REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MOMBASA COUNTY

COURT NAME: MOMBASA ENVIRONMENT AND LAND COURT

CASE NUMBER: ELC 184/2010

KENYA ANT-CORRUPTION COMMISSION VS GILBERT MWANGI NJUGUNA AND ANOTHER

JUDGMENT

I. Preliminaries

1. The Judgement by this Honourable Court pertains to a Civil suit of the claim by the *Ethics and Anti-Corruption Commission (EACC)*, the Plaintiff herein, instituted against *Gilbert Mwangi Njuguna, Wilson Gachanja*, *Jimmy Kimaru Karatu*, *Yusuf Alimkwiru*, and *Eskon Rumwa*, the Defendants herein, by way of an Amended Plaint dated 24th February, 2022. The Plaintiff sought for recovery of public land known as Mombasa Municipality/Block XXVI/933 (Hereinafter referred to as "The Suit Land"), alleged to have been fraudulently and irregularly alienated from government ownership and reserved for civil servants' housing.

2. Upon service of Summons to Enter Appearance, the Defendants opposed the claim by filing the following pleadings. These were:-

   a) The 1st Defendant filed a Defence maintaining that he lawfully acquired the property through a lease issued by the Commissioner of Lands.

   b) The 2nd Defendant, then Commissioner of Lands, filed his Defence denying any fraudulent conduct and asserting that his actions were within statutory mandate.

c) The 3rd and 4th Defendants claimed ownership under a Certificate of Lease dated 30th September, 1997; while,

d) The 5th Defendant, through possession, asserted that he was lawfully entitled to occupy the property.

3. Each Defendant denied collusion or fraud, contending that the allocation and registration were procedurally regular and valid in law.

II. The Description of the Parties

4. 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.

5. The 1st Defendant, *Gilbert Mwangi Njuguna,* is an adult male of sound mind residing within the Republic of Kenya. He is sued as the person alleged to have wrongfully and fraudulently procured a letter of allotment and lease over the suit property for private purposes, notwithstanding its reservation for government housing.

6. The 2nd Defendant, *Wilson Gachanja*, is an adult male of sound mind & understanding residing in Nairobi within the Republic of Kenya. At all material times, he served as the Commissioner of Lands under the repealed Government Lands Act (Cap 280). He is sued for having unlawfully and fraudulently issued a letter of allotment and lease over the suit property in excess of his statutory powers and in breach of fiduciary duty owed to the public.

7. The 3rd Defendant, *Jimmy Kimaru Karatu*, is an adult male of sound mind & understanding residing within the Republic of Kenya. He is sued as one of the persons alleged to have fraudulently procured and obtained a certificate of lease over the suit property on 30th September 1997, despite the absence of a valid Part Development Plan (PDP) or Letter of Allotment.

8. The 4th Defendant, *Yusuf Alimkwiru*, is an adult male of sound mind & understanding residing within the Republic of Kenya. Together with the 3rd Defendant, he is alleged to have fraudulently procured and obtained a

certificate of lease over the suit property for a term of 99 years commencing 1st January 1996, without lawful authority or compliance with statutory procedures.

9. The 5th Defendant, *Eskon Rumwa,* is an adult male of sound mind and understanding residing within the Republic of Kenya. He is sued as the person in possession of the suit property, alleged to be enjoying undue use and occupation thereof, notwithstanding the fraudulent and unlawful alienation of the land from government ownership.

III. Court Directions before Hearing

10. Upon perusal of the pleadings and interlocutory applications filed herein, this Honourable Court directed that the Plaintiff be granted leave of fourteen (14) days to file and serve an Amended Plaint dated 24th February, 2022.

11. The Defendants were correspondingly granted fourteen (14) days to file and serve their respective Amended Defences and/or Counter - Claims, arising from the Plaintiff's amended pleadings. In particular, the 1st Defendant was directed to file any documentary evidence substantiating his alleged entitlement under the impugned lease; the 2nd Defendant was directed to file any records or correspondence issued in his capacity as the then Commissioner of Lands; while the 3rd and 4th Defendants were directed to file the Certificate of Lease dated 30th September, 1997 together with any supporting Part Development Plan relied upon. The 5th Defendant was directed to file evidence of possession and occupation of the suit property.

12. The Court further ordered that the matter be mentioned on 16th May, 2022 for purposes of confirming compliance with the filing directions, and thereafter fixed for pre-trial conference on 18th October, 2022.

13. Upon compliance with pre-trial directions under 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 16th November, 2022, with liberty to call witnesses and produce documentary evidence and thereafter closed their case on the same date, while the Defendants were closed on the same day as well.

IV. The Plaintiff's Case

14. From the pleadings before this Honourable Court, the Plaintiff, the Ethics and Anti-Corruption Commission (EACC), averred that pursuant to its legal mandate, the Plaintiff had launched investigations into allegations regarding corrupt, fraudulent and illegal alienation of parcel of land described as Mombasa Municipality/Block XXVI/933, with a view of recovering the same on behalf of the

Government of Kenya. The Plaintiff averred that in the course of its investigations, its investigators had conducted interviews, recorded written statements, and requested and obtained copies of public documents and evidence from public officers and institutions.

15. Following the investigations, the Plaintiff established crucial facts, including that:

a) At all material time to this suit land reference number: Mombasa Municipality/Block XXVI/933 - “the suit property" situated within Mombasa Municipality was part of land reference number: Mombasa Municipality/Block XXVI/243, which the Government of Kenya set aside for public purposes of establishment of residential houses for civil servants and other Government officers.

b) The suit property was part of land which was set aside for the construction of government houses and indeed house number HG was constructed on the suit property.

c) The copies of Survey Plans, Development Plans and Topocadastral Plans for Mombasa Island clearly bears out that the suit property falls within the area planned for Government Houses and indeed house number: HG No. 53 was constructed on the suit property.

d) The Government of Kenya reserved land reference number: Mombasa Municipality/Block XXVI/243 for public services and in particular for purposes of establishment of residential houses for civil servants and other Government officers by way of a Survey Plan Register number 65/69.

e) As at the time the Survey Plan Folio Register number 65/69 was being prepared, the government had constructed houses on land reference number: Mombasa Municipality/Block XXVI/243, to house its civil servants.

f) The Government proceeded to develop the said parcel of land to wit: Mombasa Municipality/Block XXVI/243 and built residential houses thereon as intended and that the said houses have been in the possession and occupation of civil servants.

g) On 15th December, 1994, the 2nd Defendant, through his officers, wrote to the Coast Provincial Physical Planning Officer and informed him that the government had approved allocation of house reference number HG 53 to the 1st Defendant and requested for the boarding of the house to facilitate the documentation of the same.

h) On 29th July, 1996, the then Provincial Officer, Coast Province, wrote to the then Permanent Secretary in the Ministry of Public Works and Housing instructing him to convene a board of survey in respect of the house on the suit property so that the same could be allocated to the 1st Defendant.

i) On 13th August, 1996, a letter was written to the then Permanent Secretary in the Ministry of Public Works and Housing informing him that the Office of the President did not have any objection if the Ministry of the Public Works and Housing boarded the house on the suit property.

j) On 20th August, 1996, the then Permanent Secretary in the Ministry of Public Works and Housing informed the then Permanent Secretary in the Office of the President that the Cabinet had discussed the issue of boarding the house on the suit property and declined to have the said house boarded for purpose of allocating the same to the 1st Defendant or at all.

k) On 23rd December, 1997, the 2nd Defendant issued to the 1st Defendant with a letter of allotment for the house on the suit property notwithstanding the position which had been taken by the then Permanent Secretary, Ministry of Public Works and Housing.

l) The Part Development Plan annexed on the letter of allotment shows the existence of a house as at the time of the allocation of the suit property.

m) On the basis of the letter of allotment, a survey plan folio number 312/74 was prepared and land reference number: Mombasa Municipality/Block XXVI/933 was created.

n) On 02nd March, 1997, the 1st Defendant, prepared and issued to the 2nd Defendant a Lease in respect to the suit property for private purpose.

o) The Valuation Report prepared by the Plaintiff's Valuer dated 30th July, 2008, revealed that the suit property had a government house registered in the then Ministry of Housing offices in Mombasa as HG 53 as at the time of the allocation.

p) On or about 1997, the 1st Defendant wrongfully and fraudulently procured from the 2nd Defendant, a letter of allotment and Lease over the suit property for private purposes.

q) On 30th September, 1997 Jimmy Kimaru Karatu (Intended 3rd Defendant) and Yusuf Alimkwiru (Intended 4th Defendant) wrongfully and fraudulently procured and obtained Certificate of Lease over the suit property for a period of 99 years from the 01/01/1996.

r) There exists no valid letter of allotment that supports the leasehold interest over the suit property purportedly held by the Jimmy Kimaru Karatu (Intended 3rd Defendant) and Yusuf Alimkwiru (Intended 4th Defendant).

s) There exists no valid Part Development Plan that supports the leasehold, interest over the suit property purportedly held by the Jimmy Kimaru Karatu (Intended 3rd Defendant) and Yusuf Alimkwiru (Intended 4th Defendant).

t) There exists no registered Part Development Plan that supports the leasehold interest over the suit property purportedly held by the Jimmy Kimaru Karatu (Intended 3rd Defendant) and Yusuf Alimkwiru (Intended 4th Defendant).

u) On 09th March, 1998 the 2nd Defendant unlawfully and fraudulently issued a Certificate of Lease to the 1mt Defendant for a period of 99 years; for private use notwithstanding the fact that a government house number for purposes of selling and/or demolishing, HG 53 did exist on the suit property and the same had not been boarded

16. The Plaintiff stated that at all material times ALL THAT parcel of land now registered as Mombasa Municipality/Block XXVI/933 situated within Mombasa Municipality was part of a larger parcel of land reference number Mombasa Municipality Block XXVI/243 which the Government of Kenya set aside for public purposes and in particular for the purposes of establishment of residential houses for civil servants and other Government officers. At all material to this suit the Government proceeded to develop the said parcel of land to wit; Mombasa Municipality/Block XXVI/243 and built residential houses thereon as intended. The said houses have been in the possession and occupation by the civil servants.

17. The Government development the residential houses as per the approved Development Plan (DP) and the Topocadastral Plans for Mombasa Municipality. The boundaries of the various parcels of land and houses thereof were clearly marked and defined and each house together with its compound is clearly identifiable. The Plaintiff averred that pursuant to a statutory investigation it has undertaken under section 7 of the Act, it has been established that on or about the 1997, the 1st Defendant wrongfully and fraudulently procured from the 2nd

Defendant a letter of allotment and Lease over the suit property for private purposes.

18. On or about 2nd March, 1988, the 2nd Defendant unlawfually and fraudulently issued to the 1st Defendant a Lease over the suit property for private purpose notwithstanding the fact that a government house number HG 53 did exist on the suit property and the same had not been board for the purpose of selling and or demolishing. The said lease was purportedly registered at the District Land Registry in Mombasa and a Certificate of Lease issued to the 1st Defendant under the provisions of the Registered Land Act, Chapter 300 of the Laws of Kenya, without the knowledge or consent of the Permanent Secretary, Ministry of Finance.

19. The Plaintiff relied on the following particulars of the 1st and 2nd Defendants' fraud:-

a) The Defendants knew or ought to have known that the suit property and the house thereon was reserved for the civil servants and was therefore not unalienated Government land.

b) The Defendants knew or ought to have known that the suit property belonged to, and was in the actual possession of, the Permanent Secretary, Treasury in trust for the civil servants and or the public.

c) The 2nd Defendant issued and the 1st Defendant obtained, the lease over the suit property without the knowledge or consent of the Permanent Secretary, Ministry of Finance (Treasury) and the Permanent Secretary in charge of Government houses.

d) The Defendants failed to circulate the Part Development Plan (PDP) to the relevant authorities leading to the said unlawful alienation.

e) The alienation was done selectively and arbitrarily without any public auction or tendering.

f) The 2nd Defendant, with knowledge of want of authority, purported to issue the lease in the name of the President of the Republic of Kenya

20. The Plaintiff also contended that the 2nd Defendant acted illegally in issuing the letter of allotment and Lease to the 1st Defendant in the first instance and relied on the following particulars of illegality:

(a) Knowingly and without legal authority alienating land and a house reserved for public use for private purposes.

(b) Alienating land reserved for public use without following the laid down legal procedures.

(c) Failing to circulate or adequately circulate the Part Development Plan (PDP) leading to the said alienation to interested authorities for comments in accordance with the requirements of the applicable legislation.

(d) Allocating a government house before convening the Board of Survey.

(e) Alienating public land and allocating a government house contrary to and ultra vires the provisions of the Government Lands Act.

(f) There was neither approval by the responsible Minister for Housing or the Permanent Secretary, Treasury for the alienation of the suit property to the 1st Defendant contrary to the provisions of the Government Financial Regulations and Procedures.

21. The Plaintiffs 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 for Mombasa Municipality/Block XXVI/933 to the 1st Defendant was consequently null and void ab initio.

22. The Plaintiff asserted that at all material times the Defendants were actually or constructively aware that the suit property was reserved for government houses and the same was not available for allocation for private purpose.

23. The Plaintiff relied on the following particulars of the Defendant's knowledge:-

(a) The relevant Survey Plans and Topocadastral Plans for reservation of the suit property for the construction of government houses were deposited at Survey Records Office at Survey of Kenya and were at all times available to the public.

(b) The presence of a government house number HG 53 on the suit property as at the time of the allocation.

(c) The provisions of Government Land Act governing the procedure to be followed for the allocation of Government Land.

24. The Plaintiff contended that since the allocation of the suit property and the registration of the same in the name of the 1st Defendant in the first instance 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 subsequent person. The Plaintiff further contended that the illegal alienation of the suit property for private purposes was clearly contrary to the intended public

user for which the land was reserved for.

25. In the alternative, but without prejudice to the foregoing, the Plaintiff pleaded that the 1st Defendant holds the registration of the suit property as a constructive trustee in trust in trust for the Public and or the Permanent Secretary, Treasury and that the land register ought to be rectified to reflect this legal position.

26. The Plaintiff relied on the following particulars giving rise to a constructive trust:-

(a) The suit property constitutes land meant for the construction of government houses for the civil servants and ought to be used only for such purpose.

(b) The Defendants had actual or constructive knowledge of the matters' pleaded in paragraph 18 hereof.

(c) The alienation was cone selectively and arbitrarily without any public auction or tendering as required by law.

(d) The 1st Defendant acted fraudulently in the acquisition of the suit property as particularized hereinabove.

(e) The 2nd Defendant's action of alienating the suit property was ultra vires his powers under the Government Lands Act and consequently null and void ab initio

(f) In all the circumstances of the case it would be unjust and inequitable to allow the 1st Defendant to hold the legal as well as the equitable title to the suit property to the detriment of public interest

27. At the time of the allocation, the suit property and the house thereon had already been allocated and reserved for public utility and as such, the suit property was not available for alienation or allocation to the 1st Defendant in the first instance. By reason of the matters sure said, the allocation of the suit property and the house thereon to the 1st Defendant in the first instance was done unlawfully, corruptly and contrary to the provisions of the Government Lands Act (repealed) and the Government Financial Regulations and bond of Survey Procedures.

28. The Plaintiff relied on the following particulars of fraud, irregularity and illegality against the 1st, 2nd, 3rd, 4th and 5th Defendants:-

a) The 1st Defendant fraudulently obtained allocation and registration of the suit property when he knew or ought to have known that the suit property and the house thereon was reserved for public utility and was therefore not un-alienated Government land.

b) The 1st Defendant fraudulently obtained allocation and registration of the suit property in when he knew or ought to have known that that the allocation was done in blatant disregard of the law in respect to Government land.

c) At all material times the 1st Defendant knew or ought to have known that the suit property and the house thereon belonged to the Government of Kenya.

d) The 1st Defendant fraudulently obtained allocation and registration of the suit property when she knew or might to have known that the Government of Kenya has never surrendered or relinquished the suit property as to be available or allocation to any person.

e) The 1st Defendant fraudulently obtained allocation and registration of the suit property when he knew or ought to have known that the Minister then responsible for lands, Transport or Finance did not consent to any allocation over the suit property pursuant to the provisions of the Government Lands Act (repealed) and the Government Financial Regulations and Procedures.

f) The 2nd Defendant’s action of allocating and alienating the suit property to the 1st Defendant in the first instance was ultra vires under the Government Lands Act and consequently null and void ab initio.

29. The Plaintiff avers that at considering the aforesaid pleaded-facts, the 3rd, 4th and 5th 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, Cap. 280 (Now repealed) and the Registration of Titles Act, Cap, 281 (Now repealed).

30. The Plaintiff relied on the following particulars of Defendants knowledge:-

a) The 3rd, 4th and 5th 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.

31. In the alternative, but without prejudice to the foregoing, the Plaintiff pleads that the 3rd and 4th Defendant hold the registration of the suit property as a constructive trustee for the public and Government of Kenya and that the land

register ought to be rectified to reflect this legal position.

32. The Plaintiff relied on the following particulars giving rise to a constructive trust:-

a) The 3rd and 4th Defendants had actual or constructive knowledge of the defects in the title purportedly issued to them.

b) The alienation was done selectively and arbitrarily without any public auction or tendering as required by law.

c) The 3rd and 4th Defendants acted fraudulently and corruptly in the acquisition of the suit property as particularized hereinabove.

d) In all the circumstances of the case it would be unjust and inequitable to allow the 3rd and 4th Defendants to hold the legal as well as the equitable title to the suit property to the detriment of public interest.

33. It was the Plaintiff's case that the 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 Plaintiff averred that the 1st, 2nd, 3rd and 5th Defendants respectively had actual knowledge or ought to have known through due diligence that the defects in the title held by the 1st Defendant and as such the 1st, 2nd, 3rd, 4th and 5th Defendants assumed the risk of all legal consequences appurtenant thereto.

34. It was the Plaintiff's case that the 2nd Defendant as a public officer was 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.

35. The Plaintiff relied on the following particulars of negligence against the 2nd Defendant:-

(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 in the first instance.

(b) Willfully facilitating the alienation of the suit property in favor of the 1st Defendant in the first instance.

(c) Failing to stop the irregular and unlawful alienation of the suit property to the 1st Defendant in the first instance.

(d) Failing to report to the Kenya Anti-Corruption Commission and Ethics and Anti-Corruption Commission over the apparent irregular and unlawful alienation of the suit property to the 1st Defendant

36. The Plaintiff averred the 2nd 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 fraudulently, illegally and in abuse of his office, the 2nd Defendant acted in alienate the suit property to the 1st Defendant in the first instance breach of his duties as a fiduciary by virtue of being public officer.

37. The Plaintiff relied on the following particulars of fraud, irregularity, illegality and breach of trust, abuse of office against the 2nd Defendant:-

(a) The 2nd Defendant knew or ought to have known that the suit property was not available for alienation outside the confines of the Government Lands Act (repealed) and the Registered Land Act (repealed).

(b) The 2nd Defendant knew or ought to have known that the suit property were not available for alienation in favor of the 1st Defendant in the first instance without a valid Part Development Plan.

(c) The 2nd Defendant knew or ought to have known that the suit property were not available for alienation in favor of the 1st Defendant in the first instance without a duly registered Part Development Plan (PDP).

(d) The 2nd Defendant jointly and severally facilitated to the 1st Defendant the suit property outside the confines of the Government Lands Act, Cap. 280 (Now repealed) and the Registered Land Act, Cap. 300 (Now repealed).

(e) The 2nd Defendant recklessly failed to comply with the relevant statutes and regulations governing the administration and alienation of Government land.

(f) The 2nd Defendant dishonestly dealt and corruptly facilitated alienation of the suit property being an alienated Government land.

(g) The 2nd Defendant acted in bad faith by facilitating allocation and alienation of the suit property to the 1st Defendant in the first instance.

(h) The 2nd Defendant acted in bad faith and in excess of statutory powers accorded to him.

(i) With malice and knowledge of want of authority, purporting to act in the name of the President of Republic of Kenya.

(j) With malice and knowledge of illegality of his actions, willfully failing to comply with and/or ignoring the provisions of the Government Lands

Act, the Government Financial Regulations and Procedures and other provisions of the law.

(k) Failing to stop the irregular and unlawful alienation of the suit property.

(l) Failing to report to the Kenya Anti-Corruption Commission/Ethics and Anti-Corruption Commission over the irregular and unlawful alienation of the suit property

(m) The 2nd Defendant facilitated the alienation of the suit property, to the 1st Defendant in the first instance without any or any legal authority.

(n) The 2nd Defendant alienated and issued a Certificate of Lease over the suit property in favor of the 1st Defendant in the first instance in express breach of the provisions of the Government Land Act (repealed) and the Registered Land Act (repealed).

(o) The 2nd Defendant facilitated the allocation and alienation of the suit property in favor of the 1st Defendant in the first instance, with notice that it was public land that had not hec.t altered or its use changed in accordance with applicable legal requirements.

(p) Willful failure to ensure that the alienation of the suit property was, transparent and lawful.

(q) Failure to notice and take remedial action over the fact that the alienation of the suit property was unlawful.

(r) With malice and knowledge of want of authority, purporting to excise and alienate land reserved for public utility.

38. The Plaintiff averred that the 2nd Defendant, with knowledge that he had no statutory powers and/or he was 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.

39. The Plaintiff relied on the following particulars of loss and damage against the 2nd Defendant:-

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 and lawful use thereby occasioning loss to the Republic of Kenya, been illegally alienated for private use and rendered unavailable for proper

c) Due to the illegal alienation of the suit property, the 1st Defendant in the first instance have been enjoying use over the suit property

40. It was the Plaintiff’s case that the 3rd, 4th and 5th Defendants were jointly and severally liable for corruptly and fraudulently acquiring, unduly using and trespassing upon the suit property.

41. The Plaintiff relied on the following particulars of fraud and illegality against the 3rd, 4th and 5th Defendants:-

(a) The suit property was fraudulently alienated in the first instance in favour of the 1st Defendant by the 2nd Defendant contrary to the provisions of the Registered Land Act (repealed) and the Government Lands Act (repealed).

(b) The suit property was fraudulent acquired by the 3rd and 4th Defendants despite the fact that it was not available for alienation at all.

(c) The 3rd and 4th Defendants lacked capacity to acquire the suit property on 30/09/1997.

(d) The 3rd and 4th Defendants facilitated and knowingly relied on false documents in procuring and facilitating registration of the leasehold over the suit property in favour of the 3rd and 4th Defendants.

(e) On or about 30th September, 1997 the 3rd and 4th Defendants personally executed documents that were used to facilitate the alienation, registration of leasehold interest over the suit property and issuance of Certificate of Lease dated 30th September, 1997.

(f) On 30th September, 1997 the 3rd and 4th Defendants corruptly obtained Certificate of Lease over the suit property.

(g) The 3rd and 4th Defendants acquired the suit property which was corruptly and fraudulently alienated in the first instance in favour of the 1st Defendant contrary to the provisions of the Registered Land Act (repealed)and the Government Lands Act (repealed).

(h) Due the conduct of the 3rd and 4mh Defendants’ conduct of unlawful acquisition of the suit property, the 5th Defendant is in possession and enjoying undue use of the suit property hence the said 3rd, 4th and 5th Defendants' actions have rendered the suit property unavailable for use and benefit of the public.

(i) The 3rd and 4th Defendants fraudulently acquired the said property despite the fact that its physical location, it was common knowledge that the land was public land occupied by a functioning Airport.

(j) The 3rd, 4th and 5th Defendants jointly and severally knew or ought to have known that the suit property was reserved for public utility and was therefore not unalienated Government land hence it was not available for allocation.

(k) The 3rd, 4th and 5th Defendants jointly and severally knew or ought to have known that the suit property was not available for private use to the detriment of the Government of Kenya.

(l) The 3rd, 4th and 5th jointly and severally knew or ought to have known that the suit property was alienated in favour of the 1st Defendant in the first instance in blatant disregard of the relevant statutory provisions and regulations on alienation of Government land.

(m) The 3rd, 4th and 5th Defendants jointly and severally shut their eyes to the obvious and failed to make inquiries for fear of getting the correct information.

(n) Failure by the 3rd, 4th and 5th Defendants to avail any evidence to prove that the alienation of the suit property in the first instance was undertaken in accordance with the Registered Land Act (repealed) and the Government Lands Act (repealed).

(o) The Certificate of Lease over the suit property held by 3rd and 4th Defendants is a product of corruption and a nullity ab initio.

(p) Due to the impugned conduct of the Defendants jointly and severally, the suit property has been illegally alienated and transferred for private use and rendered unavailable for proper and lawful use thereby occasioning loss to the Republic of Kenya.

(q) Due to the illegal alienation of the suit property, the 3rd, 4th and 5th Defendants have been unduly enjoying use over the suit property.

(r) In spite of the Plaintiff's suit, the 3rd and 4th Defendants have failed to avail any evidence on how and whether they lawfully acquired the suit property.

(s) In spite of the Plaintiff's suit, the 3rd, 4th and 5th Defendants continue to , trespass upon the suit property.

(t) In spite of all facts disclosed by the Plaintiff to the 3rd, 4th and 5th Defendants they have declined to disown and voluntarily relinquish their claim over title and use over the suit property.

(u) The 3rd, 4th and 5th Defendants jointly and severally failed to stop the _irregular and unlawful use of the suit property.

(v) The 3rd, 4th and 5th Defendants jointly and severally failed to report to the Kenya Anti-Corruption Commission/Ethics and Anti-Corruption Commission over the apparent irregular and unlawful alienation and use of the suit property by them.

(w) The 5th Defendant has benefited and continue to benefit from an illegal alienation of the suit property.

42. The Plaintiff averred that it has legal and equitable interest over suit property and title thereto, over the said property by virtue of its constitutional and statutory mandate.

43. The Plaintiff relied on the following particulars of loss and damage against the 3rd, 4th and 5th Defendant:-

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 in the first instance have been enjoying use over the suit property.

d) The Defendants continue to claim title over the suit property without lawful justification.

e) The Defendants have trespassed and continue to trespass upon the suit property to the detriment of the Government of Kenya.

44. 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 for suit property to the 1st Defendant in the first instance was consequently null and void ab initio. The Plaintiff therefore prayed for a declaration that the registration of, and issuance of a Certificate of Lease to the 1st Defendant in respect of Mombasa Municipality/Block XXVI/933 was null and void ab initio and ineffectual to confer a good title upon itself.

45. The Plaintiff also prayed for an order for rectification of the register by cancellation of the Lease over Mombasa Municipality/Block XXVI/933 and the

Certificate of Lease issued to the 1st Defendant and an order of permanent injunction to restrain the 1st Defendant from leasing, charging, transferring, entering upon, developing, or in any manner howsoever dealing with land comprised in Mombasa Municipality/Block XXVI/933.

46. By reason of the foregoing, the purported issuance of the Lease over the suit property to the 1st Defendant in the first instance and subsequently to the 2nd and 3rd Defendants was void ab *initio,* and incapable of conferring on the said Defendants any estate, interest or right in the suit property or at all. Consequently, the 1st Defendant could not transfer to the 2nd Defendant or any person any valid estate, right or interest in the suit property or at all. By reason of the foregoing, the purported issuance of the Certificate of Lease over the suit property to the 3rd and 4th Defendants ion 30/09/1997 was void ab initio, and incapable of conferring on the said Defendants any estate, interest or right in the suit property or at all. Consequently, the·3rd and 4th Defendant could not transfer or assign any valid estate, right or interest in the suit property at all.

47. By reason of the foregoing, the Plaintiff averred that the 3rd and 4th Defendant could not assign any valid user rights or possession entitlement over the suit property on any person including the 5th Defendant herein.

48. Despite demand and notice of intention to sue having been issued, the Defendants have failed to admit liability and or to restore the suit property to the public and or the Permanent Principal Secretary, National Treasury. Despite of knowledge about the Plaintiff's case over the suit property, the 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 over the said property to the Government of Kenya hence necessitating the filing of this suit against the said Defendants jointly and severally.

49. It was the Plaintiff’s case that it was within the tenets of public interest that the corruptly and fraudulently acquired public property such as the suit property herein by the 1st, 4th and 5th Defendant respectively should be promptly recovered and returned back to the Government of Kenya in accordance with the law and the Plaintiff's legal mandate. 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, 2012**.

50. There was no suit pending and there have been no previous proceedings in any court between the Plaintiff and Defendants over the same subject matter.

There was no other suit between the Plaintiff and the Defendants under the same titles and there has never been any previous similar proceedings in any court of law the Plaintiff and the Defendants under the same titles over the same subject matter which was determined on merit. This Honourable Court is competent to entertain this suit. This cause of action accrued within the jurisdiction of this Honorable Court.

51. The Plaintiff prayed for Judgment to be entered against the 1st, 2nd, 3rd , 4th & 5th Defendants jointly and severally:-

a. A declaration that the issuance of a letter of allotment and a Lease by the 2nd Defendant to the 1st Defendant over Mombasa Municipality/Block XXVI/933,was.fraudulent, unlawful, corruptly irregular and null and void ab initio and ineffectual to confer any right, interest or title upon the 1st Defendant in the first instance and subsequently to the 3rd and 4th Defendants or any other subsequent person.

b. A declaration that the registration of the Lease and issuance of a Certificate of Lease over Mombasa Municipality/Block XXVI/933, was fraudulent, unlawful, corruptly irregular and null and void ab initio and incapable of vesting any right, interest or title upon the 1st Defendant.

c. In the alternative to (a) and (b) above, a declaration that the 1st Defendant hold the-lease and certificate of lease for Mombasa Municipality/Block XXVI/933 in trust for public and or the Permanent Secretary and that the land register be rectified by deleting the name of the 1st Defendant and substituting its name with the name of the Government of Kenya and or Permanent Secretary, treasury as the proprietor.

d. A declaration that the issuance of Certificate of Lease dated 30/09/1997 to the 3rd and 4th Defendants over Mombasa Municipality/Block XXVI/933,was fraudulent, unlawful, corruptly irregular and null and void ab initio and ineffectual to confer any right, interest or title upon the 1st Defendant in the first instance and subsequently to the 3rd and 4th Defendants or any other subsequent person.

e. A declaration that the possession, use and occupation of land reference number: Mombasa Municipality/Block XXVI/933 by the 3rd, 4th and 5th Defendants is unlawful.

f. An Order for rectification of the land register by cancellation of the entries relating to of the lease over Mombasa Municipality/Block XXVI/933 and the Certificate of Lease issued to the 1st Defendant so as to restore the suit property to the public and or the Principal Secretary, Treasury.

g. An Order for rectification 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: Mombasa Municipality/Block XXVI/933 and the Certificate of Lease issued to the 1st, 3rd and 4th Defendants so as to restore the suit property to the Government of Kenya and or the Principal Secretary, Treasury.

h. General damages for fraud

i. An order of permanent injunction to restrain the 1st, 3rd, 4th and 5mh Defendants jointly and severally, 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: to land reference number: Mombasa Municipality/Block XXVI/933, or from howsoever dealing with the said property, other than by way of a surrender to the Government of Kenya.

j. An order of eviction so as to ensure vacant possession of land reference number: Mombasa Municipality/Block XXVI/933 against the 1st, 3rd, 4th, 5th Defendants and the costs of enforcing orders of eviction to be borne by 1st, 3rd, 4th and 5th Defendants.

k. Any other relief the Court may deem fit and just to grant.

l. General damages from the Defendants, for wrongful interference with public land and irregular, illegal and fraudulent manner in which they dealt with the said land comprised in the suit property, and damages for breach of statutory provisions.

m. General damages against the 1st, 3rd, 4th and 5th Defendants for trespass.

n. General damages against! the 2nd Defendant for breach of fiduciary duties.

o. Costs and interest incidental to this suit.

p. Any other or further relief that the court may deem fit to grant in administration of substantive justice

52. The Plaintiff called his first witness on 16th November, 2022 who testified as follows:-

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

53. PW – 1 testified and sworn in English language. He was called MR. JULIUS WAWERU MWANGI. He had formerly served as Deputy Director, Estate Management under the Housing and Urban Department. PW-1 stated that he was present on behalf of the Government House and had recorded a statement on 6th September, 2021. PW - 1 averred that the suit property was Mombasa Municipality/Block XXVI/933, which was not available for alienation as it was contained in the Register of Government Buildings.

54. PW - 1 testified that from the card, Document No. 13, he wished to produce it as Plaintiff Exhibit number 1. He stated that the house had been built in the year 1928. Allocation was for individuals, but Government assets had to fulfil certain procedures. PW - 1 averred that Government Circulars No. 2 of 1958 and 2003, dated 1st March,1958, provided the process for alienation. PW -1 testified that first, there had to be a reason for the house to be boarded, and second, there had to be concurrence of the Permanent Secretary. He stated that the Board was constituted from the location/area where the property was situated. They deliberated on the Inspection Report prepared by the officer in charge. The Board then prepared its Report, which was sent to the Permanent Secretary.

55. PW - 1 averred that the Permanent Secretary forwarded it to the Treasury, and the P.S. Treasury sent it back to the P.S. Housing and Works. PW - 1 testified that the suit property never reached that level. He stated that there was a letter dated 13th August, 1996 No. 6 from the P.S. Ministry of Public Works, responding to a request from the Commissioner of Coast Provinces. A further letter dated 20th August, 1996 from Eng. Kiguru addressed to the P.S. Public Works declined the requests. PW - 1 averred that the circulars and letters referred to in his statement showed there had been no objection.

B. Cross Examination of PW - 1 M/s. Amina Advocate.

56. PW - 1 testified that the custodian of land had formerly been the then Commissioner of Lands, but it was now the National Land Commission (NLC). PW - 1 stated that there were several offices and that the acquisition in question had occurred in the year 1996, hence under the Commissioner of Lands. PW - 1 averred that the Commissioner of Lands was not a party to the suit and that the custodian of public land was the National Treasury. He testified that the procedure for acquisition of the suit property had not been followed.

57. PW - 1 stated that there had been a time when the certificate of lease was revoked. He averred that he was not aware whether any notices had been issued in that regard.

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

58. PW - 1 testified that before any allocation was done, there were many parties who had to be consulted for their approval.

59. The Plaintiff called PW - 2 on 16th November, 2022 who testified as follows:-

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

60. PW - 2 was sworn and he testified in English language. He was ALFRED MUKANDI MWAJIA. He was a Physical Planner. He stated that he had prepared Plan Plot No. CR. 23098 and had been asked to give evidence regarding Part Plan PDP No. 12/2/CT/52/94. PW - 2 averred that the first step was to seek authority to prepare a PDP from the Director. He testified that the planner was required to conduct a site visit and, while there, declare whether there were structures on the land. A report was then prepared and circulated to relevant authorities such as the Police, Public Health, Ministry of Housing, Education, and the Commissioner of Lands.

61. PW - 2 stated that the PDP was published in the newspapers and gazetted. It was then taken to the Director of Public Works and Physical Planning, but before that approval had to be obtained from the Cabinet Secretary. He testified that the PDP had to be assigned a number, approved by the Commissioner of Lands, and then by the Director of Physical Planning. PW - 2 averred that the PDP shown did not have an approved number and did not indicate that it had been circulated. He stated that the letter dated 20th June, 2018 was part of the further list of documents.

62. PW - 2 testified that they wished to amend the statement, specifically page 2 by deleting 6(i) and (ii), as it did not appear in their register. He averred that he would therefore not have been able to produce a Letter of Allotment.

B. Cross examination of PW - 2 by M/s. Amina Advocate.

63. PW - 2 testified that the PDP was prepared by the Director of Physical Planning, but he had several officers at the District level assisting him. PW - 2 stated that the register was manual and that the process was very stringent. PW - 2 averred that the PDP produced by the Defendants was not within their custody and could not have been misplaced.

C. Clarification by the Court:-

64. The Court observed that this PDP would have been made by fake staff. The Court stated that there was a standard way of preparing documents and that the PDP in question had never gone through the vetting systems. The Court further noted that the system was now transitioning digitally through Ardhi Sasa..

D. **Re – Examination**

Nil

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

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

66. PW - 3 was sworn and testified in English language. She was called AMINA ALI ATHMANI. She was a Senior Surveyor. PW - 3 stated that the survey had been conducted on 2nd September, 1963 under FR No. 243. She averred that several surveys had been undertaken, among them parcel No. 933. PW - 3 informed Court that the parcel was represented in the folio, and upon approval of the Surveyor, a further survey had been done on 3rd March,1997, which was the most current Registry Index Map (RIM). PW - 3 stated that she wished to produce the Plot Sheet, which showed the structures on the land.

67. On 16th November, 2022, the Plaintiff called PW - 4 who testified as follows:-

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

68. PW - 4 was sworn and testified in English language, He was called PIUS NYANGE MAITHYA. He was a registered Valuer attached to the EACC. He stated that he had practiced for 32 years and that his duties included valuation work. PW - 4 averred that he was present to give evidence regarding the suit property situated at Kisingo Estate, off Chabito Road, where there were high-rise houses and several other houses. PW - 4 informed Court that there was a house identified as a Government House, constituted in 1928. He stated that although it appeared old, it had been renovated, but access had been denied. The house sat on 0.1 acre, was on a 99-year lease, and was registered in the name of Gilbert Mwangi Njuguna.

69. PW - 4 averred that he had valued the suit property at a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/=) on 30th July, 2008, and as in the year 1997 at a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=). He testified that the market value was placed at a sum of Kenya Shillings One Hundred Million (Kshs. 100,000,000/=) per acre, and that this 1/8 acre portion was valued at a sum Kenya Shillings Thirty Million (Kshs. 30,000,000/=) without the land. PW - 4 stated that the house was outdated, and if one were to buy it for development of high-rise affordable housing, given the high population, a valuation report had been prepared.

B. Cross examination of PW - 4 by M/s. Amina Advocate.

70. PW - 4 testified that there had been a lease registered in the name of the

1st Defendant.

71. The Plaintiff called PW - 5 on 16th November, 2022 wherein his testimony was as follows:-

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

72. PW - 5 was sworn and testified in English language. He was called OCHIENG DEDAN OKWAMA. He an Investigator with the EACC, held a Diploma in Law, and had undertaken investigations training in-house at the Commission. PW - 5 averred that he was part of the team that carried out investigations. PW - 5 stated that the team had received an anonymous call concerning the land. PW - 5 testified that they went to the land offices, visited the site, and established that property No. 933 had been excised from the larger parcel No. 243, which had been reserved for residential houses for civil servants. PW - 5 stated that they interviewed several people.

73. PW - 5 averred that their findings established that there had been several encroachments and that this particular property was irregularly alienated. PW - 5 testified that they obtained correspondences, including a letter dated 15th December,1994 (List No. 4) purporting to allocate the house. PW - 5 stated that the letter was purportedly a Letter of Allotment.

74. PW - 5 averred that under paragraph 2, allocation of Plot Exhibit No. 11 had been signed by Commissioner Mabea. PW - 5 testified that they also obtained a letter dated 29th July, 1996 from the Provincial Commissioner, Coast, addressed to the Permanent Secretary Gharam, requesting that Mr. Njuguna be given the house. PW - 5 stated that there was a response to the letter dated 13.8.1996 (No. 6), and another letter dated 20th August, 1996. PW - 5 testified that Exhibit No. 14 was the Letter of Allotment with a PDP attached to it, and that the PDP had no PDP number. PW - 5 averred that Exhibit No. 15 (a) and (b) was a lease they found.

75. PW - 5 testified that Exhibit No. 16 was the lease, which was supposed to have been registered by the Land Registrar. PW - 5 stated that the signature of the Land Registrar was meant to witness the Commissioner’s signature, but it was noted that the Land Registrar had not signed it. PW - 5 averred that they went ahead and obtained the Green Card and White Card. PW - 5 testified that the registration of these cards had been done at Mombasa. PW - 5 stated that the Green Card showed that registration had been done on 9th March, 1998, and the lease issued the same day bore an inscription written “Fraud Suspected.”

76. PW - 5 testified that Exhibit No. 17 (a) and (b) were the Green and White Cards. PW - 5 averred that they also found Gazette Notice No. 15572 of 26th November, 2020, which was produced as Exhibit No. 18. PW - 5 testified that the intention had been for the Government to develop residential houses, and that the

property was meant for public use. PW - 5 stated that the 3rd and 4th Defendants held the same Certificate of Lease and had sued the 1st Defendant in a lower court matter. PW - 5 averred that they applied to amend the pleadings to include the 5th Defendant, who was a caretaker, and sought to have the property reverted to the Government for it to be used for the correct purpose. PW - 5 testified that he had recorded his statement and wished to have it adopted.

B. Cross examination of PW - 5 by M/s. Amina Advocate.

77. PW - 5 testified that the letter dated 15th February, 1994 had been signed by Mr. Z. Mabea and not by the 2nd Defendant. PW - 5 stated that the said letter had been authored by Kiilu, who was a party to the suit. PW - 5 averred that the lease in question had been signed by the then Commissioner of Lands and witnessed by the Land Registrar. PW - 5 testified that the Land Registrar, however, was not a party to the proceedings.

78. PW - 5 further stated that the 1st Defendant had once served as a Magistrate, and that the Certificate of Lease had been issued to the 1st Defendant.

C. Clarification for the Court

79. The 3rd and 4th Defendants were still claiming the property.

D. Re - examination of PW - 5 by M/s. Songole Advocate.

80. PW - 5 testified that the letter dated 29th July, 1996 had been authored while the addressee was a civil servant. PW - 5 stated that despite the correspondence, the Board of Survey was never approved.

81. The Plaintiff marked his case closed on 16th November, 2022 by its counsel on record M/s Songole Advocate.

V. The case by the 1st Defendants

82. Through the law firm of Messrs. Kamau Kuria & Kiraitu Advocates the 1st Defendant filed a Statement of Defence dated 18th October 2010. It averred as follows:-

a) Admitted a part of Paragraph 1 of the Plaint

b) It contended that that by virtue of the rule in the case of "***Commissioner for Local Government, Lands & Settlement – Versus – A Kaderbhai & A Kaderbhai (12) KLR at page 12",*** the Plaintiff has no cause of action against the 1st Defendant. The 1st Defendant would apply to have the suit struck out with cost against him.

c) Further, the 1st Plaintiff, like the Commissioner of Land who allotted the suit land to the Plaintiff in year 1997, was an emanation of the State of Kenya and the 1st Defendant contended that the State could not delegate from the

Grant of a Lease over the suit property under the guise or when wearing the cap of the Plaintiff.

d) The 1st Defendant contended that the State of Kenya was forbidden to by the rule in the case of:- ***"Commissioner of Lands – Versus – Hussein (1968) EA, 585***" from claiming the suit land having allocated the land to the Plaintiff and assured him he would use it as a private residence upon complying with the pre- requisite conditions of the Grant. Hence the 1st Defendant was a beneficiary to this.

e) The 1st Defendant averred that the suit land was Government land which was lawfully alienated to him. Hence he had the right to alienate it to any other individual as provided for in law and the new allottee would have all the right, interest and title over the suit land.

f) The 1st Defendant applied for the suit land to the then Commissioner of Land for the allocation of it and on 23rd December, 1997 it was allocated to him subject of the fulfilment of certain conditions which he complied. Subsequently he was issued with a certificate of Lease under the Registered of Land Act, Cap. 300 (Now repealed).

g) One of the conditions was for him to pay a sum of ***Kenya Shillings Three twenty Eight Thousand Three Fifty Hundred (Kshs, 328, 350/=)*** which he paid and the Government acknowledged receipt. Hence, the 1st Defendant holds a valid title to the suit land.

h) The contents of Paragraph 3 of the Plaint, the 1st Defendant avers that the provision of Section 5 of the Government Land Act, Cap. 280 vests the then Commissioner of Land with power to administer the Act and it was immaterial as to who the Commissioner of Lands of the day was.

i) The 1st Defendant averred that the decision to alienate the suit land to the 1st Defendant and others was a decision of the whole government and not of a particular individual including the Commissioner of Land of the day.

j) On the contents of Paragraph 4 of the Plaint are denied. The 1st Defendant holds that at all material times the suit property was part of government land which it had power to use as it choose.

k) The 1st Defendant denied all the averment made out under Paragraphs 5, 6, 7, 8, 9 ,10, 11, 12, 13, 14. 15 and 16 of the Plaint and shall be putting the Plaintiff to strict proof thereof.

l) The jurisdiction of the Court was admitted.

83. Further to this, the 1st Defendant filed a List of Documents dated 21st February, 2018. They included 8 documents which were all produced as the 1stDefendant Exhibits as follows:-

a) A copy of a letter of direct Government allocation pf the Plot dated 5th December, 1994.

b) A copy of a Letter of Allotment dated 23rd December, 1997 together with a bankers Cheque in favour of the Commissioner of Land s and an acknowledgement receipt of payment.

c) A copy of lease dated 1st January, 1998 in the name of 1st defendant.

d) A copy of Certificate of lease dated 9th March, 1998 registered in the names of the 1st Defendant.

e) A copy of a letter dated 8th January, 1998 confirming receipt of acceptance letter.

f) A copy of a letter of complaint to the Permanent Secretary, Ministry of Lands & Settlement dated 5th February, 1997.

g) A copy of alter from the office of the President dated 29th July, 1996 confirming that the house and Plot was allotted to the 1st Defendant.

h) A copy of a letter from the office of the Commissioner of Land requesting for payments of premium to facilitate the preparation of his Lease and a Bankers cheque drawn in favour of the Commissioner of land .

84. The 2nd Defendant intimated to rely on their pleadings and submissions and they did not call any witness.

VI. Submissions

85. Upon the closure of the Plaintiff's and the Defendants' cases on 16th November, 2022, the Honourable Court directed that all parties file and exchange their respective Written Submissions within the stipulated timelines.

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

A) The Written Submissions by the Plaintiff

87. The Plaintiff through the Ethics and Anti-Corruption Commission filed their written submissions 30th January, 2023. M/s. Songole Advocate commenced her submission by providing Court with a brief background of the subject matter. She informed Court that the following facts were established by the Plaintiff having

conducted investigations into the matter; the Government of Kenya reserved Mombasa Municipality Block XXVI/243 for public purposes. In particular for the purposes of establishment of residentiaI houses for civil servants and other Government Officers. The said parcel of land was created as a result of Survey Plan Folio Register number 65/69 on 23rd March, 1963 and a Registry Index Map (RIM) prepared for the said parcel (See copy of RIM and Survey Plan listed as number 1 and on Plaintiff's list of documents and produced as exhibits 6 and 7) That at the time the said survey plan number was being prepared, the Government of Kenya had constructed houses on the Mombasa Block XXVI/243 (see Plaintiff's exhibit of the Topodocadstral plan sheet numbers produced as exhibit number 9 by PW3 an official from the Director of Survey).

88. On or about 15th December, 1994 the 2nd Defendant (the then Commissioner of Lands) through his officers wrote to the Coast Provincial Physical Planning Officer and informed him that the Government of Kenya had approved the allocation of house reference HG 53 to the 1st Defendant and requested for boarding of the house (See Plaintiff List of documents number 4 produced as Plaintiff Exhibit No. 11). On 29th July, 1996, the Provincial Officer, Coast Province wrote to the Permanent Secretary Ministry of Public Works instructing him to convene a Board of Survey in respect to the house in the suit property so that the same could be allocated to the 1st Defendant (See Plaintiff List of documents number 5 produced as Plaintiff Exhibit No. 12).

89. On 13th August, 1996 an officer in the Cabinet Office wrote to the Permeant Secretary in the Ministry of Public Works and Housing and informed him that the Office of the President did not have any objection if the Ministry of Public Works and Housing boarded the house (See Plaintiff List of documents number 6 produced as Plaintiff Exhibit No. 13). On 20th August, 1996 the Permanent Secretary in the Ministry of Public Works and Housing informed the Permanent Secretary in the office of the President that the Cabinet had discussed the issue of boarding the house on the suit property and had declined to have the said house boarded for purposes of allocating the same to the 1st Defendant or at all (See letter produced as Plaintiff Exhibit No. 14).

90. The Learned Counsel asserted that on 23rd August, 1997 the 2nd Defendant issued to the 1st Defendant with a Letter of Allotment for the house on the suit property notwithstanding the position which had been taken by the Permanent Secretary in the Ministry of Public Works and Housing. Annexed to the Letter of Allotment was a Part Development Plan (PDP) which shows the existence of the house at the time of allocation of the suit (See Plaintiff List of documents number 7 produced as Plaintiff Exhibit No. 15; A and B).

91. According to the Learned Counsel, it was on the basis of the said letter of allotment that a survey plan folio number 312/74 was prepared and land reference number Mombasa Municipality /Block XXVI/933 (suit property) was created. Subsequently on 2nd March, 1997 the 2nd Defendant issued to the 1st Defendant a lease in respect of the suit property for private purposes (See Plaintiff Exhibit of the survey plan, lease, green and white cards produced as Plaintiff Exhibit Numbers. 16 & 17). That on 30th September, 1997, the 3rd and 4th Defendants were also inexplicably issued with a certificate of lease for a period of 99 years. There was no basis for issuance of the same as no evidence had been adduced in support.

92. The 3rd and 4th Defendants could not claim they were allocated the suit property lawfully and procedurally without demonstrating how the land was allocated to them. In he case of:- ***"African Line Transport Co. Limited – Versus - The Hon. Attorney General, Mombasa H.C.C.C. NO. 276 of 2003 eKLR (2007)"*** 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.***

93. The Plaintiff never came across a Part Development Plan (PDP) or letter of allotment issued to the 3rd and 4th Defendants and this was largely because the suit property already had houses constructed on it and as such was unavailable for allocation. The 3rd and 4th Defendants have not proved that this process was followed before they were issued with the certificate of lease. Turning back to the 1st Defendant who purports that he was allocated the subject suit legally, it was evident that this is untrue as the 2nd Defendant could not legally allocate the suit property because the same property had already been surveyed and set aside for use by Government.

94. It was not unalienated Government land and could not be **"planned"** by the Director of Physical Planning for the purpose of issuing a letter of allotment. The suit property could also not be surveyed by the Director of Survey on behalf of

the 2nd Defendant because it had already been surveyed. A parcel of land cannot be unalienated when it has been surveyed and has been reserved for a particular purpose by the Government.

95. The Learned Counsel further stated that it's the Plaintiff's averments and the evidence produced before this honourable court are unchallenged by the Defendants. The PDP that was attached to the letter of allotment does not exist and it is the evidence of PW - 2, an official from the Director of Physical Planning and custodians of PDPs that the PDP attached to the letter of allotment was false for reasons that;

96. An approved PDP must have a number that was also entered into their register. The said PDP is not in their register and that even the formatting of the said documents never conformed to the standards of a proper PDP prepared by the Director Physical Planning.

97. It was the Learned Counsel's argument was that considering that there is a Government house on the suit property, the Defendants were aware that the suit property was alienated land and was being used for public purpose. The Defendants cannot claim to be innocent allottees or purchasers without notice. The purported leases issued to the 1st, 3rd and 4th Defendants were issued without the consent or the approval of Government. Further, the same were issued without boarding of the house on the suit property for sale at the market value as provided for in the Government Lands Act, The Government Financial Regulations and the Board of Survey Procedures (See evidence of Plaintiff's witness number PW - 1 an official from the State Department of Housing and Urban Development).

98. The following issues which had been raised in the Plaintiff's case which had not been controverted by the Defendants according to the Learned Counsel that:

a. The Government surveyed the suit property and had was reserved for the construction of a government house and in fact a government house was already on it.

b. The house built on the suit property by the Government is still in the register of Government houses. The same has never been boarded for the purpose of selling it.

c. The Government have never sold the house on the suit property to the Defendants or at all at the market value

99. As at the time of allocation of the suit property and the house thereon, the said parcel of land had already been reserved, set aside for the use by civil

servants and other government officers. The suit property was still and is still reflected in the Government building register as an institutional house and has at all material times (See copy of register for government building produced by PW - 1 and marked Plaintiff Exhibit No. 1).

100. It was the Learned Counsel's submission that it was the Plaintiff's case that the suit property was already alienated to the Government and the purported alienation or allocation of the said suit property by the 1st Defendant to the Defendants and the subsequent transfer to the any other person was unlawful, corrupt, dishonest, fraudulent and contrary to the provisions of the Government Lands Act, Cap. 280 and the Government Financial Regulations and board of Survey Procedures. The rules and procedures for boarding and sale of government property are clear and the same were never followed in the acquisition of the suit property. This is evidenced by PW - 1 who also produced the circular and regulations relating to the sale and disposal of government property (See exhibit marked PW - 2-4).

101. The doctrine of public interest vis a vis private interest was delved into at length by Justice Nyamu (as he then was) in the case of:- ***"Nairobi Misc Civil Application No. 158 of 2005; John Peter Mureithi & another – Versus - The Republic eKLR(2006)"***, at page 16, and quoting from the ***"case of Kenya Guards Allied Workers Union"***, the Judge stated as follows:-

> ***"Should the Land Acquisition Act give shelter to the land grabbers of public land or are the courts going to invent equally strong public interest vehicle to counter this. Should individual rights supersede the communal land, catchments and forests? How for instance are the courts going to deal with the land grabbers who stare at your face and wave to you a title of the grabbed land and loudly plead the principle of indefeasibility of title. Are the courts going to stay away and refuse to rise the greater call of unraveling the indefeasibility by holding such a title perhaps issued in order to grab a public utility plot such as hospital by an individual violates a public or national interest and therefore a violation of the constitution. I venture to suggest that such titles ought to nullified on this ground and thrown in the dustbin."***

102. The Learned Judge, in the same decision, researched on the history of the doctrine of public trust and public interest. The Judge, at page 17 observed that under the English common law, ownership of common properties vested in the sovereign could not Grant ownership in them to private owners if the effect of such Grant was to interfere with the public interest because such resources were

held in trust by the sovereign for the benefit of the public, such property may not be sold or converted to other kinds of use.

103. Consequently, it is legally and factually right to state that the Defendants have been holding the suit property as a constructive trustees. The public, who are the beneficiaries of the suit property are entitled to the same. Lord Goff discussed the circumstances under which a stranger will be held to be a constructive trustee in the book **"The Law of Restitution**", Lord Goff writes as follows:

> ***"A stranger will be so liable if he received the property for his own benefit, with the knowledge that it was transferred to him in breach of trust. Certainly, he will be liable as a constructive trustee <u>if he had actual knowledge of the breach of trust, if he willfully shut his eyes to that obvious fact or if he willfully and recklessly failed to make such inquiries as an honest and reasonable man would have made and which would have led him to conclude that the property had been transferred to him in breach of trust.</u>"***

104. On this issue of restitution of a property, which is held by a Constructive trustee, the writer writes as follows:

> ***"As has been seen, Plaintiff's, for example the beneficiaries of a trust, may seek, relying on their equitable right, a declaration of the defendant holds identifiable property on their equitable title, a declaration that the Defendant holds identifiable property as a constructive trustee."***

105. It was the Learned Counsel's submissions that the lease which was issued to the 1st, 3rd and 4th Defendants by the 2nd Defendant violates the doctrine of public interest. The said titles was null and void ab initio.

106. On the issue for the determination, and on specifically if or whether the Plaintiff had locus to bring this suit, the Learned Counsel relied on the case of ***"Boniface Katana Kalaveri – Versus - Ethics & Anti-Corruption Commission & Another eKLR (2015)"*** the Court noted that the Plaintiff had '***Locus Standi"*** to:-

> ***"(k) institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures."***

At paragraph 1 of the Plaint, the Plaintiff has described itself as a body corporate established under the provisions of the Anti-Corruption and Economic Crimes Act, No.3 of 2003. (herein referred to as ACECA).

My Lord, the Plaintiff was established in 2003 to recover fraudulently and unlawfully acquired public assets, amongst other functions. Section 7 (1) (h) of the Anti-Corruption and Economic Crimes Act, 2003 gives the Plaintiff the mandate, on its own motion or after receiving a complaint, to;

"Investigate the extent of liability for loss of or damage to any Public property and-

> ***(i) to institute civil proceedings against any person for the recovery of such property or for compensation; and***
>
> ***(ii) to recover such property or enforce an order for compensation even if the property is outside Kenya or the assets that could be used to satisfy the order are outside Kenya.***

107. Unlawful and or fraudulent acquisition of public property is an economic crime as defined under provision Section 2 of the Anti-Corruption and Economic Crimes Act, 2003 (Herein referred to as "ACECA"). An economic crime has been defined by the Act as an "Offence under the provision Section 45 of ACECA states as follows:

"A person is guilty of an offence if the person fraudulently or otherwise unlawfully-

b) Acquires public property or a public service or benefit."

108. From the Provision of the ACECA mentioned above, and the cited authority, the Plaintiff submits that it has locus standi and is exercising a statutory mandate.

109. On whether the land was legally allocated to the 1st, 3rd and 4th Defendants. It was the Learned Counsel's argument that the suit property was already surveyed and a house constructed thereon to house Government employees. Just like any other legal person, the Government can own land and houses for specific purposes. Consequently, the suit property was not unalienated Government land; the suit property was not available for alienation to any private entity. Further it was the Learned Counsel's humble submission that the then Commissioner of Lands, the 2nd Defendant herein, had no legal

authority to issue the lease to the 1st, or any other person. The 2nd Defendant's actions were ultra vires, null and void ab initio.

110. If any plots were available for alienation, which is not the case here, then the 2nd Defendant was obliged to dispose of them in the prescribed manner as required under provision Sections 9 and 12 of the GLA (now repealed). Under provision Section 9, the Commissioner of Land is empowered to dispose of any town plots not required for public purposes in the prescribed manner. The manner of disposal prescribed by Section 12 was by auction. The section states that:-

> **"Leases of town plots shall, unless the president otherwise orders in any particular case, be sold by auction."**

111. Why would the law have such an elaborate mechanism of disposal of unalienated town plots? The answer is 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. The 2nd Defendant could not have issued the grant to the 1st Defendant under the provision 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 then Commissioner of Lands were given adequate consideration in the cases below. In all the cases cited below, it was held that the then Commissioner of Lands' powers are 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;

112. The Learned Counsel relied on the case of:- ***"James Joram Nyaga & Another – Versus - The Hon. Attorney General & Another, Nairobi High Court Misc. Civil Application No. 1732 0f 2004 eKLR (2007)"***. At page 8, the court interpreted the provision 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 <u>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</u>***

follows that the Commissioner of Lands could not have made any Grant under the Government Lands Act Cap 280 Laws of Kenya nor could he pass any registerable title under the Registration of Titles Act Cap 281 Laws of Kenya."

113. The case of:- ***"Town Council of Ol'Kalou – Versus - Nga'nga 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 Sections 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….."***

114. 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".***

115. The 2nd 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.

116. The Learned Counsel further relied on the case of ***"African Line Co. Ltd – Versus - The Attorney General, Mombasa H.C.C.C. NO. 276 of 2003 eKLR(2007)"***, where 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 7 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".

117. 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."

118. The Plaintiff did not find any evidence, during its investigations, to show that the President executed the Grant in favour of the 1st Defendant, 3rd and 4th Defendants. The 2nd Defendant, who allocated the suit property to the 1st Defendant, has not shown any such evidence either. The 3rd and 4th Defendants on the other hand have not demonstrated how they were allocated the title. The 2nd Defendant did not have authority under the law to allocate the suit property to the 1st Defendant when he was the Commissioner of Lands and has no adduced any evidence to show that indeed the President of the Republic directed him to sign the Grant in favour of the 1st Defendant. The 1st, 3rd and 4th Defendants, on their part have not shown that indeed they applied to the President of the Republic ad were allocated the suit property.

119. Even if the President did allocate the suit property to the said Defendants, and the 2nd Defendant executed the lease on instructions of the President, the same would still be unlawful because the suit property was land already surveyed and reserved for public purpose. It was already been used for a specific purpose. It was not unalienated Government Land. The situation also applies to the 2nd and 3rd Defendants who are also purporting to have been issued with a certificate of lease over the suit property.

120. In the case of:- ***"Insurance Company of East Africa – Versus - The Attorney General & Another, Mombasa H.C.C.C. NO. 135 OF 1998***

eKLR(2001)", at page 9 Justice Waki, as he then was, held as follows:-

> ***"There was nothing to show what legal procedures under the Government Land Act, if any, were followed in allocating the land. If it was the road reserve, there was nothing shown by the Council that it had complied with the law to preserve it."***

121. Further in the case of ***"Kenya Anti-Corruption Commission Vs. James Raymond Njenga & another, Eldoret H.C.C.C. NO. 61 OF 2008 eKLR (2010)"***, in the above case 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. Annexture'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."***

122. The Learned Counsel submitted 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 Defendants or any other person at all for private use. The Court in the ***"Milankumarn Shah case (above)"*** endorsed the law as stated by the High Court (Mbogholi Msagha J) in ***"Nairobi H.C.C.C. 3063 OF 1996 Paul Nderitu Ndungu & 20 Others – Versus - Pashito Holdings"***, in the ***Pashito case***, the High Court held as follows:

> ***"Under the Government Lands Act, the Commissioner of Lands can only make Grants of dispositions of any states, interests or rights in unalienated government land (section 3). In the instant case, the two parcels of land among others had been alienated and designated for particular purposes. It was not open for the Commissioner of Lands to re-alienate the same. So the alienation was void ab initio."***

123. Further in the case of:- ***"Dr. Syedna Mohammed Burhannudin Saheb & two Others – Versus - Benja Properties Ltd; Nairobi HCCC NO. 73 OF 2000"***, the Commissioner of Lands had allocated private land, which was not *"unalienated government land"* to 4 allottees who subsequently sold it to the 1st Defendant. The Hon. Justice Visram (as he then was) had no difficulty in holding that the initial alienation by the Commissioner of Lands was *invalid, null and void* ab *initio* since it contravened the provision of Section 3 of the

Government Lands Act and that no title, or interest could be conferred upon third parties. At page 7 Justice Visram, as he then was, stated as follows:

> ***"…….I accept the Plaintiff's Counsel, Mr Gitonga's submission that the Defendant's title, which came into being through a letter of allotment is invalid, and void, because the very allotment contravened Section 3 (a) of the Government Lands Act which provides for alienation of only unalienated land…"***

124. The Counsel relied on the case of:- ***"Kenya Anti-Corruption Commission – Versus - James Raymond Njenga & another, (Supra)"***, where the Court reiterated that:-

> ***"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. Annexture'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".***

125. 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.

126. The Learned Counsel averred 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, 3rd and 4th Defendants by the 2nd Defendant or any other person. That the process of allocation of the said land to the Defendants was not legal and did not comply with the law.

127. On whether the 1st, 3rd and 4th Defendants' titles are absolute and indefeasible. It was the Learned Counsel's humble submission that a title is indefeasible and sacrosanct, as was held by Honourable Justice J.B. Ojwang in the ***"Park View Shopping Argade Ltd – Versus - Charles, Nairobi H.C.C.C. NO. 438 OF 2004"***, ***"Wreck Motors Enterprises – Versus - The Commissioner of Lands & others Nairobi Civil Appeal No. 71 of 1997"***, ***"Pashito Holdings & another, (Supra)"*** and others if the process of allocation of the land is done in accordance with the law. ***"Champakalal Ramn***

Shah – Versus - The Attorney General & Another, Mombasa H.C.C.C. NO. 145 OF 1997". In this case, Justice Waki, as he was then, agreed with the Court of Appeal decisions in the ***"Town Council of Ol' Kalou – Versus - Nganga General Hardware, Theluji Dry Cleaners Ltd & Others (Supra)"*** case in so far as examining the process of alienation of Government land is concerned. The Learned Judge stated as follows:

> ***"By the same token, the concept of indefeasibility should not in discriminately be allowed to camouflage unlawful activities towards the acquisition of such titles, in the process courting disorder and encouraging land grabbing.."***

128. In the case of:- ***"Milankumarn Shah & 2 Others – Versus - City Council of Nairobi & Others (Supra)"***, in this matter, the Court considered the issues of wrongful and illegal alienation by the Commissioner of Lands of road reserve and a road by-pass respectively. The respective applicants had instituted proceedings challenging the actions of the relevant central and local governments in demolishing the structures on the land allocated by alleging violation of their *constitutional rights to property* under the Constitution of Kenya. Their respective applications for enforcement of their rights failed principally because *the Commissioner of Lands had no authority in law to alienate lad which had already been reserved for another purpose.* It was further held that the registration of title land is absolute to the extent that the creation of such title is done in accordance with the applicable laws of the land and is obtained without any fraud. The Court held as follows:

> ***"we hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procedure through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest.....where the law is ignored, the courts will step in and declare what the law is and means."***

129. The Court concluded its Ruling as follows:

> ***"4) the third applicant did not have an absolute and indefeasible title to L.R. No.209/15035 having acquired the same through a process which was in violation of the law, the Government Lands Act***

as well as the Physical Planning Act. Public Rights take precedence over private rights in the circumstance."

130. The Learned Counsel submitted that the leases which were issued to the 1st, 3rd and 4th Defendant was in violation of the Government Lands Act, Cap 280 (now repealed), Physical Planning Act and the same are a nullity. The interests of the public as a whole should take precedence over the right of the Defendants, who have in any event, unlawfully benefited from the suit premises since.

131. In the case of ***"Munyu Maina – Versus - Hiram Gathiha Maina (2013) eKLR"*** the Court of appeal held as follows;

"We have stated that when a registered proprietor root of title is challenged, it is not efficient 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 acquired the title to show that the acquisition was to prove the legality of how he acquired legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

132. In the case of:- ***"Elizabeth Wanjiru Githinji and 29 Others – Versus - Kenya Urban Roads Authority [2019] eKLR"***, where the Honourable Court of Appeal per Justice Otieno Odek, JA, [as he then was] held as hereunder:

"I am convinced and persuaded by the merits and reasoning in the local and comparative jurisprudence that a title under the Torrens system is defeasible on account of mistake, misrepresentation, fraud and illegality. For this reason, it is not sufficient for the Appellants to wave an RLA or RTA title and assert indefeasibility.

If a mistake is proved or total failure of consideration or other vitiating constitutional or statutory factors, an RLA or RTA title is defeasible."

133. Further it was the Plaintiff's submission that the lease issued to the 1st Defendant was not property registered. A look at the said lease (produced as Plaintiff Exhibit No. 16 by PW5) was not registered and doesn't bear the signature of the Land Registrar. The provision of Section 26 (2) of the Land Registration Act provided;

"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."

134. From the above cases it is clear that the title issued to the said defendants are defeasible as they root source of the said leases was illegal and procedural.

135. On suing the then Commissioner of lands in his personal capacity. The Learned Counsel submitted that from the authorities cited above, and others which have been filed and not cited in this submissions, the Plaintiff has shown that the 2nd Defendant, who issued the grant to the 2nd Defendant acted Ultra Vires. Consequently, he cannot be said to have acted in his own capacity as a Commissioner of Lands. The 2nd Defendant was a former Commissioner of Lands who unlawfully and fraudulently signed a lease, which was issued to the 1st Defendant. The Plaintiff submited that the actions of the 2nd Defendant in allocating the suit property to the suit property which was already surveyed and reserved for public use amounted to misconduct in public office and are nullity. 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."***

136. It was the Learned Counsel's submission that the 2nd Defendant acted contrary to his statutory duties. In fact, the 2nd Defendant was personally liable to the loss which other Defendants are likely to suffer in the event that the court orders that the lease title issued to the Defendants is a nullity. It is for that reason that the plaintiff has sued the 2nd Defendant in his personal capacity. The actions of the 2nd Defendant, were not actions of the office of the Commissioner of Lands. The 2nd Defendant did not have authority under the law to allocate the suit property to the 1st Defendant when he was the Commissioner of Lands in 2002 and has no adduced any evidence to show that indeed the President of the Republic directed him to sign the lease in favour of the 1st Defendant.

137. It was the then Commissioner who actually effected the alienation or the incumbent Commissioner who may know nothing about the basis/reasons for the alienation? What about where the offending Commissioner acted wholly outside his powers under the law, such as where he alienates public land for private purposes when such power is by law reserved exclusively for the President of the Republic of Kenya? How can the incumbent Commissioner of

Lands, or the office for that matter, defend such actions? And why should the incumbent/office be compelled to defend such suits at an additional expense to the tax payers [who are in the first place aggrieved by the alienation] when the offending government official was on a folic of his own, acting wholly outside the powers conferred by the law?

138. The Plaintiff has enjoined the former Commissioner of Lands in his private capacity in this suit on the basis of the tort of misfeasance in office, otherwise referred to as abuse of office and for which, the Applicant submits should be personally held liable rather than the office of the Commissioner of Lands.

139. On the Tort of Misfeasance in office, 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 prison 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."***

140. 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 AII 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'***.

141. 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 individua/s.' **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:

a) The Defendant is/was at material times a public officer;

b) The Defendant, at material times, was exercising power or office as a public officer

c) The Defendant acted, or made an omission, in subjective bad faith;

d) The Plaintiff has sufficient interest or nexus to bring an action;

e) Causation;

f) Recklessness by the defendant as to the consequences of his act

142. The Learned Counsel submitted 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.

143. The plain of unambiguous interpretation of the above authorities is that the Government would incur liability only if the Commissioner of Lands was acting within the confines of the applicable statutes. If the Commissioner of Lands ignores or acts outside the scope of the statute authorizing his actions, then the liability must squarely fall upon his shoulders. And if the liability does not fall on the Government, in no case could it fall on the office held by the concerned officer at any material time. The rule of law expects both the executive and the ordinary citizen to be bound and follow the law. Where an officer of government breaches or neglects to follow the law. Where an officer of the Government breaches or neglects to follow the applicable statutes, he cannot be said to be acting on the basis of instructions lawfully given.

144. On whether the Plaintiff’s suit time barred. The Learned Counsel averred that Act No. 7 of 2007 amended Section 42 of the Limitation of Actions Act, Cap. 22 by introducing sub section (1) (k) and (2). After the said amendments, Section 42 (1)(k) reads as follows:

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

145. The new provision of Section 42 (2) of the Limitation of Actions Act reads as follows:

<u>**Sub - Section (1)(k) shall apply retroactively.**</u>

146. According to the Learned Counsel there was no dispute that the Plaintiff’s suit seeks to cover lost public property Consequently, the provision of Section 7 of the Limitation of Actions Act does not apply in this case. The Plaintiff's action

is pursuant to the provision of ACECA and not the Government Lands Act per se. The Plaintiff's actions is also based on the provision of the Registration of Titles Act amongst other statutes. The issue of limitation of time Vis a vis recovery of public land was addressed in the case of ***"Kenya Anti-Corruption Commission – Versus - J.S.K (Cargo) & Another; Mombasa H.C.C.C. NO. 40 of 2009 eKLR (2009)"***.

147. In conclusion, the Learned Counsel submitted that doctrine of public interest and public trust and has shown that the public interests should always take precedence over private interests. The title documents issued to the 1st, 3rd and 4th Defendants ought to be cancelled by virtue of Article 40 (6) of the Constitution of 2010, and Section 26 of the Land Registration Act. They were unlawfully acquired. This has been held in various authorities including the decision of Mutungi J, in the case of ***"Esther Ndegi Njiru & Another – Versus - Leonard Gatei, Nairobi ELC No.128 of 2011, (2014) eKLR"***.

148. In a nutshell, the Learned Counsel urged the Court to allow the prayers sought in the Amended Plaint dated 24th February, 2022 by the Plaintiff with costs. Further the 5th Defendant to be ordered to vacate the premises.

B. The Written Submissions by the 2nd Defendant

149. The 2nd Defendant through the Law firm of Messrs. Njuguna, Kahari & Kiai Advocates filed his written submissions dated 14th February, 2023. The Learned Advocate submitted that vide an amended Plaint dated 24th February, 2022, the Plaintiff sought for the above stated orders. Subsequently, the Defendants filed and served their respective Statements of Defence where they denied the averments in the Plaint.

150. On the undisputed facts, the Learned Counsel submitted that L.R No. Mombasa Municipality/ Block/XXVI/933 was part of L.R No. Mombasa Municipality/ Block/XXVI/243. The 1st Defendant was issued with a letter of allotment dated 23rd December, 1997 in respect of L.R No. Mombasa Municipality/Block/XXVI/933. As a result of the allotment, a survey plan folio number 312/74 was prepared and the1st Defendant issued with a grant to the suit property. He is currently in occupation of the property.

151. On the Plaintiff's case, the Learned Counsel submitted that PW - 1 who works in estate management in the State Department for Housing and Urban Development. He adopted his statement dated 6th September, 2021 as his evidence in chief. He testified that the suit property was part of a bigger parcel of Mombasa Municipality/Block/XXVI/243 alienated for government housing and that it had government tenants within register of government buildings. He

produced a register of government buildings, marked and produced as Plaintiff Exhibit No. 1, which showed that the building was built in 1928. He further testified that the allocation of the suit property was not done in concurrence with the process. One must not only follow the boarding process but also fulfill financial regulations outlined by the treasury. He stated that the procedure for boarding is for removal of a structure in land. He produced two government circulars, one dated 1st March 1958, produced and marked as Plaintiff Exhibit No. 2, and another one dated 30th June, 2003, produced and marked as Plaintiff Exhibit No. 3, providing for the process of boarding a government house.

152. It was his testimony that in the process of boarding, one must give reason for boarding, which must be accepted by the Permanent Secretary for the Ministry of Public Works, who then gives the board the authority to convene where the property is located. The chairperson, secretary and other members must be present and the minutes of the meeting recorded. The proceedings and recommendations of the board are recorded in Form F.O. 58. The form, inspectors report on the government house, the minutes of the meeting and the preliminary reports are sent to permanent secretary and accounting officer for approval. If they approve, two signed copies are forwarded to the National Treasury.

153. It was his evidence that the suit property did not reach the stage of approval. On cross-examination, he confirmed that several parties are involved in the property and not just the Commissioner of Lands. He testified that the letter declining the request for boarding, dated 20th August, 1996, produced and marked as Plaintiff Exhibit No. 4 was from the Permanent Secretary who was not personally impleaded in the suit. PW - 2 who works as Deputy Director in the Department of Physical Planning under the Ministry of Lands and Physical Planning adopted his witness statement dated 29th September, 2021 as his evidence in chief. He was testifying on behalf of the Director of Physical Planning in relation to PDP 12.2.CT.52.94. He testified that before a PDP was prepared, authority is sought from the Cabinet Secretary, Ministry of Lands and Physical Planning, and the Director of Physical Planning. Thereafter, a site visit is conducted to ensure that the Plan is in line with the situation on ground and any developments on the land are captured.

154. Subsequently, the PDP was prepared and circulated to the necessary authorities for comments and the same is then published in one Swahili daily newspaper, English daily newspaper and Kenya Gazette for 60 days. After 60 days, if there were no adverse comments, the Plan is forwarded to the Cabinet Secretary for approval. Once the Cabinet secretary approves, the Plan is

presented to the Director of Physical Planning who assigns it an approved development plan number which is entered into the Registry of Approved Plans. He further testified that the PDP is attached to the Letter of Allotment and that the PDP in issue did not have an approved plan number and not in the approved registry. On cross examination, he revealed that the PDP in issue did not meet the criteria and it did not pass through the initial steps before being issued.

155. PW - 3 a senior Land Surveyor in Nairobi and a Land Adjudication Officer testified that the suit property was part of parcel Mombasa Municipality/Block/XXVI/ 243 and survey was done on 2nd September, 1963, represented by survey plan folio no 65/69, produced and marked as PEXH 6. Several surveys were done later, among them, a survey for Mombasa Municipality/Block/XXVI/ 933 which was conducted on 2nd June 1968 vide survey plan no.312/74, produced and marked as Plaintiff Exhibit No. 7A. It was amended on 21st March, 1997, and the amended plan was produced and marked as Plaintiff Exhibit No. 8. On cross examination, he stated that a new map is prepared when a new survey has been approved.

156. PW - 4 a regional valuer, who has been working with the Plaintiff since the year 2006, testified that it was his duty to carry out valuation of property under investigation. However, he was denied access to the suit property. On cross examination, he confirmed that there was a valid lease registered on the property in favour of the 1st Defendant and that in his professional opinion, the current market value of the property was valued at a sum of Kenya Shillings Thirty Million (Kshs. 30, 000, 000/=). PW - 5 an investigator with the Plaintiff testified that he received an anonymous complaint as land matters were sensitive back then.

157. It was his evidence that he established in the course of investigation that Mombasa Municipality/Block/XXVI/933 formed part of Mombasa Municipality/Block/XXVI/243 set aside for the purposes of housing civil servants. He testified that the lease produced and marked as Plaintiff Exhibit No. 16 was endorsed by the Commissioner of Lands witnessed by the Land Registrar as required. He further testified that the entries on the green card produced and marked as Plaintiff Exhibit 17A, were made on the same day the lease was issued and “fraud suspected” written on its blow.

158. Moreover, the 3rd and 4th Defendants hold a Certificate of Lease on the suit property. On cross-examination, he stated that the 2nd Defendant was and is in occupation of the suit property. Additionally, the fact that the lease was not signed by the Land Registrar makes the process irregular. Upon re -

examination, he stated that the correspondences show no forwarding letter for approval and therefore, the boarding was not approved.

159. On the Defendants' case. The Learned Counsel submitted that the case against the 1st, 3rd to 5th Defendants was closed by the Court. The 2nd Defendant while relying on the Statement of Defence and Cross - examination of the witnesses, maintained that any allocation done during his tenure as Commissioner of Lands, was done intra vires, legally, regularly and lawfully under the provisions of the Governments Land Act Cap. 280 (Now repealed). Further, if there was any issue arising in regard to a particular allocation, the same should be addressed to the Office of the Commissioner of Lands (The Land Registrar) and not himself in his personal capacity as he ceased to hold office in year 1999 and has no access to documents that would clarify any alleged disputes.

160. The Learned Counsel relied on the following issues for determination before the Court:-

*i. **Whether the Plaintiff discharged its burden of proof against the 2nd Defendant***

*ii. **Whether the present suit is discriminative and unconstitutional against the 2nd Defendant***

*iii. **Whether the 2nd Defendant should be held liable for the alleged improper allocation;***

*iv. **Whether the Plaintiff is entitled to the costs of this suit***

161. On whether the Plaintiff discharged its burden of proof against the 2nd Defendant. The Learned Counsel averred that the Plaintiff failed to substantiate the particulars of fraud against the 2nd Defendant. It is not enough for the Plaintiff to merely allege that the 2nd Defendant, who was the former Commissioner of Lands signed the letter of allotment dated 23rd December,1997 and endorsed the grant. The 2nd Defendant issued the Letter of Allotment to the 1st Defendant once it was confirmed that the land was available for allocation. There was no evidence on record to prove that the 2nd Defendant acted improperly.

162. In the case of:-***"Alice Wanjiru Ruhiu – Versus - Messiac Assembly of Yawheh [2021] eKLR"*** the Court observed as follows:

"It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the Evidence Act provide as follows:

107(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

163. In the case of ***"Denis Noel Mukhulo Ochwada & Another – Versus - Elizabeth Murungari Njoroge & Another[2018] eKLR"***, the court stated that:

"As regards standard of proof of fraud, the law is quite clear. In R.G Patel - Versus - Lalji Makanji, the former court of Appeal for Eastern Africa stated thus:

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

164. In any event, his presence in this suit cannot help determine the legality or otherwise of the said allocation, as this can only be determined by the records from the Ministry of Lands which the 2nd Defendant has had no access to for over twenty years. From the foregoing, we submit that the claim of fraud against the 2nd Defendant fails.

165. On whether the present suit is discriminative and unconstitutional against the 2nd Defendant. The Learned Counsel averred that the present suit is unconstitutional, scandalous, frivolous, vexatious and amounts to abuse of the court's processes. It was in violation of the 2nd Defendant's rights guaranteed by the provision of Article 25(c), 27,47 and 50 of the Constitution and it ought to be struck out as the suit was instituted 10 years after he left office against him personally instead of the National Land Commission which is currently in charge of all public land vide National Land Commission Act No. 5 of 2012.

166. Further, the process of alienation of land is as a result of several stages and processes undertaken, vetted and approved by different officers in the then Office of the Commissioner of Lands. PW - 1 indeed confirmed this to this Honourable Court. The 2nd Defendant cannot also defend himself against the allegations raised herein as he only has access to the evidence produced by the Plaintiff and not the documentary evidence in custody of the National Land Commission. In the case of:- ***"Joshua Okungu and another – Versus - the***

Chief Magistrate's Court, ACC Nairobi and another (2014) eKLR", the Court stated that:-

> ***".......where therefore the prosecution has been commenced or is being conducted in an arbitrary, discriminative and selective manner which cannot be justified, that conduct would amount to an abuse of the legal process"***

167. In light of the above, the 2nd Defendant humbly submits that the proceedings filed against the 2nd Defendant in his personal capacity instead of the Attorney General, by dint of the provisions of the repealed Government Lands Act cap 280 were unprocedural and a nullity ab initio.

168. On whether the 2nd Defendant should be held liable for the alleged improper allocation. The Learned Counsel averred that the 2nd Defendant issued the grant while acting on instructions of the President and the laws of Kenya. The proper person to have been sued in the instant case is the Attorney General as the 2nd Defendant issued the grant while discharging his official functions. The provision of Section 8 of the Government Lands Act, (repealed) provides that:

> **"8. (1)All actions, suits and proceedings by or on behalf of the Government respecting- (a) Government land; or (b) any contract relating to Government land or any breach of any such contract; or (c) any trespass on Government land or any damages accruing by reason of such trespass; or (d) the recovery of any rent, purchase money or other monies in respect of Government land; or (e) any damages or wrongs whatsoever in any way suffered by the Government in respect of Government land or any other land; or (f) the recovery of any fine or the enforcement of any penalty under this Act, shall be commenced, prosecuted and carried on by and in the name of the Commissioner who shall be represented y the Attorney-General or by any public officer or other person appointed by the Commissioner in any particular case."**

169. On whether the Plaintiff was entitled to the costs of this suit. The Learned Counsel submitted that the Plaintiff was a public body established under the provision Section 3 of the Ethics and Anti-Corruption Commission, Act of 2011. It is mandated to institute and conduct proceedings in court for the purposes of recovery of public property. Therefore, the Plaintiff in the suit was acting in public interest and it should not be awarded any costs. Further, costs are awarded subject to the discretion of the court under the provision of Section

27(1) of the Civil Procedure Act, Cap. 21.

170. In conclusion, the Learned Counsel submitted from the foregoing that the Plaintiff’s act of carrying out selective investigations against the 2nd Defendant alone and in his personal capacity, and not all officers involved in the process of allocation of land, amounts to gross abuse of the Plaintiff's powers under the provisions of the Ethics and Anti - Corruption Act, 2011. It was unfair and biased as it fails to take into account that the 2nd Defendant left office in the year 1999 and that he no longer has access to evidence that he could use to defend himself. They urged this Honourable Court to dismiss the suit against the 2nd Defendant and to order the Plaintiff to bear the costs of this suit.

VII. Analysis & Determination

171. 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 Counsels for the respective parties, and the myriad authorities cited. Additionally, 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 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”***.

172. 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 sub-headings. These are: -

a) Whether the suit property, Mombasa Municipality/Block XXVI/933, was public land reserved for government housing and civil servants’ residential use.

b) Whether the Defendants fraudulently, irregularly, or unlawfully facilitated the alienation and registration of the suit property.

c) Whether the lease and certificate of lease issued to the 1st Defendant, and subsequently to the 3rd and 4th Defendants, were valid in law.

d) Whether the Defendants, jointly or severally, breached fiduciary duty, acted in excess of statutory authority, or unjustly enriched themselves at the expense of the Government of Kenya.

e) What remedies, if any, are available to the Plaintiff, including recovery of the suit property, cancellation of titles, rectification of the land register, and damages.

f) Who should bear the costs of the suit.

ISSUE NO. (a) Whether the suit property, Mombasa Municipality/Block XXVI/933, was public land reserved for government housing and civil servants' residential use?

173. Under this sub - heading the Court examined the pleadings, oral testimony, documentary evidence, and statutory provisions to determine the true character of the suit property. The Plaintiff's case, supported by PW - 5's testimony and documentary exhibits, demonstrated that the suit property had originally formed part of Mombasa Municipality/Block XXVI/243, a larger parcel expressly reserved by the Government of Kenya for the construction of residential houses for civil servants. Survey Plans, Development Plans, and Topocadastral Plans (Folio Register No. 65/69) confirmed that the land was earmarked for government housing. Indeed, House No. HG 53 had been constructed on the suit property and occupied by civil servants, thereby evidencing its public utility.

174. The Court considered correspondence tendered in evidence, including letters dated 15th December, 1994, 29th July, 1996, 13th August, 1996, and 20th August, 1996, which revealed that the Ministry of Public Works and Housing, together with the Office of the President, had deliberated on whether the house could be boarded for allocation to the 1st Defendant. Crucially, the Cabinet and the Permanent Secretary in the Ministry of Public Works and Housing had declined to approve such boarding, thereby affirming the Government's consistent position that the property was reserved for public use and unavailable for private alienation.

175. The Court further critically examined the Green Card and White Card obtained from the Land Registry, which showed that registration of the lease had been effected on 9th March, 1998. Significantly, the Green Card bore an inscription **"Fraud Suspected,"** a notation that lent weight to the Plaintiff's contention that the alienation was irregular, unlawful, and contrary to the governing statutes. Additionally, Gazette Notice No. 15572 of 26th November, 2020 was produced, reaffirming the Government's intention to preserve the property for public housing purposes. This official publication underscored the enduring public character of the land and the absence of any lawful process to alter its user.

176. The Court observes that under the Constitution of Kenya, 2010, and the statutory framework provided by the Land Registration Act, 2012, and the repealed Government Lands Act, Cap. 280 in particular the provisions of Sections 3 and 9 of the Act, public land reserved for a specific purpose could not be lawfully alienated without adherence to due process, including approval by the relevant authorities and compliance with statutory safeguards. No evidence was adduced to show that such procedures had ever been followed in respect of the suit property.

177. On the basis of this cumulative evidence, the Court finds that the suit property is indeed public land reserved for government housing and civil servants' residential use, and that no lawful process was ever undertaken to change its user or surrender it for private allocation.

178. Therefore, the court discern that the Defendants' claim to the property is inconsistent with the constitutional and statutory framework governing public land, and any purported title derived therefrom is incapable of conferring valid rights.

ISSUE No. (b) Whether the Defendants fraudulently, irregularly, or unlawfully facilitated the alienation and registration of the suit property.

179. Under this sub - heading the Court examines whether the Defendants fraudulently, irregularly, or unlawfully facilitated the alienation and registration of the suit property. The efficacy and effectiveness of registration and ownership of land is governed by the provision of Article 40 (1) & (2) of the Constitution of Kenya, 2010, Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012.

180. Article 40 (1), (2) & (3) of the Constitution provides:-

40.(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-

(a) of any description; and

(b) in any part of Kenya.

(2) Parliament shall not enact a law that permits the State or any person-

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or.......

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired".

181. 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.

182. 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".

183. Section 26 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".

184. 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 that I did in the said dictum."

185. I am in agreement with Munyao J. 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.

186. 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".

187. 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 – Versus - Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune – Versus - Occident [1989] 1 Lloyd's Rep. 305, 308).

188. 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 obtainted in a fradulent 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."

189. 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."

190. 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."

191. The Plaintiff's evidence established that the 2nd Defendant, then Commissioner of Lands, had issued a Letter of Allotment and lease to the 1st Defendant despite clear evidence that the suit property was already developed and reserved for government housing. The correspondence dated 15th December, 1994, 29th July, 1996, 13th August, 1996 and 20th August, 1996 demonstrated that the Permanent Secretary in the Ministry of Public Works and Housing, as well as the Cabinet, had expressly declined to approve boarding of House No. HG 53 for allocation to the 1st Defendant. The issuance of the allotment and lease in disregard of these decisions pointed to irregularity, abuse of office, and deliberate circumvention of lawful authority.

192. The Court notes that the lease produced as Exhibit No. 16 bore the Commissioner's signature but lacked proper witnessing by the Land Registrar. The Green Card and White Card obtained from the Land Registry showed that registration was effected on 9th March, 1998 and bore the inscription **"Fraud Suspected.**" This official notation was not a mere clerical remark but a strong indicator that the process had been tainted by illegality and had raised suspicion even within the registry itself.

193. Further, the 3rd and 4th Defendants were shown to have procured a Certificate of Lease dated 30th September, 1997 for a term of 99 years

commencing 1.1.1996, despite the absence of a valid Part Development Plan or lawful letter of allotment. Their reliance on defective documents and their subsequent claim to title underscored fraudulent acquisition. The Court observed that the absence of a registered PDP, coupled with the lack of ministerial approval, rendered their purported leasehold interest a nullity ab initio.

194. The Plaintiff also demonstrated that the Defendants had actual or constructive knowledge of the defects in title. Survey Plans and Topocadastral Plans deposited at the Survey of Kenya clearly indicated that the land was reserved for government housing. The presence of House No. HG 53 on the suit property was a physical fact that could not have escaped the Defendants' attention. By shutting their eyes to the obvious, the Defendants acted in bad faith and assumed the risk of all legal consequences.

195. The Court observes that under the Government Lands Act, Cap. 280 (Now repealed) and the Registered Land Act, Cap. 300 (Now repealed), alienation of public land required strict compliance with statutory procedures, including circulation of Part Development Plans, approval by the responsible Minister, and convening of a Board of Survey before any government house could be allocated. None of these requirements were met. The Defendants' actions were therefore ultra vires, irregular, and unlawful.

196. The Court further notes that the Defendants' conduct was not merely technical error but amounted to a deliberate scheme to defeat public interest. The issuance of allotments and leases in disregard of Cabinet decisions, the manipulation of survey records, and the reliance on defective instruments collectively pointed to a corrupt enterprise. The Defendants, being public officers at the material time, stood in fiduciary positions vis-à-vis government land. Their breach of that fiduciary duty constituted not only illegality but also betrayal of public trust.

197. The root of title collapses because absence of a registered PDP and allotment are defective. Following the case of:- ***"Dignified Holdings (Supra)"***, alienation of reserved land is void ab initio. The conduct of the Defendants amounts to fraud, irregularity, and abuse of office.

198. On the totality of the evidence, the Court finds that the Defendants jointly and severally facilitated the fraudulent and irregular alienation of the suit property. Their conduct amounted to abuse of office, breach of fiduciary duty, and unlawful interference with public land reserved for government housing. The alienation and registration of Mombasa Municipality/Block XXVI/933 were

therefore fraudulent, irregular, and unlawful.

<u>ISSUE No. (c) Whether the lease and certificate of lease issued to the 1st Defendant, and subsequently to the 3rd and 4th Defendants, were valid in law</u>

199. Under this sub-heading the Court examined the instruments of title produced by the Defendants, the statutory framework governing alienation of public land, and the evidence tendered by the Plaintiff. The question was not merely whether documents existed, but whether those documents had been lawfully conceived, executed, and registered in accordance with the governing statutes and constitutional principles. I have previously referenced the provision of 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 provision 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.

200. 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 (Supra)"***, 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.

201. The Plaintiff demonstrated that the lease purportedly issued to the 1st Defendant had been prepared without lawful authority, and in disregard of the fact that the suit property was already developed and reserved for government housing. The lease exhibited as Exhibit No. 16 bore the Commissioner's signature but conspicuously lacked proper witnessing by the Land Registrar. The Green Card and White Card obtained from the Land Registry showed that registration was effected on 9th March, 1998 and bore the inscription **"Fraud Suspected."** This notation was not a trivial remark but a formal indication by the registry itself that the process of registration was irregular, tainted, and potentially unlawful.

202. The Court further considers the Certificate of Lease dated 30th September, 1997, purportedly held by the 3rd and 4th Defendants. The evidence revealed that this certificate had been procured without a valid Part Development Plan, without a lawful letter of allotment, and without ministerial approval. The absence of these statutory prerequisites rendered the certificate defective and incapable of conferring any valid leasehold interest. The Court noted that the Defendants had relied on documents that were facially incomplete, irregular, and unsupported by the legal framework governing public land.

203. The Court observes that under the Government Lands Act, Cap. 280 (Now repealed) and the Registered Land Act Cap. 300 (Now repealed), alienation of public land required strict compliance with statutory procedures. These included circulation of Part Development Plans to relevant authorities, approval by the responsible Minister, and convening of a Board of Survey before any government house could be allocated. None of these requirements were satisfied in the present case. The failure to adhere to these safeguards was not a mere technicality but a fundamental breach of the law designed to protect public land from arbitrary alienation.

204. The Court also notes that the Defendants had actual or constructive knowledge of the defects in title. The presence of House No. HG 53 on the suit property was a physical fact that could not have been overlooked. The Defendants' reliance on defective documents and their continued assertion of title amounted to bad faith and deliberate disregard of the law. The Court emphasized that parties cannot rely on fraudulent or irregular instruments to defeat public interest, and that knowledge of defects in title imposes a duty to refrain from asserting such claims.

205. The Court notes that indefeasibility of title is not a shield for fraud. The doctrine of public trust under provision 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.

206. On the totality of the evidence, the Court finds that the Lease and Certificates of Lease issued to the 1st Defendant, and subsequently to the 3rd and 4th Defendants, were null and void ab initio. They were incapable of conferring any estate, interest, or right in the suit property, which remained public land reserved for government housing. The purported titles were therefore invalid, unenforceable, and subject to cancellation and rectification of the land register.

ISSUE No. (d) Whether the Defendants, jointly or severally, breached fiduciary duty, acted in excess of statutory authority, or unjustly enriched themselves at the expense of the Government of Kenya.

207. Under this sub-heading the Court examined the conduct of the Defendants in light of their statutory duties, fiduciary obligations as public officers, and the constitutional principles governing public land. The Court was mindful that public officers entrusted with the administration of government land are bound by a higher duty of care, fidelity, and accountability to the citizenry, and that any deviation from these obligations undermines the very foundation of public trust.

208. The Plaintiff's evidence demonstrates that the 2nd Defendant, as Commissioner of Lands, held a fiduciary position vis-à-vis all government land. By purporting to alienate the suit property to the 1st Defendant, despite clear evidence that the land was reserved for government housing, the 2nd Defendant acted in breach of that fiduciary duty. The issuance of a lease and certificate of lease without lawful authority, and in disregard of Cabinet and ministerial decisions, amounted to abuse of office and excess of statutory power. The Court emphasized that fiduciary duty is not a mere formality but a substantive obligation requiring honesty, transparency, and loyalty to the public interest.

209. The acts and commissions committed by duly appointed Public Officers - the then Commissioners of Land and the Land Registrar in wilfully facilitating the 1st Defendant to illegally, unlawfully and fraudulently acre 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. The Court notes that fiduciary duty requires public officers to act in good faith, with loyalty to the public interest, and to avoid conflicts of interest. The Defendants' actions—issuing allotments and leases without lawful approval, failing to convene a Board of Survey, and ignoring statutory safeguards—were inconsistent with these obligations. Their conduct was not merely negligent but deliberate, designed to confer private benefit at the expense of the Government of Kenya. Such conduct, in the Court's view, amounted to a betrayal of the public trust and a violation of the constitutional principle that public land must be managed for the benefit of all

citizens.

210. The Court further observes that the 3rd and 4th Defendants procured a Certificate of Lease dated 30th September, 1997 without a valid Part Development Plan or lawful Letter of Allotment. Their reliance on defective documents, and their continued assertion of title despite knowledge of the defects, amounted to unjust enrichment. They acquired and enjoyed use of public property reserved for civil servants, thereby depriving the Government of its intended utility. The Court underscored that unjust enrichment arises where one party benefits at the expense of another without lawful justification, and here the enrichment of the Defendants was directly tied to the unlawful alienation of public land.

211. The Plaintiff also establishes that the Defendants jointly and severally facilitated a corrupt enterprise. By shutting their eyes to the obvious—such as the existence of House No. HG 53 on the suit property—the Defendants acted in bad faith and assumed the risk of all legal consequences. Their actions were not isolated mistakes but coordinated steps to defeat public interest. The Court noted that the deliberate concealment of facts, manipulation of documents, and disregard of statutory procedures pointed to a scheme of fraud rather than inadvertence.

212. The Court finds that the Defendants, jointly and severally, breached fiduciary duty, acted in excess of statutory authority, and unjustly enriched themselves at the expense of the Government of Kenya. Their conduct constituted abuse of office, betrayal of public trust, and unlawful interference with land reserved for government housing.

213. Therefore, the Court holds that the Defendants' actions were not only legally untenable but morally reprehensible, striking at the heart of constitutional governance and the rule of law.

ISSUE No. (e) What remedies, if any, are available to the Plaintiff, including recovery of the suit property, cancellation of titles, rectification of the land register, and damages.

214. Under this sub-heading the Court examined the reliefs sought by the Plaintiff in light of the findings already made on the nature of the suit property, the conduct of the Defendants, and the validity of the titles in question. The Court was guided by the constitutional imperative under the provision of Articles 40, 62, and 68 of the Constitution of Kenya, 2010, the provisions of the Land Registration Act, 2012, and the repealed Government Lands Act. These provisions collectively underscore the principle that public land must be

safeguarded against unlawful alienation and that fraudulent titles cannot be allowed to stand.

215. The Plaintiff prayed for recovery of the suit property, cancellation of the titles, rectification of the land register, and damages. The evidence demonstrated that the suit property was public land reserved for government housing, and that the Defendants had fraudulently and unlawfully procured leases and certificates of lease over it. The Court noted that fraudulent and irregular titles are null and void ab initio, incapable of conferring any estate, interest, or right. Accordingly, the Court held that cancellation of the titles and rectification of the land register were necessary remedies to restore the property to its intended public use.

216. The Court further considers whether damages were appropriate. The Plaintiff had shown that the Government of Kenya had suffered loss of user rights over the suit property, which had been rendered unavailable for civil servants' housing. The Defendants had unjustly enriched themselves by enjoying use and mesne profits from the property. In such circumstances, the Court found that an award of damages was justified, both to compensate the Government for the deprivation and to deter similar unlawful conduct in future. The Court emphasized that damages in cases of trespass and unlawful occupation are not merely compensatory but also serve a deterrent function, ensuring that public officers and private individuals alike are discouraged from engaging in fraudulent dealings with public land

217. Further under the provision Section 24, 25 and 26 of the Land Registration Act, No. 3 of 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.

218. 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 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:

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

"A person shall not unlawfully occupy Private, Community or Public

Land."

220. 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."**

221. 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."**

222. 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."**

223. 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 possession of the land."**

224. The Court also emphasized that recovery of the suit property was a matter of public interest. Public land cannot be alienated for private gain through fraud or abuse of office. Restitution of the property to the Government was therefore the primary remedy, ensuring that the land would be used for the purpose for which it had been reserved. The Court stressed that allowing the Defendants to retain the property would amount to rewarding illegality and

undermining the constitutional framework for land governance.

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

225. 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, Cap. 21 provides that costs follow the events.

226. 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"***.

227. The Plaintiff, acting under its constitutional and statutory mandate, instituted this suit to recover public land that had been fraudulently and unlawfully alienated. The evidence demonstrated that the Defendants jointly and severally facilitated the irregular allocation, procured defective titles, and unjustly enriched themselves at the expense of the Government of Kenya. Their conduct necessitated the filing of this suit and prolonged litigation.

228. The Court observes that the Defendants' actions were not mere technical lapses but deliberate acts of fraud, illegality, and abuse of office. In such circumstances, it would be unjust and inequitable to saddle the Plaintiff, who acted in the public interest, with the costs of proceedings. Accordingly, the Court finds that the Defendants, jointly and severally, should bear the costs of the suit. This order not only compensates the Plaintiff for expenses incurred but also serves as a deterrent against future unlawful dealings with public land.

VIII. Conclusion and disposition

229. 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 24th February, 2022;

b) THAT a declaration be and is hereby made that the registration and issuance of the Lease and Certificate of Lease in favour of the 1st Defendant, and subsequently the 3rd and 4th Defendants, was unconstitutional, fraudulent, unlawful, corruptly irregular, null and void ab initio, and ineffectual to confer any right, interest, or title upon them.

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 Mombasa Municipality/Block XXVI/933.80

d) THAT a permanent injunction be and is hereby issued restraining the Defendants, whether by themselves, 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 Mombasa Municipality/Block XXVI/933, 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 the Plaintiff shall be entitled to interest on the award in at Court rates from the date of filing the suit until payment in full.

h) THAT a declaration be and is hereby made that the duly appointed Public Officers - the then Commissioners of Land and the Land Registrar 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 willfully facilitating the 1st Defendant to illegally, unlawfully and fraudulently acquiring the suit land.

i) THAT the costs of this suit shall be borne by the Defendants jointly and severally, the Plaintiff having succeeded in his claim.

IT IS ORDERED ACCORDINGLY.

JUDGEMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS………17TH ……..DAY OF……JULY………… 2026.

Judgment delivered in the presence of:

(a) M/s. Firdaus Mbula, the Court Assistant.

(b) M/s. Songole Advocate for the Plaintiff.

(c) No appearance for the 1st, 2nd, 3rd, 4th & 5th Defendants.

SIGNED BY/FOR:

THE JUDICIARY OF KENYA

HON.JUSTICE L.L. NAIKUNI
Mombasa Environment and Land Court
Environment and Land Court
Date: 2026-07-21 15:08:35