpose of the land was not altered. The Court accepted this evidence as authoritative, noting that the Part Development Plan (PDP No. 413.KWL.394) and subsequent allotment did not lawfully convert the road reserve into alienable land for any other purposes including private or individual use.
196. Therefore, the Court aligns these facts with the governing statutory and Constitutional provisions. Towards this end, as a starting point, is imperative to note that Land in Kenya which is very sensitive and emotive is categorized into three - Public, Private and Community land in accordance with the provision of Articles 61, 62, 63 & 64 of the Constitution of Kenya, 2010. According to the provision of Article 62(1)(a) and (l) of the Constitution provides that Public Land is *‘inter alia’*:-

a. land which at the effective date was un-alienated government land as

defined by an Act of Parliament in force at the effective date;

1. all land between the high and low water marks.

197. Pursuant to the provision of Section 45 of the Survey Act, the Survey (Amendments) Regulations 1994, were enacted. Regulation 110 thereof provides as follows:

“ 110.(1) Where unalienated Government land fronting on the area coast is being surveyed for alienation, a strip of land not less than 60 metres in width shall normally be reserved above the high-water mark for Government purposes:

Provided that, if the interests of development require, the Minister may direct that the width of this reservation shall be less, than 60 metres in special cases.

(2) High-watermark in all cases in these regulations means the ‘Mean High Water Mark of Spring Tides.’

198. The Section 82 of the repealed Government Lands Act provides:

“a conveyance, lease or license under this Act shall not, unless otherwise expressly provided therein, confer any right to the foreshore”.

199. A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of the provision of Article 62 of the Constitution and the Government Lands Act (repealed). This notwithstanding the fact that, the expression **“Public Land”** only came to the fore with the promulgation of the 2010 Constitution. What the provision of Article 62 of the Constitution does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of **“Public tenure”**. The retired constitution used the term **“government”** instead of **“Public”** to define such lands. Therefore, it is incorrect for the respondents to assert that the lands in question were un-alienated government land but not public land. It is even more inaccurate to argue that the said parcels had never been public land. Un-alienated government land remains public until it is privatized through allocation to individuals or other private entities.

200. Although the provision of **Article 62(1)(l) of the Constitution** makes no reference to the 60 metres above the High-Water Mark (only limiting itself to the language of “the high and low water mark”) sub - article (1)(n) provides for another category of public land as being any other land declared to be public land by an Act of Parliament in force at the effective date; or enacted after the effective date; hence the relevance of regulation 110(1) which was enacted before the effective date pursuant



to the provision of Section 45 of the Survey Act. Furthermore, Section 82 of the Government Lands Act (repealed) which predates the Survey Act, and under which the lands herein fell as un-alienated government land, out-rightly forbids the conferment of any right to the foreshore by a conveyance, lease or license.

201. When the Environment and Land Court (ELC) evaluates whether a suit property is public land reserved for beach access, it tests the dispute against these legal pillars:

a. **Was the Land ever legally available?**

b. **The Root of Title test:**

i) **Check original Part Development Plans (PDPs)**

ii) **Check if designated as “Open Space” or “Reserve”**

c. **The Foreshore & High-Water Mark Boundary**

d. **Constitutional Limitation**

202. On whether parcel Kwale/Diani Beach Block/1072 is ever legally available for alienation, or whether it remains perpetually reserved as public land for beach access to the Indian Ocean. The Plaintiff’s witness (PW-1) testifies that Survey Plan - FR 147/3 identifies parcel 1072 as a road separating parcel 187, 188, 189, and 190. He emphasizes: “the purposes were not changed.” He explains that the later survey (FR 262/60) is a compilation survey that does not alter the original reservation, since no new beacons are placed and existing ones are reused. This testimony, corroborated by survey records, demonstrates that parcel 1072 is created and recorded as a road reserve. The Letter of Allotment letter and Part Development Plan (PDP No. 413.KWL.394) prepared by the 2nd Defendant do not lawfully convert the road reserve into alienable land. The Court notes that the PDP is irregular, lacking statutory authority, and therefore incapable of extinguishing the public reservation.

203. In the case of:- ***“Kenya Anti-Corruption Commission - Versus - Online Enterprises Limited & 4 Others [2019] eKLR”***, the Environment and Land Court ruled that the Commissioner for Lands illegally alienated public land (a railway reserve) without approved Part Development Plans, ordering the cancellation of private titles. Although not a beach access case, the judgment establishes that land designated for public utility cannot be legally alienated and that subsequent “bona fide purchaser” defenses fail if the root of title is fraudulent.

204. In the landmark case of ***“Chemey Investment Limited - Versus - Attorney***



General & 2 others [2018] eKLR", the Court of Appeal at Nairobi firmly established that statutory protections for registered property titles do not extend to public land acquired through illegal or fraudulent alienations. These precedents reinforce the principle that public utility reservations are sacrosanct and cannot be extinguished by irregular administrative acts.

205. In the instant case, the statutory framework and survey evidence establish that parcel 1072 is a public beach access road. Public land reserved for utility is not legally available for alienation unless lawfully re-designated. No evidence shows that the reservation is ever lifted or altered in accordance with law. The PDP prepared by the 2nd Defendant is irregular and lacks statutory authority. The Commissioner of Lands acts ultra vires in issuing a lease over land reserved for public utility. Once the Plaintiff demonstrates the parcel's reservation as a road, the burden shifts to the Defendants to prove lawful alienation. They fail to discharge this burden.
206. The Court underscores that alienation of beach access roads undermines constitutional values of equality, access, and public trust. Such alienation denies the public their right to access natural resources and violates the fiduciary duty of public officers to safeguard public land. The Court therefore finds that Kwale/Diani Beach Block/1072 is and was never legally available for alienation. It remains public land reserved for beach access, and any purported Lease or Certificate of title issued over it is fraudulent, unlawful, and void ab initio.
207. On the root of the title test, under this sub-heading the Court examines whether the Defendants' title to parcel Kwale/Diani Beach Block/1072 satisfies "**the root of title**" test, which requires scrutiny of the original planning and survey documents to determine if the land is lawfully alienable. The Court emphasizes that the legitimacy of any title must be traced back to its origin, and if the foundation is defective, the entire chain of ownership collapses.
208. Legally speaking, the process of alienation of Public Land is well governed by the provisions of Sections 3 and 9 of the Government Land, Cap. 280 (Now Repealed). Technically speaking, the process commences from, Firstly, an area being declared open for allocation – Development Plan (DP). It is followed by Planning whereby the Part Development Plan (PDP) is prepared with all the details including issuance of numbers. A Letter of Allotment to the Applicant is prepared to invariably accompany the PDP. Secondly, then Surveying exercise to details on the size and



location of the area follows, a letter of allotment is invariably accompanied by a PDP (Part Development Plan) with a definite number and other details. These are then taken to the Department of Survey, who undertakes the surveying. Thirdly, once the surveying is complete, it is then taken to the Director of Surveys for authentication and approval. The “**approval**” and recording in the registered is critical. Thereafter a land reference number is issued in respect of the plot. Finally, the details are send to the then Commissioner of Land (now the National Land Commission for processing of Lease to be forwarded to the Land Registrar for registration and issuance of the Certificate of Lease to the Applicant/Allottee or back to the Director of Survey if its for Sub - Division of the Land to prepare Mutation Forms.

209. On the Original Part Development Plans (PDPs), the Court interrogates Part Development Plan No. 413.KWL.394, prepared by the 2nd Defendant. PW - 1 testifies that this PDP is irregularly prepared and unlawfully approved. It is noted that this were dine under the nose and full knowledge of the 1st, 2nd and 3rd Defendants yet they never intervened at all as was expected of them as duty bound Public Servants. PW - 1 explains that the PDP shows a road being crossed, separating parcels 819, 627, and 628, yet the land in question is already reserved as a road. This anomaly demonstrates that the PDP is not only defective but also incapable of supporting a valid allocation. The Court took notice that, despite of all these glaring anomaly, the 3rd Defendant casually explained by stating that it was an inadvertent oversight.

210. Under the provision Section 24 of the Physical Planning Act, Cap. 286, (Now repealed) it is provided that:

“A Part Development Plan shall be prepared by an officer authorized by the Director of Physical Planning and shall be approved by the Director before any sub - division or allocation is effected.”

211. This provision underscores that PDPs must originate from lawful authority and be duly approved. Further to that, the provision of Section 13 of the Land Act, Act No. 6 of 2012 provides that:-

“S. 13. (1) Where any land reverts back to the national or county government after expiry of the leasehold tenure the Commission shall offer to the immediate past holder of the leasehold interest pre-emptive rights to allocation of the land provided that such lessee is a Kenya citizen and that the land is not required by the national or the county government for public purposes.

(2) The Commission may make rules for the better carrying out the provisions of this section, and without prejudice to the generality of the



foregoing, the rules may provide for the following.

- (a) prescribing the procedures for applying for extension of leases before their expiry.
- (b) prescribing the factors to be considered by the Commission in determining whether to extend the tenure of the lease or re-allocate the land to the lessee.
- (c) the stand premium and or the annual rent to be paid by the lessee in consideration of extension of the lease or re-allocation of the land.
- (d) other covenants and conditions to be observed by the lessee”.

212. Certainly, in the instant case, the PDP relied upon by the Defendants fails this statutory test. It is not prepared or approved in accordance with law, and therefore cannot form a valid root of title.

213. On checking if designated as “**Open space**” or “**reserve**”, I note that Survey records (FR 147/3 and FR 262/60) identify parcel 1072 as a road reserve. PW - 1 emphasizes: “***the purposes were not changed.***” This designation as a road reserve means the land is constitutionally protected as public land under the provision of Article 62(1)(a) of the Constitution of Kenya, 2010, which defines public land to include land reserved for public utility.

214. The provision of Section 26 (1) of the Land Registration Act, 2012 provides that:

“A certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor, shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to challenge 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.”

215. Section 80(1) of the Land Registration Act, 2012 further provides that:

“Subject to subsection (2), the court may order 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.”

216. These provisions collectively establish that designation as “open space” or “reserve” renders land unavailable for alienation, and any title issued contrary to this designation is impeachable. The root of title test requires that the Defendants demonstrate a lawful chain of allocation beginning with a valid PDP and lawful designation. The evidence shows:

- a. The PDP relied upon is irregular and unauthorized



- b. Survey records designate the land as a road reserve, not available for alienation.
 - c. No lawful re-designation or gazettement exists to convert the land into alienable property.
217. Therefore, the Defendants' title fails the root of title test. The Court finds that the Defendants' title to parcel Kwale/Diani Beach Block/1072 collapses at its root. The original PDP is irregular, and the land is designated as a public reserve for beach access. Consequently, the purported lease and certificate of title are fraudulent, unlawful, and void ab initio.
218. On the foreshow and high water mark boundary, the Court notes that under this sub-heading the Court examines whether the suit property, Kwale/Diani Beach Block/1072, extends into or interferes with the foreshore and high-water mark boundary, and whether such land is legally alienable. Article 62(1)(f) of the Constitution provides that:-
- “Public land includes all land between the high-water mark and the low-water mark, the sea bed, and the subsoil underlying the ocean.”**
219. This provision categorically places foreshore land within the domain of public land. It is held in trust for the people of Kenya, and its alienation for private use is constitutionally prohibited unless a lawful re-designation process is undertaken.
220. Further under the provision of Section 21 of the Survey Act (Cap. 299 Laws of Kenya), the same provides that survey boundaries must respect natural features, including tidal boundaries. Surveyors are required to record the high-water mark where land abuts the ocean. This ensures that survey plans reflect the natural demarcation between private land and foreshore public land.
221. Under the provision of Section 55 of the Environmental Management and Coordination Act (EMCA), 1999, the law declares the foreshore and coastal zone as environmentally sensitive areas, requiring special protection and regulation. This provision underscores the ecological and public interest dimensions of foreshore land, making its alienation subject to strict environmental safeguards.
222. PW - 1 testifies that parcel 1072 is created as a road reserve abutting the beach. He emphasizes: **“the purposes were not changed.”** The survey records (FR 147/3 and FR 262/60) confirm that the parcel lies adjacent to the foreshore. This means that any alienation of the parcel necessarily implicates the high water mark boundary. The Court notes that no



evidence is produced to show lawful re-designation of the foreshore or approval by the National Land Commission. The purported PDP and allotment letter do not override constitutional provisions reserving foreshore land as public property.

223. In the case of: ***“Coastal Properties Limited - Versus - County Government of Kwale; Director of Survey Kwale County & 3 Others [2022] KEELC 15337 (KLR)”***, the Court emphasizes that beach access roads and foreshore land are public reserves. Alienation of such land undermines public trust and violates Article 62 of the Constitution.
224. The foreshore and high-water mark boundary is constitutionally protected as public land. Survey evidence shows that parcel 1072 abuts the foreshore and is designated as a road reserve. No lawful re-designation exists to convert this land into alienable property. The PDP relied upon by the Defendants is irregular and cannot override constitutional protections. The Court finds that alienation of foreshore land or beach access roads is unlawful. The Defendants’ title fails because it purports to privatize land that is constitutionally reserved for public use.
225. Therefore, the Court finds that Kwale/Diani Beach Block/1072 lies adjacent to the foreshore and high-water mark boundary, and is constitutionally protected as public land. It is never legally available for alienation, and any purported lease or certificate of title issued over it is fraudulent, unlawful, and void ab initio.
226. On the constitutional limitation. The Court notes that under this sub-heading the Court examines whether the Constitution of Kenya imposes limitations on the alienation of public land, particularly land reserved for beach access and foreshore areas, and whether the Defendants’ actions are consistent with these constitutional safeguards. The provision of Article 40(3) of the Constitution provides that:-

“The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation —

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—

(i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”



227. This provision protects property rights but expressly subjects them to public interest and constitutional limitations. Fraudulent acquisition of public land cannot be shielded under Article 40. The Constitution makes clear that property rights are not absolute; they are balanced against the public interest.

228. Further, the provision of Article 10 (2)(c) of the Constitution provides that:-

“The national values and principles of governance include... integrity, transparency and accountability.”

229. This provision requires that all dealings in public land adhere to integrity and transparency. It elevates the management of public land to a constitutional value, ensuring that corruption, fraud, or irregular allocation cannot be legitimized.

230. The Constitution expressly prohibits alienation of land reserved for public utility, including beach access roads and foreshore areas. Survey evidence shows that parcel 1072 is a road reserve abutting the foreshore. No lawful re-designation or gazettement exists to convert this land into alienable property. The Defendants’ reliance on an irregular PDP and allotment letter cannot override constitutional provisions. Applying *Gichinga Kibutha and Coastal Properties*, the Court finds that the Defendants’ title is unconstitutional. Article 40 of the Constitution does not protect property acquired through fraud or illegality, and Article 62 of the Constitution vests such land in the national government in trust for the people. The Court further notes that Article 10 of the Constitution requires integrity and transparency in public land management. The Defendants’ conduct, characterized by irregular surveys and unauthorized PDPs, violates these constitutional values.

231. Thus, the Court finds that constitutional limitations under Articles 62, 40, and 10 of the Constitution render the suit property unavailable for alienation. Any purported Lease or Certificate of Title issued over parcel Kwale/Diani Beach Block/1072 is fraudulent, unconstitutional, and void ab initio.

ISSUE NO. (b) Whether the Defendants fraudulently or irregularly facilitated its alienation.

232. Under this sub-heading the Court examines whether the Defendants, jointly or severally, fraudulently or irregularly facilitated the alienation of parcel Kwale/Diani Beach Block/1072, which is reserved for public beach access.



233. The efficacy and effectiveness of registration and ownership of land are further governed in addition to Article 40 (1) & (2) of the Constitution of Kenya, 2010, Sections 24, 25 and 26 of the land Registration Act, No. 3 of 2012. Section 24 of the Act provides that subject thereto:—

a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of lease.

234. Section 25 of the Act states as follows:-

“(1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an Order of Court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:—

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.

235. Section 26 of the Act states as follows:-

“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original”.



236. In the case of *“Alice Chemutai Too - Versus - Nickson Kipkurui Korir & 2 Others [2015] eKLR”* Justice Sila Munyao held that:

*“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of *Elijah Makeri Nyangwara - Versus - Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012* where I stated as follows:- “...it needs to be appreciated that for Section 26 (1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent titleholder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally, or through a corrupt scheme. The titleholder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions. “I stand by the above words and I am unable to put it better than I did in the said dictum.”*

237. I am fully in agreement with Munyao JA. that the provision of Section 26 is meant to protect the real title holders from unscrupulous persons whose intention is to benefit where they have not sown. It is trite that he who alleges must prove, as provided by Section 107 of the Evidence Act. The Plaintiff alleged fraud on the part of the Defendants, and they had a duty to prove the existence of such fraud.

238. **Black’s Law Dictionary, 9th Edition** defines fraud as;

“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. As applied to contracts, it is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, in the sense of a Court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly



reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another”.

239. In the case of **“Arthi Highway Developers Limited - Versus - West End Butchery Limited & 6 others [Supra]”**, the Court held that;

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. One of the authorities produced before us has this passage from Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition at page 427:

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd’s Rep. 305, 308).

240. Where a person’s title is under attack, he must of necessity give an account on how he acquired the same; the Accuser must also show the court that the property as truly obtained in a fraudulent transaction. In the case of **“Munyu Maina - Versus - Hiram Gathiha Maina (Supra)”**, where the Appeal Court held that: -

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

241. It is trite that fraud must be specifically proved. See the case of **“Vijay Morjaria - Versus - Nansingh Madhusingh Darbar & Another [2000] eKLR”**, where the Court held:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

242. See also the case of **“Koinange & 13 others - Versus - Charles Karuga Koinange 1986 KLR”** at page 23, where the court held that:

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

243. The Plaintiff avers that the 2nd Defendant unlawfully prepared and uttered a false PDP (No. 413 KWL 294). The 3rd Defendant fraudulently



facilitated allotment of the suit property to Juma Boy Juma despite its reservation as a public beach access road. The 4th Defendant, as Commissioner of Lands, purported to issue a lease to the 1st Defendant in excess of his statutory powers. The 1st Defendant knowingly acquired the property despite its reservation for public use.

244. PW1's testimony confirms that the PDP crossed a road reserve and was irregular. He emphasizes that "*the purposes were not changed*", meaning the land remained a road reserve.
245. The statutory framework and evidence demonstrate that the Defendants act irregularly and fraudulently:
- . Irregular PDP: The 2nd Defendant lacks authority to prepare a PDP for alienation of a road reserve.
 - . Fraudulent Allotment: The 3rd Defendant facilitates allotment of land reserved for public use, contrary to law.
 - . Ultra Vires Lease: The 4th Defendant issues a lease over land not available for alienation, exceeding his statutory powers.
 - . Knowledge of Reservation: The 1st Defendant acquires the property with constructive knowledge that it is reserved for beach access.
246. The root of title collapses because the original PDP and allotment are defective. Following "***Dignified Holdings (Supra)***", alienation of reserved land is void ab initio. The conduct of the Defendants amounts to fraud, irregularity, and abuse of office.
247. The Court therefore finds that the Defendants fraudulently and irregularly facilitated the alienation of parcel Kwale/Diani Beach Block/1072. Their actions are ultra vires, unconstitutional, and void ab initio. The lease and certificate of title issued to the 1st Defendant confer no rights or interests in the suit property.

ISSUE No. (c) Whether the Lease and Certificate of lease issued to the 1st Defendant are valid

248. Under this sub-heading the Court examines whether the lease dated 2nd August, 1994 and the Certificate of Lease dated 10th August, 1994 issued to the 1st Defendant confer any valid rights or interests in parcel LR. No. Kwale/Diani Beach Block/1072. I have previously referenced the provision Section 24 of the Land Registration Act, No. 3 of 2012 which protects registered proprietors but expressly subjects their rights to overriding interests, including reservations for public utility. A proprietor cannot claim indefeasibility of title where the land is constitutionally



reserved for public use while the provision of Section 26 (1) makes clear that indefeasibility of title is conditional. It collapses where fraud, illegality, or procedural irregularity is demonstrated and further the provision of Section 80(1) of the Land Registration Act, No. 3 of 2012, empowers the Court to cancel entries in the land register where fraud or mistake is established, thereby restoring the integrity of the register.

249. The Court in the case of:- ***“County Government of Kwale & 2 Others - Versus - Patria Properties Limited & 6 Others [2022] eKLR”***, emphasized that long-term encroachment does not validate title over public land. Further in the landmark case of ***“Dignified Holdings Limited - Versus - Attorney General & 12 Others [2020] KEELC 2746 (KLR), the Environment and Land Court (ELC)”*** ruled that when a private land parcel is sub - divided to accommodate a public infrastructure project, the resulting title for the road reserve remains public utility land, rendering any duplicate private titles issued over that reserve fraudulent, null, and void.
250. The lease and certificate of lease issued to the 1st Defendant purport to confer ownership rights over parcel 1072. However, survey evidence and statutory provisions establish that the land is a public beach access road reserved for utility. The PDP relied upon is irregular, and the Commissioner of Lands acts ultra vires in issuing the lease. Applying the provision of Section 26(1) of the Land Registration Act, the Certificate of Lease is impeachable because it is acquired illegally, unprocedurally, and through a corrupt scheme. Following the precedence extensively discussed in this Judgment, the burden shifts to the 1st Defendant to prove legality of acquisition. No evidence demonstrates lawful re-designation of the land or compliance with statutory procedures.
251. The Court notes that indefeasibility of title is not a shield for fraud. The doctrine of public trust under the provision of Article 62 of the Constitution places beach access roads within the category of public land, which cannot be alienated for private gain. The issuance of a lease over such land is unconstitutional, fraudulent, and void.
252. The Court holds that the lease dated 2nd August, 1994 and the Certificate of Lease dated 10th August, 1994 issued to the 1st Defendant are invalid. They are unconstitutional, fraudulent, and void ab initio, and must be cancelled under the provision of Section 80 of the Land Registration Act, 2012. The purported registration confers no estate, interest, or right in the suit property, and the land remains public property reserved for beach access.

ISSUE No. (d)

What remedies, if any, are available



253. Under this sub-heading the Court examines the reliefs sought by the Plaintiff at the foot of the Plaint, and whether they are merited in light of the findings that parcel Kwale/Diani Beach Block/1072 is public land reserved for beach access and that the Defendants fraudulently and irregularly facilitated its alienation. The Plaintiff prays for:

- a) **A declaration that the lease and certificate of lease issued to the 1st Defendant are unconstitutional, fraudulent, unlawful, and void ab initio.**
- b) **An order directing the Chief Land Registrar to rectify the register by cancelling entries relating to Kwale/Diani Beach Block/1072.**
- c) **A permanent injunction restraining the Defendants from dealing with the property in any manner other than surrender to the Government of Kenya.**
- d) **Costs of the suit.**
- e) **Any other relief deemed fit by the Court**

254. The Legal basis for the remedies is found in Section 80(1) of the Land Registration Act, 2012 which provides that:-

“(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.”

255. In the case of ***“Kenya Anti-Corruption Commission - Versus - Online Enterprise Limited Kisumu ELC number 708 of 2015”*** as cited in ***“Baishe - Versus - Bwana (Environment & Land Case 229 of 2021) [2023] KEELC 19129 (KLR) (27 July 2023) (Judgment)”*** the court stated that;

“The court is also empowered under section 80 (1) of the Land Registration Act, to order the rectification of the register by directing that any registration be cancelled or amended if its satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the defendants irregularly, fraudulently and un-procedurally registered the suit land in their names and the same should not be allowed to stand.” *Emphasis mine.*

256. Further under Section 24, 25 and 26 of the Land Registration Act, 2012, the same confers rights of proprietorship but expressly subject them to defeat where fraud, illegality, or overriding interests are proved. Section



62(1)(a) and (f) of the Constitution provides for public land including.

257. I also take note that there is an element of trespass by the Defendants. Article 40 of the Constitution recognises that every person has the right to acquire and own property of any kind and in any location within Kenya. The protections and limitations related to such land rights are governed by the provision of Sections 24, 25, and 26 of the Land Registration Act, which demarcate land rights, privileges, appurtenances, liabilities, and interests. Other relevant provisions of the law are contained in the Land Act and the Trespass Act, which specifically stipulate:

258. Section 152A of the Land Act 2016 states as follows: -

“A person shall not unlawfully occupy Private, Community or Public Land.”

259. Section 3 (1) of the Trespass Act defines trespass as: -

“any person who without unreasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on private land without the consent of the occupier thereof shall be guilty of an offence.”

260. As for the writings of eminent scholars, the text of **Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923**, defines trespass to land as follows: -

“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.”

261. **Page 927** of the same text discourses as to who may sue for trespass, and it states as follows: -

“Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner.”

262. In the book of **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition, page 428**, trespass is discussed as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in



263. The prevailing theme in the definition of trespass, as articulated by these esteemed scholars, is that ownership is not a prerequisite for such a claim. Nevertheless, the assertion of a person holding title to the land takes precedence in cases of competing claims of possession.
264. The Plaintiff has demonstrated that the lease and certificate of lease issued to the 1st Defendant are fraudulent and void ab initio. The Defendants’ actions amount to trespass against public land. The Plaintiff is therefore entitled to:
- **A declaration that the lease and certificate of lease are unconstitutional, fraudulent, unlawful, and void ab initio.**
 - **Cancellation of the entries in the land register relating to Kwale/Diani Beach Block/1072 under Section 80(1) of the Land Registration Act.**
 - **A permanent injunction restraining the Defendants from alienating, transferring, charging, leasing, subdividing, or otherwise dealing with the property.**
 - **General damages for trespass assessed on the basis of prolonged interference with public rights of access.**
265. Be that as it may, the Court cannot avoid pointing out the acts and commissions committed by duly appointed Public Officers - the District Physical Planning Officer, the then Commissioners of Land and the Land Registrar (the 3rd 4th & 5th Defendants herein) in wilfully facilitating the 1st Defendant to illegally, unlawfully and fraudulently acquire the suit land. I can not agree more with the Learned Counsel for the Plaintiff to the effect that they as Civil Servants were guilty of acting unprofessionally, in bad faith, ultra vires and in misconduct in public office. They breached “**the Tort of Misfeasance**”. The Court therefore finds that the Plaintiff is entitled to the remedies sought. The lease and certificate of lease issued to the 1st Defendant are cancelled, the register is rectified, a permanent injunction is issued, and general damages for trespass are awarded.

ISSUE No. (e) Who will bear the costs of the Suit

266. Under this sub-heading the Court examines the issue of costs, which is a discretionary relief but guided by statutory provisions and judicial precedent.. It’s now well established that the issue of Costs is at the discretion of Court. Costs means any award that a party is as the conclusion of any legal action, proceedings and process of any litigation. The Proviso of the provision of Section 27(1) of Civil Procedure Act provides that costs follow the events.



267. By events it means the result such a legal action, process and/or proceedings. (See the Supreme Court case of “**Jasbir Rai Singh Rai - Versus Tarchalon Singh (2014) eKLR**; and the case **Rose Mary Wambui Munene - Versus - Ihururu Dairies Co - Operative Limited (2014) eKLR**, **Kenya Sugar Board - Versus - Ndungu Gathini (2013) eKLR**; and **Cecilia Nyayo - Versus Barclays Bank of Kenya Limited (2016) eKLR**” where Courts held that:-

“The basic rule on attribution of costs is that costs follow the event.....it is well recognised that the principles costs follow the event is not be used to penalize the losing party rather it is for compensating the successful party for the trouble taken in presenting of defending the case”.

268. In the present case, the Plaintiff (Ethics and Anti-Corruption Commission) succeeds in demonstrating that the lease and certificate of lease issued to the 1st Defendant are fraudulent, unlawful, and void ab initio. The Defendants have failed to establish a lawful root of title or demonstrate procedural compliance. Applying Section 27(1) of the Civil Procedure Act, costs must follow the event. The Plaintiff has been compelled to institute proceedings to recover public land unlawfully alienated. The Defendants, having been found culpable of fraud and irregularity, must bear the costs of the suit.

269. The Court finds no special circumstances to depart from the general rule. Awarding costs to the Plaintiff is consistent with the principle that no party should benefit from their own wrong (*nullus commodum capere potest de injuria sua propria*).

270. The Court therefore orders that the Defendants shall jointly and severally bear the costs of this suit, together with costs incidental to the proceedings. This ensures that the Plaintiff, acting in the public interest, is indemnified against the expenses incurred in recovering public land.

X. Conclusion and disposition

271. Ultimately, upon conducting an elaborate analysis of the framed issues herein, this Honourable Court concludes, on a balance of probabilities, that the Plaintiff has successfully established its case against the Defendants. For avoidance of doubt, I specifically make the following orders: -

a) THAT Judgment be and is hereby entered in favour of the Plaintiff in accordance with the Plaint dated 16th May, 2019.

b) THAT a declaration be and is hereby made that the registration and issuance of the Lease dated 2nd August 1994 and Certificate of Lease dated 10th August 1994 in favour of the 1st Defendant was unconstitutional, fraudulent, unlawful, corruptly irregular,



null and void ab initio, and ineffectual to confer any right, interest, or title upon the 1st Defendant.

- c) THAT the Chief Land Registrar and the Land Registrar, Mombasa Land Registry, do and are hereby directed to rectify the land register by cancelling the entries relating to land reference number Kwale/Diani Beach Block/1072.
- d) THAT a permanent injunction be and is hereby issued restraining the 1st Defendant, whether by themselves, their agents, servants, or assigns, from alienating, transferring, charging, leasing, subdividing, disposing of, wasting, entering or remaining upon, or undertaking any construction or development of any nature thereon, land reference number Kwale/Diani Beach Block/1072, or from howsoever dealing with the said property other than by way of surrender to the Government of Kenya.
- e) THAT the Defendants' purported alienation and occupation of the suit property is hereby declared unlawful and irregular, the same having been effected without a lawful root of title or compliance with statutory procedures.
- f) THAT the Plaintiff is awarded general damages for trespass assessed at Kenya Shillings Ten Million (Kshs. 10,000,000/-), together with interest at Court rates from the date of this Judgment until payment in full.
- g) THAT a declaration be and is hereby made that the duly appointed Public Officers - the District Physical Planning Officer, the then Commissioners of Land and the Land Registrar - the 3rd 4th & 5th Defendants herein, be and are hereby found guilty of "the Tort of Misfeasance" - acting unprofessionally, in bad faith, ultra vires and in misconduct in public office for wilfully facilitating the 1st Defendant to illegally, unlawfully and fraudulently acquiring the suit land.
- h) THAT the Plaintiff shall be entitled to interest on the award in (f) at Court rates from the date of filing the suit until payment in full.
- i) THAT the costs of this suit shall be borne by the Defendants jointly and severally, the Plaintiff having succeeded in their claim.



IT IS ORDERED ACCORDINGLY.

**JUDGEMENT DELIVERED THROUGH MICRO - SOFT TEAMS VIRTUAL
MEANS, SIGNED AND DATED AT KWALE THIS.....14TH
.....DAY OF.....JULY....., 2026.**

Judgment delivered in the presence of:

- (a) Mr. Daniel Disii, the Court Assistant.
- (b) M/s. Songole Advocate for the Plaintiff.
- (c) Mr. Waziri Advocates for the 2nd Defendant.
- (d) Mr. Aboga Advocate holding brief for Mr. Mogaka for the 3rd Defendant.
- (e) M/s. Ngure Advocate for the 4th Defendant.
- (f) No appearance for the 1st & 5th Defendants.

SIGNED BY: HON.JUSTICE L.L. NAIKUNI



THE JUDICIARY OF KENYA.
KWALE ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT
DATE: 2026-07-20 11:16:45+03

