

THE COMMISSION ON ADMINISTRATIVE JUSTICE  
“Office of the Ombudsman”



**Hata Mnyonge ana Haki**  
**“Officers’ playground”**



**An investigation report on the alleged irregular allocation of  
Eastleigh market to private developers**

**August, 2016**



## **Foreword**

The Commission on Administrative Justice (CAJ) pursuant to its mandate as stipulated under Section 8 of CAJ Act undertook investigations into the alleged irregular allocation of Eastleigh market land, LR. No. 36/VII/1037 to private developers.

The investigation was undertaken based on complaint received from representatives of a group of 403 traders who operated stalls at Eastleigh Market. The complainants alleged that the market was allocated to private developers under the guise of Public-Private Partnership initiative in 2008 by the then Nairobi City Council. This prompted the Commission to conduct investigations into possible dereliction of duty, abuse of power, unfair treatment and injustice by Nairobi City Council Officials in the allocation of land, L.R No. 36/VII/1037 to private developers.

The Commission wrote to the Nairobi County Governor notifying him of the decision to conduct investigations into the allegation. CAJ investigators visited Nairobi County Offices, Ministry of Lands, Survey of Kenya and the land in dispute.

This report was informed by interviews held with officials from Nairobi City County, Ministry of lands, Survey of Kenya, Area Chief, Deputy County Commissioner, Kamukunji Sub-county and some Eastleigh Market Traders. The report was also informed by the examination of documents recovered in the process of investigations.

The Commission has made recommendations to the relevant Government agencies for implementation. CAJ is confident that the findings of this investigation will help in the repossession of the public land, ensure justice is done to the traders who incurred losses as a result of demolition of stalls which they built using their own money and provide caution to public officials who abuse their official power in the allocation of public land to private developers.

**Signed this..... day of July, 2016**

**Dr. Otiende Amollo, E.B.S**

**Chairperson of the Commission on Administrative Justice**

**(Office of the Ombudsman)**

## **Preamble**

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The Commission on Administrative Justice (CAJ) has a mandate, inter-alia, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct.

In addition to the CAJ's investigative powers under Article 252 (1) (a), Sections 26, 27, 28 and 29 of the CAJ Act gives the Commission powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

Under Section 31 of its Act, CAJ has power not limited by other provisions to investigate an administrative action despite a provision in any written law to the effect that the action taken is final or cannot be appealed, challenged, reviewed, questioned or called in question.

After undertaking its investigations, the Commission is required under Section 42 of its constitutive Act, to prepare a report to the State organ, public office or organization to which the investigation relates. The report shall include the findings of the investigation, action the Commission considers to be taken and reasons whereof and recommendations the Commission deems appropriate.

CAJ may upon an inquiry into a complaint, undertake such other action as it may deem fit against a concerned person or persons where the inquiry discloses a criminal offence as provided for under Section 41 of the CAJ Act.

Section 8 (g) of the CAJ Act gives the Commission power to recommend compensation or other appropriate remedies against persons or bodies to which the Act applies.

Section 42 (4) states; If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take the appropriate action.

Section 52 (b) and (d) of the CAJ Act 2011, provides that a person who knowingly submits false or misleading information to a member of staff of the Commission commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or imprisonment for a term not exceeding two years or both.

Further, Article 59(2) (j) of the Constitution of Kenya, 2010 empowers the Commission to report on complaints investigated under paragraph (h) and (i) and take remedial actions.

The following is the layout of the report:

- Introduction to the investigations
- Investigations strategy
- Normative framework
- Analysis and findings
- Conclusions
- Determinations

## Table of Contents

<b>Foreword</b> .....	<b>i</b>
<b>Preamble</b> .....	<b>ii</b>
<b>Acronyms</b> .....	<b>v</b>
<b>Executive Summary</b> .....	<b>vi</b>
<b>Determinations</b> .....	<b>xvii</b>
<b>1.0 Introduction to the investigation</b> .....	<b>1</b>
<b>1.1 Issues under investigation</b> .....	<b>2</b>
<b>1.2 Investigation Process</b> .....	<b>2</b>
<b>1.3 Legal Framework</b> .....	<b>4</b>
<b>2.0 Analysis and Findings</b> .....	<b>8</b>
<b>2.1 Court Cases</b> .....	<b>14</b>
<b>3.0 General Conclusions</b> .....	<b>16</b>
<b>4.0 Determinations</b> .....	<b>18</b>

## Acronyms

BOT	Built Operate and Transfer
CAJ	Commission on Administrative Justice
DCIO	Divisional Criminal Investigations Officer
DPP	Director of Public Prosecutions
LR	Land Registration
PPP	Public- Private Partnership
PPPA	Public- Private Partnership Agreement
RIM	Registry Index Map

## **Executive Summary**

The Commission on Administrative Justice (CAJ) received a complaint on 15<sup>th</sup> December, 2015 from representatives of a group of traders who had operated stalls at Eastleigh Market (L.R No. 36/VII/1037).

The complainants alleged that they were allocated space at the market by the defunct Nairobi City Council in 1981 and they constructed stalls using their own money. The traders operated various businesses until the market was demolished in the early morning of 10<sup>th</sup> January 2009. According to the complaint, the market was allocated to private developers under the guise of Public-Private Partnership initiative in 2008 by the then Nairobi City Council.

The complaint prompted the Commission to conduct investigations into possible dereliction of duty, abuse of power, unfair treatment and injustice by the defunct Nairobi City Council officials in the allocation of land registered as L.R No. 36/VII/1037 to private developers.

CAJ wrote to the Governor, Nairobi City County to notify him of its decision to conduct the investigation. The investigation team visited the offices of Nairobi City County, Survey of Kenya, Ministry of lands, Kamukunji Sub-County Administration, Supreme Court, High Court and the land in dispute at Eastleigh, 1<sup>st</sup> Avenue. The team interviewed a number of officers and some of the traders and recovered several documents relevant to the matter under investigation. The information gathered was analyzed to inform the findings of the investigation.

## **Summary of findings**

According to documents recovered by CAJ, the piece of land, LR. No. 36/VII/1037 measuring 0.5116 Hectares (approx) is a public land vested in Nairobi City County.

CAJ recovered allocation letters issued by the defunct Nairobi City Council to individual traders allocating them space to operate various businesses on the



said piece of land, LR. No. 36/VII/1037. According to the traders, they were given authority to construct stalls in accordance with the Council's approved plans. CAJ also recovered receipts of payment of ground rates, licence fees and administration charges by the market traders to the then Nairobi City Council.

The traders had been operating various businesses in the Eastleigh open air market until the early morning of 10<sup>th</sup> of January, 2009 when the stalls which they constructed using their own money were demolished by private developers.

CAJ investigators recovered a copy of a lease document dated 16<sup>th</sup> January, 2007 from Nairobi City County indicating that the land (LR. No. 36/VII/1037) was leased to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow. The lease document was signed by the former Deputy Town Clerk, Nairobi City Council, Mr. Nelson Otido and the former Mayor, Nairobi City Council, the late Mr. Dick Wathika. CAJ interviewed the then Town Clerk, Mr. John Gakuo who confirmed that he did not sign the lease document nor give explicit and specific authority to Mr. Otido to sign it.

CAJ has confirmed that Mr. Ali Sheikh Mohammad and Mr. Farah Mohamed Barrow operating as Alfa Traders are currently constructing on the said piece of land, LR. No. 36/VII/1037.

CAJ established that the procedure for alienation of Council land was not followed by Nairobi City Council officials in the issuance of lease document to the private developers. According to the Director, Legal Affairs, Nairobi City County, Mr. Karisa Iha, the procedure for leasing land to private developers at the time was as follows; a proposal would be presented to the Town Clerk by the relevant department. The Town Clerk would then bring it as an item of agenda to the Town Planning Committee of the Council. The matter would then be deliberated by the Town Planning Committee and a resolution is passed. The resolution would then be brought before a Full Council Meeting to be accepted, rejected or referred back to the appropriate department for further discussions.

CAJ also recovered a copy of a letter Ref: DLA/MNN/1116/E/07 dated 15th February, 2007 signed by Ms. M. N. Ng'ethe, the then Director, Legal Affairs, Nairobi City Council to the Chief Lands Registrar stating that the land LR. No. 36/VII/1037 is a public utility operated as a market and that the lease issued on the said land to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow was fraudulently obtained and should be revoked immediately.

Ms. M. N. Ng'ethe wrote another letter Ref: DLA/MNN/1011/E/2008 dated 2nd December, 2008 to the Chief Land Registrar reiterating that Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow obtained the lease document through 'misrepresentation/mistake'.

Mrs. T. N. Mburu, Registrar of Titles, Ministry of lands, Nairobi, revoked the lease issued to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow on the said piece of land, LR. No 36/VII/1037 vide a Gazette Notice No. 11951 dated 19th December, 2008.

Mr. Karisa Iha, Director Legal Affairs, Nairobi City County, wrote a memo REF: LA/DLA/KI/63/M/14 dated 7th February, 2014, to Mr. Nyoike Isaac, Chief Valuer, Nairobi City County, asking him to confirm ownership of the land, LR. No. 36/VII/1037. In an undated response shown as received on 13th February, 2014, Mr. Nyoike replied and confirmed that the registered and rateable owners of the land, LR. No. 36/1037 are Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud. As at the date of issuance of the letter, Mr. Nyoike Isaac ought to have been aware of the ongoing court cases and the question of ownership of the said parcel of land had not been determined authoritatively. Moreover, by Gazette Notice No. 11951 dated 19th December, 2008, the government had revoked the lease granted to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud and as at the date of Mr. Nyoike's letter, there was no valid lease to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud. CAJ finds Mr. Nyoike Isaac, Chief Valuer, Nairobi City County culpable of abuse of power and breach of public trust.

CAJ wrote to Mr. Nyoike Isaac, Chief Valuer, Nairobi City County vide a letter Ref: CAJ/IE/6/41/15(18) dated 21st April, 2016. The Commission received Mr. Nyoike's response vide a letter Ref: VAL.430/VB.436/8/1/3/NNI/awk dated 4th May, 2016. In his response, Mr. Nyoike asserted that his predecessor was responsible for the registration of the land in dispute to private developers. However, when Mr. Nyoike was requested to provide documentary evidence to substantiate his claim, he failed to do so.

In a subsequent letter, Mr. Karisa Iha informed Mr. Ahmednassir Abdikadir vide a letter Ref: LA/DLA/KI/79/E/14 dated 14th February, 2014 that his clients, Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow are the registered owners of the land, LR. No. 36/VII/1037 and that they should take possession of the premises subject to court cases being discharged. As at the date of issuance of the confirmation letter, Mr. Karisa ought to have been aware of the ongoing court cases on the said parcel of land and the question of ownership had not been authoritatively determined. Also, Mr. Karisa ought to have been aware of the correspondence between his predecessor, Ms. M. N. Ngethe and the Ministry of lands, denouncing the lease issued to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud.

On the basis of the letter from Mr. Karisa Iha, City Planning Department approved building plan Reg. CPF-AF 380 for Mr. Ali Sheikh Mohamed and Mr. Farah Mohamed Barrow to commence constructions on LR. No. 36/VII/1037 vide a letter dated 20th March, 2014. The same building plan was again disapproved vide a letter Ref: CCN/CPD/DC/L/00106/YC/jnm by the Director, Urban Planning and Housing, Nairobi City County on 16th June, 2014.

CAJ finds Mr. Karisa Iha, Director Legal Affairs, Nairobi City County culpable of gross abuse of power and breach of public trust for failing to do due diligence and confirming that Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow are the registered and rateable owners of the land, LR. No. 36/VII/1037.

CAJ wrote to Mr Karisa Iha, Director Legal Affairs, Nairobi City County vide a letter Ref: CAJ/IE/6/41/15(19) dated 21st April, 2016, to accord him a further

opportunity to respond to the findings and proposed recommendations of this investigation. The Commission is in receipt of Mr. Karisa's response vide a letter, Ref: LA/F/097/08 dated 28<sup>th</sup> April, 2016. Mr. Karisa's response was not substantive enough to exonerate him from culpability because he denied having knowledge of series of correspondence between his predecessor and the Ministry of Lands, letters he clearly knew about or ought to have known about.

In a scene reminiscent of a playground, Nairobi City Council officials floated bids for prospective investors to partner with the Council in 2008 on the same piece of land under Public-Private-Partnership (PPP) scheme. Two companies, Bluesea Shopping Mall Limited and Golden Lime International Limited submitted their proposal for re-development of Eastleigh Market. In other words, Nairobi City Council officials made multiple allocation of the same piece of land, first to the traders, then to two private companies, notably Alfa Traders (Mr. Farah and Mr. Ali) and Golden Lime International. The former Company was awarded a lease on 16<sup>th</sup> January, 2007, and the latter granted PPPA on 24<sup>th</sup> of November, 2008.

CAJ established that a Full Council Committee meeting chaired by Mr. Godfrey O. Majiwa, the then Mayor, Nairobi City Council was held on 18<sup>th</sup> November, 2008 to deliberate on the proposals for re-development of Eastleigh market, LR. No. 36/VII/1037 as a commercial complex. The Full Council passed a resolution awarding the contract to Golden Lime International Limited.

As a result of the above Full Council Resolution, a Public-Private Partnership Agreement was signed on 24<sup>th</sup> of November, 2008 between Nairobi City Council and Golden Lime International Limited. The Council allocated the land to the company for a period of 45 years. The company was to commence construction on January, 2009 and complete it on January, 2011 (a project period of 36 months). The Agreement emphasised that the ownership of the property was to remain with the Council at all times.

It is noteworthy that the minutes of Full Council meeting dated 18<sup>th</sup> November, 2008 indicate that the then mayor, Mr. Godfrey Majiwa had a dissenting view

that the PPP proposal be referred back to the Chief Officers meeting for further evaluation. Nonetheless, voting was carried out and majority of the members voted in support of the proposal to award the contract to Golden Lime International Limited, thereby overruling the dissenting view of the former Mayor, Mr. Godfrey Majiwa. During an interview with CAJ, Mr. Godfrey Majiwa still held his dissenting view and explained that he signed the PPPA because it had been passed by majority vote.

The public-private partnership agreement was signed by the former Mayor, Nairobi City Council, Mr. Godfrey Majiwa and the former Deputy Clerk, Mr. Nelson Otido. In an interview with the CAJ investigators, the then Town Clerk, Nairobi City Council, Mr. John Gakuo, confirmed that he did not sign the PPP agreement nor specifically authorize Mr. Otido to sign it. CAJ finds Mr. Otido culpable of abuse of power for executing the lease document and Public-Private Partnership Agreement without specific authority.

CAJ wrote to Mr. Nelson Otido, former Deputy Town Clerk, Nairobi City Council, vide a letter Ref: CAJ/IE/6/41/15)17) dated 21st April, 2016. The Commission is in receipt of Mr. Otido's response vide a letter dated 5th May, 2016 with enclosure of a copy of a letter Ref: DLA/MNN/1076/E/06 stating that Mr. John Gakuo had authorised him to sign all Council documents on his behalf.

The Commission wrote to Mr. John Gakuo, vide a letter REF: CAJ/1E/6/41//15(20) dated 17th May, 2016 seeking for further clarification in light of evidence produced by his former Deputy, Mr. Otido. Mr. Gakuo responded vide a letter dated 20th May, 2016 denying having given specific authority to his deputy to sign the lease and PPPA documents on his behalf. However, he admits having signed the letter Ref: DLA/MNN/1076/E/06 giving general authorisation to Mr. Otido to sign Council documents on his behalf.

CAJ wrote again to Mr. Otido vide a letter Ref: CAJ/1E/6/41//15(21), dated 17th May, 2016 asking him to submit council minutes relating to issuance of the lease documents for land LR. No. 36/VII/1037 to private developers and confirm whether he notified the then Town Clerk on the execution of the same. The

Commission received Mr. Otido's response vide a letter dated 30th May, 2016 and determined that it was not substantive enough to exonerate him from culpability.

The repealed Local Government Act, CAP 265 provided for the Town clerk to sign documents on behalf of the City Council unless any written law otherwise requires or authorizes, or the local authority shall have given the necessary authority to some other person for that purpose. CAJ confirmed that Mr. Otido signed the lease document and Public-Private Partnership Agreement without specific authority from the former Town Clerk, Mr. John Gakuo.

CAJ could not obtain the Deed file containing title documents relating to L.R. No. 36/V11/1037 from the Registrar of Tittles. In a letter dated 27th January, 2016, Mr. J.W. Kamuyu, Registrar of Tittles, indicated that the file relating to the disputed land couldn't be traced. As a result, Mr. Kamuyu had to reconstruct another file for the said piece of land. Further, Mr. Kamuyu provided the Commission with a copy of a lease document in favour of Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow as the registered owners of the land L.R. No. 36/V11/103, basing his decisions on High Court Misc. Applications No. 37 of 2009 that was withdrawn on 9<sup>th</sup> September, 2015. In addition, Mr Kamuyu failed to uphold the revocation of that lease by his predecessor, Registrar of Titles, Mrs. T N Mburu. CAJ finds Mr. J.W. Kamuyu, Registrar of Titles culpable of misbehaviour in office, inefficiency and ineptitude.

CAJ wrote to Mr. Kamuyu vide a letter dated 3rd May, 2016 to accord him an opportunity to respond to the findings and the proposed recommendations of the investigation. In a letter dated 8th June, 2016, Mr. Kamuyu indicated that his decision was based on High Court Misc. Applications No. 37 of 2009. However, the investigation revealed that the application was withdrawn on 9th September, 2015. Therefore, Mr. Kamuyu's response was not substantive enough to exonerate him from culpability. Further, Mr. Kamuyu enclosed a copy of a lease document in favour of Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow as the registered owners of the land L.R. No. 36/V11/1037, thereby failing to uphold the revocation of that lease by Registrar of Titles, Mrs. T N Mburu.

## **Court Cases on Eastleigh Market LR. No. 36/VII/1037**

The Commission conducted an analysis of the following court cases relating to Eastleigh Market, LR. No. 36/VII/1037 in order to establish whether or not the investigations fall under any of the cases where the jurisdiction of the Commission is limited, as contemplated under section 30 (c) of the Commission Act;

- i. High Court of Kenya at Nairobi, Civil Suit No. 24 of 2007, Mwanthi Mugwe and 2 others -vs- Ali Sheikh Mohamed Barrow and 7 others, later renamed as Environment and Land Court (ELC) at Nairobi, Civil Suit No. 782 of 2013, Mwanthi Mugwe and 2 others -vs- Ali Sheikh Mohamed Barrow and 6 others, and treated as a lead file for purposes of handling 3 interlocutory applications.
- ii. High Court of Kenya at Nairobi, Civil Suit No. 615 of 2008, Mwanthi Mugwe and 2 others -vs- Golden Lime International Limited and another.
- iii. High Court of Kenya at Nairobi, Civil Suit No. 589 of 2008, Ali Sheikh Mohamed Barrow -vs- City Council of Nairobi and 2 others.
- iv. In the High Court of Kenya at Nairobi, (Judicial Review) Miscellaneous Civil Application No. 37 of 2009, Republic -Vs-Registrar of Titles, and 4 Others,
- v. In the Court of Appeal at Nairobi, Civil Appeal No. 129 of 2013, Blue Seas Shopping Mall Limited -vs- The City Council of Nairobi and 3 others (arising from H.C. Misc C. C. No. 808 of 2008),

### **Analysis of court cases**

- i. High Court of Kenya at Nairobi, Civil Suit No. 24 of 2007 and High Court Civil Suit No. 615 of 2008 were struck out by the ruling of Justice J.M Mutungi, dated 19<sup>th</sup> February, 2014, and later dismissed on 7<sup>th</sup> March, 2014.
- ii. ELC, Civil Suit No. 782 of 2013 was also dismissed by the court, without proceeding to be heard on merit.

- iii. Judicial Review Miscellaneous Civil Application No. 37 of 2009, was withdrawn on 9<sup>th</sup> September, 2015.
- iv. High Court of Kenya at Nairobi, Civil Suit No. 589 of 2008, was withdrawn on 9<sup>th</sup> September, 2015.
- v. Court of Appeal at Nairobi, Civil Appeal No. 129 of 2013, arising from H.C. Misc. C. C. No. 808 of 2008 was allowed, quashing the award Public Private Partnership tender to Golden Lime International Limited, for being unlawful, irregular and in contravention of the Public Procurement and Disposal Act, 2005.

### **Conclusions of the analysis of court cases**

The Commission has jurisdiction in accordance with section 8 of the Commission on Administrative Justice Act, 2011 to carry out the investigations.

Contrary to the position taken by Mr. Ahmednasir in his letter to the Commission dated Monday, 22<sup>nd</sup> February, 2016, the Commission's jurisdiction and power is not fettered in any way by the Civil Appeal No. 129 of 2013. The said appeal had long been decided on 22<sup>nd</sup> May, 2015, and order issued quashing the award of Public Private Partnership tender to Golden Lime International Limited, for being unlawful, irregular and in contravention of the Public Procurement and Disposal Act, 2005, contrary to his averments that on the said date, it was still pending determination.

There is currently no subsisting suit in court challenging the legality or the process followed by the County Government of Nairobi, formerly Nairobi City Council, to transfer public land to private individuals.

There is also no court order that had invalidated the Registrar of Titles, Ministry of lands, Nairobi, revocation of the lease issued to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow on the LR. No 36/VII/1037 vide a Gazette Notice No. 11951 dated 19<sup>th</sup> December, 2008.

Therefore, the current investigations do not fall under any of the cases where the jurisdiction of the Commission is limited, as contemplated under section 30 (c) of



the CAJ Act, since there are currently no judicial proceedings touching on Eastleigh Market, situated on LR. No. 36/VII/1037.

### **General Conclusions**

- i. The land registered as LR. No. 36/VII/1037 measuring 0.5116 Hectares (approx) is public land vested in the County Government of Nairobi.
- ii. CAJ established that the defunct Nairobi City Council had allocated pitches for individual stalls to 403 traders on the land LR. No. 36/VII/1037 (Eastleigh Market).
- iii. Nairobi City Council made double allocation of the land, LR. No. 36/VII/1037 to two private companies. The land was leased to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow operating as Alfa Traders on 16<sup>th</sup> January 2007 for 99 years and on 24<sup>th</sup> of November, 2008 the same land was leased to Golden Lime International Limited for a period of 45 years under PPP Agreement. All these allocations were done with full knowledge that this was public land (Eastleigh Market) Licensed to individual traders.
- iv. Nairobi City Council denounced the authenticity of the lease document on LR. No. 36/VII/1037 in favour of Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow. Subsequently, Mrs. T. N. Mburu, Registrar of Titles, Ministry of lands revoked the said lease vide a Gazette Notice No. 11951 dated 19<sup>th</sup> December, 2008.
- v. The investigation confirmed that the issuance of the lease document to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow did not follow the Council's procedure for leasing public land to private developers. CAJ has established a Full Council meeting to deliberate and award the lease didn't take place as per the required process at the time.
- vi. The Civil Appeal No. 129 of 2013 quashed the award of Public Private Partnership tender to Golden Lime International Limited on 22<sup>nd</sup> May, 2015, for being unlawful, irregular and in contravention of the Public Procurement and Disposal Act, 2005. Further, the PPPA elapsed in the year 2011 as per the agreement.

- vii. CAJ established that Mr. Nelson Otido appended his signature on the lease document and the Public-Private Partnership Agreement document in place of the Town Clerk. CAJ finds Mr. Otido culpable of abuse of power for executing the lease document and Public-Private Partnership Agreement without specific authority. As the Deputy Town Clerk, he did not have the powers to sign the lease document and PPP Agreement both being important documents affecting land resources. Mr. Otido ought to have known that the Council's procedure of Full Council Meeting for approval of public land alienation was not followed in leasing the market land to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow.
- viii. CAJ finds Mr. Nyoike Isaac, Chief Valuer, Nairobi City County culpable of abuse of power and breach of public trust for stating that Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow are the registered and rateable owners of the land knowing well that the lease document issued to the private developers had been revoked vide a Gazette Notice No. 11951 of 19<sup>th</sup> December, 2008. In addition, he should have known that the issuance of the lease document did not follow the Council's procedure of Full Council Meeting for approval of public land alienation.
- ix. CAJ finds Mr. Karisa Iha, Director Legal Affairs, Nairobi City County culpable of gross abuse of power and breach of public trust for failing to do due diligence and confirming that Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow are the registered and rateable owners of the land, LR. No. 36/VII/1037. As at the date of issuance of the confirmation letter, Mr. Karisa ought to have been aware of the ongoing cases and the court had not authoritatively determined the question of ownership of the said parcel of land. In addition, Mr. Karisa ought to have been aware of the correspondence between his predecessor, Ms. M. N. Ngethe and the Ministry of lands, denouncing the lease issued to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud. Moreover, by Gazette Notice No. 11951 dated 19<sup>th</sup> December, 2008, the government had revoked the lease granted to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh

Mohamud and as at the date of Mr. Karisa's letter, there was no valid lease to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud.

- x. CAJ finds Mr. J.W. Kamuyu, Registrar of Titles culpable of misbehaviour in office, inefficiency and ineptitude for failing to produce the original file for land LR No. 36/VII/1037 containing crucial information relating to the parcel. Further, Mr. Kamuyu failed to uphold the revocation of the lease in favour of Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud, basing his decisions on High Court Misc. Applications No. 37 of 2009 that was withdrawn on 9<sup>th</sup> September, 2015.
- xi. The Nairobi City County has lost revenue approximated at about KSh. 72,540,000 in the last ten years being ground rates, licence fee and administration charges payable by the 403 traders at the average rate of KSh. 1,500 per month per trader.
- xii. Following the demolition of stalls in Eastleigh market, each trader incurred a loss approximated at KSh. 250,000 being the cost of construction of each stall. The traders also lost their wares during the demolition.

### **Determinations**

- i. Nairobi City County should issue cessation notice to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow directing them to immediately stop construction on the parcel of land, LR. No. 36/VII/1037.
- ii. Nairobi City County should retake and develop the parcel of land, LR. No. 36/VII/1037 into a modern market and give priority to the 403 traders or their successors. The County Government generates enough revenue to develop the property.
- iii. In the event that the County Government of Nairobi is not able to develop the property, it should legally negotiate for a proper Public-Private Partnership contract that secures the interest of the County Government and the traders. CAJ should be involved in that process of PPP Agreement.
- iv. The Nairobi City County should compensate the Eastleigh Market traders at KSh. 150,000 each for the cost expenditure incurred in the

- construction of market stalls. The individual loss of goods and businesses are too varied to be determined in this inquiry.
- v. The Commission finds that Mr. Nelson Otido is culpable for abuse of power and recommends that he should not hold any public office for the reason that he executed the lease documents in favour of Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow without specific authority from the Town Clerk. As the Deputy Town Clerk, Mr. Otido did not have powers to sign the documents. Further, Mr. Otido also knew that the Council procedure for leasing the market land was not followed
  - vi. The Commission recommends that the Governor, Nairobi City County, Hon. Dr. Evans Kidero should remove from office Mr. Nyoike Isaac, Chief Valuer, Nairobi City County for abuse of power and breach of public trust.
  - vii. The Commission recommends that the Governor, Nairobi City County, Hon. Dr. Evans Kidero should remove from office Mr. Karisa Iha, Director, Legal Affairs, Nairobi City County for gross abuse of power and breach of public trust.
  - viii. The Permanent Secretary, Ministry of lands, Housing and Urban Development should serve a strong warning letter, and any other appropriate administrative action, on Mr. J.W. Kamuyu, Registrar of Titles for misbehaviour in office, inefficiency and ineptitude.
  - ix. The Permanent Secretary, Ministry of lands, Housing and Urban Development should expedite automation of the Land Registry in order to address the anomaly of missing parcel files in the Registry. The parcel file for the land in dispute could not be easily traced in the Nairobi Land Registry and a new file had to be constituted at the time of this investigation.

## 1.0 Introduction to the investigation

The Commission on Administrative Justice (Office of The Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The CAJ has a mandate *inter-alia*, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Government authorities and to compel production of such information.

The Commission is also mandated to inquire into systemic issues within Government bodies, and make recommendations and advisories aimed at improving public service and the administration of justice.

In this regard, the Commission received a complaint from representatives of a group of 403 traders who operated stalls at Eastleigh City Council Market (LR No. 36/VII/1037). The traders were allocated stalls at the market as early as 1981 and have been operating there until the stalls were demolished in the early morning of 10<sup>th</sup> January 2009. The complainants alleged that the market was sold to a private developer under the guise of Public-Private Partnership initiative in 2007 by the then Nairobi City Council without any consultation with them.

The complaint prompted the Commission to undertake investigations to establish the circumstance under which the said land was taken away from the

traders to a private developer and possible dereliction of duty, abuse of power, unfair treatment and injustice by Council Officers in the irregular allocation.

## **(Annexure A1)**

### **1.1 Issues under investigation**

- i. Establish the ownership of the land in dispute (LR. No. 36/VII/1037).
- ii. Establish the process of allocation of plot LR. No. 36/VII/1037 to a private developer and possible dereliction of duty, abuse of power, unfair treatment and any injustice by Council Officers in the process.
- iii. Establish how the Public-Private Partnership Scheme was conducted and possible dereliction of duty, abuse of power, unfair treatment and any injustice by Council Officers in the process.

### **1.2 Investigation Process**

#### **1.2.1 Notification**

A letter Ref: CAJ/IE/6/41/15 dated 17th December, 2015 was sent to the Governor, Nairobi City County to notify him of the Commission's intentions to conduct investigations into the alleged irregular allocation of the market land to private developers. **(Annexure A2)**

#### **1.2.2 Interviews Conducted**

- i. Six (6) Eastleigh market traders (complainants)
- ii. Senior Chief, Eastleigh North Location
- iii. Assistant Chief, Garage Sub-Location
- iv. Assistant Chief, Eastleigh North
- v. County Executive Committee for land, Nairobi City Government
- vi. Chief Officer for land, Nairobi City Government
- vii. Director, Social Services, Nairobi City Government
- viii. Senior Assistant Deputy Commissioner, Kamukunji Sub-County
- ix. Registrar of lands
- x. Director, Urban Planning and Housing, Nairobi City Government
- xi. Director, Legal Affairs, Nairobi City Government
- xii. Former Town Clerk, Nairobi City Council
- xiii. Former Mayor, Nairobi City Council

### 1.2.3 Documents Recovered

- i. Market allocation letters issued by City Council of Nairobi to individual traders dated 1<sup>st</sup> October, 1981
- ii. Payment Receipts from Eastleigh market traders
- iii. Lease document dated 29<sup>th</sup> January, 2007 issued by City Council of Nairobi to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow for land reference number 36/VII/1037
- iv. Map Ref. Map/ RIM South A 37/G.11.d.2 relating to LR. No. 36/Vol. VII/1037
- v. A letter dated 29<sup>th</sup> January, 2009 from Director, Legal Affairs, City Council of Nairobi to Chief Land Registrar indicating that the lease issued to Ali Sheikh Mohamud and Farah Mohamed Barrow for land LR. No. 36/VII/1037 was obtained through misrepresentation/ Mistake.
- vi. The Gazette Notice No. 11951 dated 19<sup>th</sup> December, 2008 revoking the lease issued to Ali Sheikh Mohamud and Farah Mohamed Barrow for land LR. No. 36/VII/1037
- vii. Full Council Minutes dated 18<sup>th</sup> November, 2008 in which it was resolved that Golden Lime International Limited to develop Eastleigh Market.
- viii. Public- Private Partnership Agreement dated 24<sup>th</sup> of November, 2008 between the City Council of Nairobi and Golden Lime International Limited in which the former leased land Registered as LR. No. 36/ VII/1037 to the later for a term of 45 years on a Built-Operate and Transfer (BOT) basis.
- ix. List of 403 traders who operated stalls in Eastleigh Market
- x. A letter dated 15<sup>th</sup> March, 2016 from Mr. John Gakuo disowning signatures on the Lease document and Public-Private Partnership Agreement.
- xi. A memo Ref: LA/DLA/KI/63/M/14 dated 7<sup>th</sup> February from Mr. Karisa Iha, Director, Legal Affairs to Mr. Nyoike N.I, Chief Valuer requesting for confirmation about the ownership of the land, LR. No 36/VII/1037.
- xii. A memo Ref: VAL. 157/VB 426/NNI/Igm from Mr. Nyoike N.I to Mr. Karisa Iha, confirming the ownership of the land, LR. No 36/VII/1037.
- xiii. Request for expression of interest in development of markets

- xiv. Lease proposals (Expressions of Interest) from Golden Lime International Limited and Blueseal Shopping Mall Limited
- xv. Miscellaneous Civil Application No. 37 of 2009.

### **1.3 Legal Framework**

#### **Constitution of Kenya, 2010**

##### **Chapter Five—Land and Environment**

61. (1) *All land in Kenya belongs to the people of Kenya collectively as a nation, as communities and as individuals.*

(2) *Land in Kenya is classified as public, community or private.*

62. (1) *Public land is—*

(d) *Land in respect of which no individual or community ownership can be established by any legal process;*

(2) *Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission, if it is classified under—*

(a) *Clause (1) (a), (c), (d) or (e); and*

(b) *Clause (1) (b), other than land held, used or occupied by a national State organ.*

#### **Fourth Schedule (Article 185 (2), 186 (1) and 187 (2))**

*Distribution of Functions between the National Government and the County Governments*

*Part 2—County Governments*

8. *County planning and development, including—*

(b) *land survey and mapping;*



## **Land Act, No. 6 of 2011**

### **8. Management of public land**

*In managing public land on behalf of the national and county governments, the Commission—*

*(a) Shall identify public land, prepare and keep a database of all public land, which shall be geo-referenced and authenticated by the statutory body responsible for survey;*

*(b) Shall evaluate all plots of public land based on land capability classification, land resources mapping consideration, overall potential for use, and resource evaluation data for land use planning.*

10

### **12. Allocation of public land**

*(2) The Commission shall ensure that any public land that has been identified for allocation does not fall within any of the following categories—*

*(f) Reserved land.*

### **National Land Commission Act, 2011:**

According to section 5 (1) of the National Land Commission Act, 2011 and pursuant to Article 67(2) of the Constitution, the functions of the Commission that address the issue under discussion include:

*(a) To manage public land on behalf of the national and county Governments;*

*(c) To advise the national government on a comprehensive programme for the registration of title in land throughout Kenya;*

*(e) To initiate investigations, on its own initiative or on a complaint, into present or historical land injustices, and recommend appropriate redress;*

*(h) To monitor and have oversight responsibilities over land use planning throughout the country.*

*5(2) In addition to the functions set out in subsection (1), the Commission shall, in accordance with Article 67(3) of the Constitution—*

*(b) Monitor the registration of all rights and interests in land;*

(c) Ensure that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations;

(d) Develop and maintain an effective land information management system at national and county levels;

(e) Manage and administer all unregistered trust land and unregistered community land on behalf of the county Government;

6. (1) The Commission, shall have all the powers necessary for the execution of its functions under the Constitution, this Act and any other written law.

6. (2) without prejudice to the generality of subsection (1), the Commission shall have powers to—

(a) gather, by such means as it considers appropriate, any relevant information including requisition of reports, records, documents or any information from any source, including any State organ, and to compel the production of such information where it considers necessary;

(b) Hold inquiries for the purposes of performing its functions under this Act;

(c) Take any measures it considers necessary to ensure compliance with the principles of land policy set out in Article 60 (1) of the Constitution.

6. (3) in the exercise of its powers and the discharge of its functions, the Commission—

(a) May inform itself in such manner as it may consider necessary;

11

## **County Governments Act No. 17 of 2011**

### **Functions of county governments**

5. (1) A county government shall be responsible for any function assigned to it under the Constitution or by an Act of Parliament.

(2) Without prejudice to the generality of subsection (1), a county government shall be responsible for—

(c) Functions provided for in Article 186 and assigned in the Fourth Schedule of the Constitution;

## **Physical Planning Act, Cap 286 Revised Edition 2011 [2010]**

### **Part IV—Physical Development Plans**

#### **A—Regional Physical Development Plans**

16. (1) *A regional physical development plan may be prepared by the Director with reference to any Government land, trust land or private land within the area of authority of a county council for the purpose of improving the land and providing for the proper physical development of such land, and securing suitable provision for transportation, public purposes, utilities and services, commercial, industrial, residential and recreational areas, including parks, open spaces and reserves and also the making of suitable provision for the use of land for building or other purposes.*

21. *The Minister shall within fourteen days after he has approved the regional physical development plan, cause to be published in the Gazette, by the Director, a notice to the effect that the plan has been approved with or without modifications and may be inspected at the places and times specified in the notice during normal working hours.*

(2) *An approved regional physical development plan published under subsection (1) shall have full force and effect in the area to which it relates, and every person shall comply with the requirements of the approved plan.*

## 2.0 Analysis and Findings

According to documents recovered by the Commission, the piece of land, LR. No. 36/VII/1037 measuring 0.5116 Hectares (approx.) is a public land vested in Nairobi City County **(See annexures A3 and A4)**.

Allocation letters recovered by CAJ indicate that pitches were licensed to individual traders by the then Nairobi City Council on land, LR. No. 36/VII/1037. The traders were then given authority to construct stalls in accordance with the Council's approved plans. CAJ also recovered receipts of payment of ground rates, licence fee and administration charges by the market traders to the then Nairobi City Council **(See annexures A5, A6, A7, A8, A9, A10, A11, A12, A13 and A14)**.

According to interviews conducted with Eastleigh traders and Area Chief, Eastleigh open air market was demolished by private developers in the early morning of 10th of January, 2009. CAJ has confirmed that Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow operating as Alfa Traders are currently constructing on the said piece of land, LR. No. 36/VII/1037.

CAJ investigators visited Nairobi City County offices to establish how the land, LR. No. 36/VII/1037 was leased to the private developers. A copy of a lease document dated 16th January, 2007 recovered from the Nairobi City County indicated that the land (LR. No. 36/VII/1037) was leased to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow. The lease document was signed by the former Deputy Town Clerk, Mr. Nelson Otido and the former Mayor, Nairobi City Council, the late Mr. Dick Wathika **(See annexure A15)**.

CAJ interviewed the then Town Clerk, Mr. John Gakuo who confirmed that he did not sign the lease document nor specifically authorize the then deputy Town Clerk, Mr. Otido to sign it **(See annexure A43)**.

CAJ established that the procedure for alienation of Council land was not followed by Nairobi City Council officials in the issuance of lease document to

Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow for land registered as LR. No. 36/VII/1037. According to the Director, Legal Affairs, Nairobi City County, Mr. Karisa Iha, the procedure for leasing land to private developers at the time was as follows; a proposal would be presented to the Town Clerk by the relevant department. The Town Clerk would then bring it as an item of agenda to the Town Planning Committee of the Council. The matter would then be deliberated by the Town Planning Committee and a resolution is passed. The resolution is then brought before a Full Council Meeting to be accepted, rejected or referred back to the appropriate department for further discussions. The Full Council's resolution would then be sent to the Minister, Local Government for consent **(See annexure A 29)**.

CAJ recovered a copy of a letter Ref: DLA/MNN/1116/E/07 dated 15th February, 2007 signed by Ms. M. N. Ng'ethe, the then Director, Legal Affairs, Nairobi City Council to the Chief Lands Registrar stating that the land LR. No. 36/VII/1037 is a public utility operated as a market. The letter also indicates that the lease issued on the said land to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow was fraudulently obtained and should be revoked immediately. Ms. M. N. Ng'ethe wrote another letter Ref: DLA/MNN/1011/E/2008 dated 2nd December, 2008 to the Chief Land Registrar reiterating that the lease was issued to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow through 'misrepresentation/mistake' **(See annexures A16 and A17)**.

Mrs. T. N. Mburu, Registrar of Titles, Ministry of lands, Nairobi revoked the lease issued to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow on land registered as LR. No 36/VII/1037 vide a Gazette Notice No. 11951 dated 19th December, 2008 **(See annexure A18)**.

Mr. Karisa Iha, Director Legal Affairs, Nairobi City Council, wrote a memo REF: LA/DLA/KI/63/M/14 dated 7th February, 2014, to Mr. Nyoike Isaac, Chief Valuer, Nairobi City County, asking him to confirm ownership of the land, LR. No. 36/VII/1037. In an undated response shown as received on 13th February, 2014, Mr. Nyoike replied and confirmed that the registered and rateable owners of the land, LR. No. 36/1037 are Mr. Farah Mohamed Barrow and Mr. Ali Sheikh

Mohamud. As at the date of issuance of the letter, Mr. Nyoike Isaac ought to have been aware of the ongoing cases and the court had not authoritatively determined the question of ownership of the said parcel of land. Moreover, by Gazette Notice No. 11951 dated 19th December, 2008, the government had revoked the lease granted to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud and as at the date of Mr. Nyoike's letter, there was no valid lease to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud. CAJ finds Mr. Nyoike Isaac, Chief Valuer, Nairobi City County culpable of abuse of power and breach of public trust **(See annexures A19 and A20)**.

CAJ wrote to Mr. Nyoike Isaac, Chief Valuer, Nairobi City County vide a letter Ref: CAJ/IE/6/41/15(18) dated 21st April, 2016. The Commission received Mr. Nyoike's response vide a letter Ref: VAL.430/VB.436/8/1/3/NNI/awk dated 4th May, 2016. In his response Mr. Nyoike asserted that his predecessor was responsible for the registration of the land in dispute to private developers. However, when Mr. Nyoike was requested to provide documentary evidence to substantiate his claim, he failed to do so **(See annexures A31 and A32)**.

In a subsequent letter, Mr. Karisa Iha informed Mr. Ahmednassir Abdikadir vide a letter Ref: LA/DLA/KI/79/E/14 dated 14th February, 2014 that his clients, Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow are the registered owners of the land, LR. No. 36/VII/1037 and that they should take possession of the premises subject to court cases being discharged. As at the date of issuance of the confirmation letter, Mr. Karisa ought to have been aware of the ongoing court cases on the said parcel of land and the question of ownership had not been authoritatively determined. Also, Mr. Karisa ought to have been aware of the correspondence between his predecessor, Ms. M. N. Ngethe and the Ministry of lands, denouncing the lease issued to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud **(See annexure A21)**.

On the basis of the letter from Mr. Karisa Iha, City Planning Department approved building plan Reg. CPF-AF 380 for Mr. Ali Sheikh Mohamed and Mr. Farah Mohamed Barrow to commence constructions on LR. No. 36/VII/1037 vide a letter dated 20th March, 2014. The same building plan was again disapproved

vide a letter Ref: CCN/CPD/DC/L/00106/YC/jnm by the Director, Urban Planning and Housing, Nairobi City County on 16th June, 2014 **(See annexures A22 and A23).**

CAJ finds Mr. Karisa Iha, Director Legal Affairs, Nairobi City County culpable of gross abuse of power and breach of public trust for failing to do due diligence by confirming that Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow are the registered and rateable owners of the land, LR. No. 36/VII/1037.

CAJ wrote to Mr. Karisa Iha, Director Legal Affairs, Nairobi Council vide a letter Ref: CAJ/IE/6/41/15(19) dated 21st April, 2016, to accord him a further opportunity to respond to the findings and proposed recommendations of this investigation. The Commission received Mr. Karisa's response vide a letter, Ref: LA/F/097/08 dated 28TH April, 2016. Mr. Karisa's response was not substantive enough to exonerate him from culpability because he denied having knowledge of series of correspondence between his predecessor and the Ministry of Lands, letters he clearly knew about or ought to have known about **(See annexures A29 and A30).**

In a scene reminiscent of a playground, Nairobi City Council officials floated bids for prospective investors to partner with the Council In 2008 on the same piece of land under Public-Private-Partnership (PPP) scheme. Two companies, Bluesea Shopping Mall Limited and Golden Lime International Limited submitted their proposal for re-development of Eastleigh Market. The Social Services and Housing Committee deliberated on the proposal on 8th October, 2008. A scrutiny of the Full Nairobi City Council minutes dated 18th November, 2008 revealed that the Council Committee chaired by Mr. Godfrey O. Majiwa, the then Mayor, Nairobi City Council passed a resolution awarding the construction of a Complex Mall to Golden Lime International Limited In other words, Nairobi City Council officials made multiple allocation of the same piece of land, first to the traders, then to two private companies, notably, Alfa Traders (Mr. Farah and Mr. Ali) and Golden Lime International. The former Company was awarded a lease on 16<sup>th</sup> January, 2007, and the latter granted PPPA on 24th of November, 2008 **(See annexures A24, A25, A26 and A27, Min: 15).**

A copy of a public-private partnership agreement recovered from the Nairobi City County shows that on the 10th of February, 2009, the then Nairobi City Council entered into an agreement with Golden Lime International Limited. The Council, through the PPPA, leased the property to the Golden Lime International Limited for a period of 45 years. The ownership of the property was to remain with the Council at all times. The company would at its own cost, demolish the stalls and relocate the traders in the market to another site. Further, Golden Lime International Limited would develop the property by constructing a modern market mall costing Kenya Shillings Four Hundred Million (Ksh. 400,000,000). The company was expected to complete the project within a period of thirty-six (36) months starting from 2008 to 2011. Therefore, the project duration elapsed in 2011 **(See annexure A4)**.

Full Council minutes dated 18th November, 2008 indicate that during the Council meeting, the then mayor, Mr. Godfrey Majiwa had a dissenting view that the PPP proposal be referred back to the Chief Officers meeting for further evaluation. Nonetheless, voting was carried out and majority of the members voted in support of the proposal. During an interview with CAJ, Mr. Godfrey Majiwa still held his dissenting view and explained that he signed the PPPA because it had been passed by a majority vote **(See annexure A27)**.

The public-private partnership agreement was signed by the former Mayor, Nairobi City Council, Mr. Godfrey Majiwa and the former Deputy Town Clerk, Mr. Nelson Otido. In an interview with the CAJ investigators, the then Town Clerk, Nairobi City Council, Mr. John Gakuo, confirmed that he did not sign the PPP agreement nor specifically authorize the then deputy Town Clerk, Mr. Otido to sign it. CAJ finds Mr. Otido culpable of abuse of power for executing the lease document and Public-Private Partnership Agreement without specific authority **(See annexure A43)**.

CAJ wrote to Mr. Nelson Otido, former Deputy Town Clerk, Nairobi City Council, vide a letter Ref: CAJ/IE/6/41/15(17) dated 21st April, 2016. The Commission received Mr. Otido's response vide a letter dated 5th May, 2016. Mr Otido provided copy of a letter Ref: DLA/MNN/1076/E/06 stating that Mr. John Gakuo



had authorised him to sign on behalf and for the City Council of Nairobi all legal documents **(See annexure A33 and A34).**

CAJ wrote to Mr. John Gakuo, vide a letter REF: CAJ/1E/6/41//15(20) dated 17th May, 2016 seeking for further clarification in light of evidence produced by his former Deputy, Mr. Otido. Mr. Gakuo responded vide a letter dated 20th May, 2016 denying having given specific authority to his deputy to sign the lease and PPPA documents on his behalf. However, he admits having signed the letter Ref: DLA/MNN/1076/E/06 giving general authorisation to Mr. Otido to sign Council documents on his behalf **(See annexure A35 and A36).**

CAJ wrote again to Mr. Otido vide a letter Ref: CAJ/1E/6/41//15(21), dated 17th May, 2016 asking him to submit council minutes relating to issuance of the lease documents for land LR. No. 36/VII/1037 to private developers and confirm whether he notified the then Town Clerk on the execution of the same. The Commission received Mr. Otido's response vide a letter dated 30th May, 2016 and determined that it was not substantive enough to exonerate him from culpability **(See annexures A37 and A38).**

CAJ could not obtain the Deed file containing title documents relating to L.R. No. 36/V11/1037 from the Registrar of Tittles. In a letter dated 27th January, 2016, Mr. J.W. Kamuyu indicated that the file relating to the disputed land couldn't be traced. As a result, Mr. Kamuyu had to reconstruct another file for the said piece of land. Further, Mr. Kamuyu provided the Commission with a copy of a lease document in favour of Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow as the registered owners of the land L.R. No. 36/V11/1037, thereby failing to uphold the revocation of that lease by Registrar of Titles, Mrs. T N Mburu. CAJ finds Mr. J.W. Kamuyu, Registrar of Titles, culpable of misbehaviour in office, inefficiency and ineptitude **(See annexure A28).**

CAJ wrote to Mr. Kamuyu vide a letter dated 3rd May, 2016 to accord him an opportunity to respond to the findings and the proposed recommendations of the investigation. In a letter dated 8th June, 2016, Mr. Kamuyu indicated that his decision was based on Misc. Applications No. 37 of 2009 for leave to file Judicial

Review Orders against the decision of the then Chief Land Registrar, Mrs. T N Mburu to cancel the lease registered in favour of Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow. However, the investigation revealed that this application was withdrawn on 8th September, 2015. Mr. Kamuyu's response was not substantive enough to exonerate him from culpability **(See annexures A39 and A40)**.

## **2.1 Court Cases**

During the investigation, the Commission established a number of court cases that had been previously instituted pertaining to the subject matter of the investigation, the Eastleigh Market (L.R No. 36/VII/1037).

The Commission conducted an analysis of the following court cases in order to establish whether or not the investigations falls under any of the cases where the jurisdiction of the Commission is limited, as contemplated under section 30 (c) of the Commission Act;

- i. High Court of Kenya at Nairobi, Civil Suit No. 24 of 2007, Mwanthi Mugwe and 2 others -vs- Ali Sheikh Mohamed Barrow and 7 others, later renamed as Environment and Land Court (ELC) at Nairobi, Civil Suit No. 782 of 2013, Mwanthi Mugwe and 2 others -vs- Ali Sheikh Mohamed Barrow and 6 others, and treated as a lead file for purposes of handling 3 interlocutory applications.
- ii. High Court of Kenya at Nairobi, Civil Suit No. 615 of 2008, Mwanthi Mugwe and 2 others -vs- Golden Lime International Limited and another.
- iii. High Court of Kenya at Nairobi, Civil Suit No. 589 of 2008, Ali Sheikh Mohamed Barrow -vs- City Council of Nairobi and 2 others.
- iv. In the High Court of Kenya at Nairobi, (Judicial Review) Miscellaneous Civil Application No. 37 of 2009, Republic -Vs-Registrar of Titles, and 4 Others,
- v. In the Court of Appeal at Nairobi, Civil Appeal No. 129 of 2013, Blue Seas Shopping Mall Limited -vs- The City Council of Nairobi and 3 others (arising from H.C. Misc C. C. No. 808 of 2008).

### **2.1.1 Analysis of the court cases**

- i. High Court of Kenya at Nairobi, Civil Suit No. 24 of 2007 and High Court Civil Suit No. 615 of 2008 were struck out by the ruling of Justice J.M Mutungi, dated 19<sup>th</sup> February, 2014, and later dismissed on 7<sup>th</sup> March, 2014.
- ii. ELC, Civil Suit No. 782 of 2013 was also dismissed by the court, without proceeding to be heard on merit.
- iii. Judicial Review Miscellaneous Civil Application No. 37 of 2009, was withdrawn on 9<sup>th</sup> September, 2015.
- iv. High Court of Kenya at Nairobi, Civil Suit No. 589 of 2008, was withdrawn on 9<sup>th</sup> September, 2015 (**See Annexures A41 and A42**).
- v. Court of Appeal at Nairobi, Civil Appeal No. 129 of 2013, arising from H.C. Misc. C. C. No. 808 of 2008 was allowed, quashing the award Public Private Partnership tender to Golden Lime International Limited, for being unlawful, irregular and in contravention of the Public Procurement and Disposal Act, 2005.

### **2.1.2 Conclusion of the analysis of court cases**

Upon the review of the court cases disclosed to the Commission, touching on Eastleigh Market, LR. No. 36/VII/1037, it was established that the Commission has jurisdiction in accordance with section 8 of the Commission on Administrative Justice Act, 2011 to carry out the investigations.

Contrary to the position taken by Mr. Ahmednasir in his letter to the Commission dated Monday, 22<sup>nd</sup> February, 2016, the Commission's jurisdiction and power is not fettered in any way by the Civil Appeal No. 129 of 2013. The said appeal had long been decided on 22<sup>nd</sup> May, 2015, and order issued quashing the award of Public Private Partnership tender to Golden Lime International Limited, for being unlawful, irregular and in contravention of the Public Procurement and Disposal Act, 2005, contrary to his averments that on the said date, it was still pending determination.

There is currently no subsisting suit in court challenging the legality or the process followed by the County Government of Nairobi, formerly Nairobi City Council, to transfer public land to private individuals.

There is also no court order that had invalidated the Registrar of Titles, Ministry of lands, Nairobi, revocation of the lease issued to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow on the LR. No 36/VII/1037 vide a Gazette Notice No. 11951 dated 19th December, 2008.

Therefore, the current investigations do not fall under any of the cases where the jurisdiction of the Commission is limited, as contemplated under section 30 (c) of the CAJ Act, since there are currently no judicial proceedings touching on Eastleigh Market, situated on LR. No. 36/VII/1037.

### **3.0 General Conclusions**

- i. The land registered as LR. No. 36/VII/1037 measuring 0.5116 Hectares (approx) is public land vested in the County Government of Nairobi.
- ii. CAJ established that the defunct Nairobi City Council had allocated pitches for individual stalls to 403 traders on the land LR. No. 36/VII/1037 (Eastleigh Market).
- iii. Nairobi City Council made double allocation of the land, LR. No. 36/VII/1037 to two private companies. The land was leased to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow operating as Alfa Traders on 16<sup>th</sup> January 2007 for 99 years and on 24<sup>th</sup> of November, 2008 the same land was leased to Golden Lime International Limited for a period of 45 years under PPP Agreement. All these allocations were done with full knowledge that this was public land (Eastleigh Market) Licensed to individual traders.
- iv. Nairobi City Council denounced the authenticity of the lease document on LR. No. 36/VII/1037 in favour of Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow. Subsequently, Mrs. T. N. Mburu, Registrar of Titles, Ministry of lands revoked the said lease vide a Gazette Notice No. 11951 dated 19<sup>th</sup> December, 2008.
- v. The investigation confirmed that the issuance of the lease document to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow did not follow the

- Council's procedure for leasing public land to private developers. CAJ has established a Full Council meeting to deliberate and award the lease didn't take place as per the required process at the time.
- vi. The Civil Appeal No. 129 of 2013 quashed the award of Public Private Partnership tender to Golden Lime International Limited on 22nd May, 2015, for being unlawful, irregular and in contravention of the Public Procurement and Disposal Act, 2005. Further, the PPPA elapsed in the year 2011 as per the agreement.
  - vii. CAJ established that Mr. Nelson Otido appended his signature on the lease document and the Public-Private Partnership Agreement document in place of the Town Clerk. CAJ finds Mr. Otido culpable of abuse of power for executing the lease document and Public-Private Partnership Agreement without specific authority. As the Deputy Town Clerk, he did not have the powers to sign the lease document and PPP Agreement both being important documents affecting land resources. Mr. Otido ought to have known that the Council's procedure of Full Council Meeting for approval of public land alienation was not followed in leasing the market land to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow.
  - viii. CAJ finds Mr. Nyoike Isaac, Chief Valuer, Nairobi City County culpable of abuse of power and breach of public trust for stating that Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow are the registered and rateable owners of the land knowing well that the lease document issued to the private developers had been revoked vide a Gazette Notice No. 11951 of 19<sup>th</sup> December, 2008. In addition, he should have known that the issuance of the lease document did not follow the Council's procedure of Full Council Meeting for approval of public land alienation.
  - ix. CAJ finds Mr. Karisa Iha, Director Legal Affairs, Nairobi City County culpable of gross abuse of power and breach of public trust for failing to do due diligence and confirming that Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow are the registered and rateable owners of the land, LR. No. 36/VII/1037. As at the date of issuance of the confirmation letter, Mr. Karisa ought to have been aware of the ongoing cases and the court had not authoritatively determined the question of ownership of the said parcel

of land. In addition, Mr. Karisa ought to have been aware of the correspondence between his predecessor, Ms. M. N. Ngethe and the Ministry of lands, denouncing the lease issued to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud. Moreover, by Gazette Notice No. 11951 dated 19<sup>th</sup> December, 2008, the government had revoked the lease granted to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud and as at the date of Mr. Karisa's letter, there was no valid lease to Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud.

- x. CAJ finds Mr. J.W. Kamuyu, Registrar of Titles culpable of misbehaviour in office, inefficiency and ineptitude for failing to produce the original file for land LR No. 36/VII/1037 containing crucial information relating to the parcel. Further, Mr. Kamuyu failed to uphold the revocation of the lease in favour of Mr. Farah Mohamed Barrow and Mr. Ali Sheikh Mohamud, basing his decisions on High Court Misc. Applications No. 37 of 2009 that was withdrawn on 9<sup>th</sup> September, 2015.
- xi. The Nairobi City County has lost revenue approximated at about KSh. 72,540,000 in the last ten years being ground rates, licence fee and administration charges payable by the 403 traders at the average rate of KSh. 1,500 per month per trader.
- xii. Following the demolition of stalls in Eastleigh market, each trader incurred a loss approximated at KSh. 250,000 being the cost of construction of each stall. The traders also lost their wares during the demolition.

#### **4.0 Determinations**

- i. Nairobi City County should issue cessation notice to Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow directing them to immediately stop construction on the parcel of land, LR. No. 36/VII/1037.
- ii. Nairobi City County should retake and develop the parcel of land, LR. No. 36/VII/1037 into a modern market and give priority to the 403 traders or their successors. The County Government generates enough revenue to develop the property.
- iii. In the event that the County Government of Nairobi is not able to develop the property, it should legally negotiate for a proper Public-Private

- Partnership contract that secures the interest of the County Government and the traders. CAJ should be involved in that process of PPP Agreement.
- iv. The Nairobi City County should compensate the Eastleigh Market traders at KSh. 150,000 each for the cost expenditure incurred in the construction of market stalls. The individual loss of goods and businesses are too varied to be determined in this inquiry.
  - v. The Commission finds that Mr. Nelson Otido is culpable for abuse of power and recommends that he should not hold any public office for the reason that he executed the lease documents in favour of Mr. Ali Sheikh Mohamud and Mr. Farah Mohamed Barrow without specific authority from the Town Clerk. As the Deputy Town Clerk, Mr. Otido did not have powers to sign the documents. Further, Mr. Otido also knew that the Council procedure for leasing the market land was not followed
  - vi. The Commission recommends that the Governor, Nairobi City County, Hon. Dr. Evans Kidero should remove from office Mr. Nyoike Isaac, Chief Valuer, Nairobi City County for abuse of power and breach of public trust.
  - vii. The Commission recommends that the Governor, Nairobi City County, Hon. Dr. Evans Kidero should remove from office Mr. Karisa Iha, Director, Legal Affairs, Nairobi City County for gross abuse of power and breach of public trust.
  - viii. The Permanent Secretary, Ministry of lands, Housing and Urban Development should serve a strong warning letter, and any other appropriate administrative action, on Mr. J.W. Kamuyu, Registrar of Titles for misbehaviour in office, inefficiency and ineptitude.
  - ix. The Permanent Secretary, Ministry of lands, Housing and Urban Development should expedite automation of the Land Registry in order to address the anomaly of missing parcel files in the Registry. The parcel file for the land in dispute could not be easily traced in the Nairobi Land Registry and a new file had to be constituted at the time of this investigation.