



REPUBLIC OF KENYA

KENYA NATIONAL ASSEMBLY

TENTH PARLIAMENT – THIRD SESSION

**THE DEPARTMENTAL COMMITTEE
ON
LOCAL AUTHORITIES**

**REPORT ON THE PROCUREMENT OF CEMETERY LAND BY THE CITY
COUNCIL OF NAIROBI**

PARLIAMENT BUILDINGS
NAIROBI

JANUARY, 2010

PREFACE

Mr. Speaker Sir,

Departmental Committee on Local Authorities is established under Standing Order No.198 (1); its mandate pursuant to Standing Order 198(3) is:-

- a) to investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;**
- b) to study the programme and policy objectives of the Ministries (and Local Authorities) and departments and the effectiveness for implementation;**
- c) to study and review all legislation referred to it;**
- d) to study, assess and analyze the relative success of Ministries and departments as measured by the results obtained as compared with its stated objective;**
- e) to investigate and inquire into all matters relating to all assigned Ministries and Departments as they may deem necessary, and as may be referred to them by the House or a Minister and;**
- f) to make reports and recommendations to the House as often as possible, including recommendation of proposed legislation.**

The Committee comprises of the following Members:

Hon. Ahmed Shakeel Shabbir, M.P -----Chairman

Hon. Mwalimu Mwahima, M.P.

Hon. Joshua Kutuny, M.P.

Hon. Stanley Githunguri, M.P.

Hon. Fahim Twaha, M.P.

Hon. Gideon Konchella, M.P.

Hon. Mohammed H. Gabow, M.P.
Hon. David Ngugi, M.P.
Hon. Maitha Gideon Mungaro, M.P.

Mr. Speaker Sir,

Your office ordered the Committee to investigate and to file a report on the procurement of Cemetery Land by the City Council of Nairobi after a question by private notice was asked by Hon. Linturi to the Minister for Local Government.

Mr. Speaker Sir,

The Committee has carried out the investigations and has taken evidence from many witnesses and has now compiled the attached report.

Mr. Speaker Sir,

The Committee is grateful to you and to the office of the Clerk for providing the requisite technical support.

Mr. Speaker Sir,

On behalf of the Committee, it is now my pleasant duty to lay on the Table of the House the report of the Committee pursuant to the provisions of Standing Order 181(3).

Hon. SHAKEEL SHABBIR, MP

Chairman, Select Committee on Local Authorities

REPORT ON THE PROCUREMENT OF CEMETERY LAND BY NAIROBI CITY COUNCIL

BACKGROUND

Mr Tom Sipul of Kenya Wildlife Service provided the following information:-

The plot in question was formally part of L.R. No. 10029 which had a size of 8,912 acres registered in 1951 in favour of Kenya Meat Commission(KMC) for a term of 99 years.

KMC surrendered the land back to the government on 31st December 1970 so that it could be reserved for the Ministry of Agriculture and Livestock Development for a holding ground.

In 1982, the government sub-divided the plot into two portions namely:-

L.R. No. 10029/1 measuring 6000 acres allocated to a group of squatters who were occupying it at the time.

From the evidence adduced it is clear that one of the squatters on L.R NO. 10029/1 by the name Marinie Ole Tiranti Makaita apparently allowed one Henry Kilonzi to lease his land for agricultural purposes.

After the death of Marinie Ole Tiranti Makaita in 2002, Henry Kilonzi obtained a title for the land which is now known as L R. No. 14759/1 in Athi River Township. It is the sale of this land to Nairobi City Council which is under investigations.

ii) L.R. NO. 10029/II measuring 2912 acres (1,179 hectares)approximately reserved for the Ministry of Agriculture and Livestock Development for sheep and goat rearing- Reservation letter was dated 23rd March 1982.

On 7th May, 1996, the Permanent Secretary, Ministry of Agriculture and livestock Development vide his letter Ref.

MALD/LAND.1Vol./161 relinquished the Ministry's interest on 2,500 acres for allocation to KMC thus leaving a balance of 412 acres.

In the same letter it is stated that his Ministry had decided that decided that 250 acres be allocated to masai Imprex and the balance of 162 acres be left in the Ministry's name.

Consequently, 2500 acres were allocated to Kenya Meat Commission vide a letter of allotment Ref. No. 64408/233 of 9th July, 1998.

Another 250 acres (101.2 ha) were allocated to M/S Masai Impex Ltd who are the owner Vide a letter of allotment Ref. No. 64408/230 of 25th June, 1996 at a stand premium of Ksh 3.6 million and annual rent of Ksh. 720,000/=p.a.

This plot is now surveyed as L.R No. 23139 and title No. I.R 70443/1 registered on 9th September, 1986.

On the remaining portion (after item c and d) there is a Mr. Francis Mayaka who was allowed to do horticultural farming on a 125 acres plot on temporary basis by the ministry of Agriculture and Livestock Development.

The Kenya Wildlife service has complained of the above developments stating that the land L.R 10029/II which is adjacent to the Nairobi national park is used as a Wildlife Corridor.

He also stated that the area is not suitable for a cemetery because it is rocky and the soil is not six feet deep.

EVIDENCE ADDUCED BY VARIOUS WITNESSES

RICHARD NGANGI

This witness testified as follows:

My names are Richard Ngangi and I retired in 2002 from Portland Cement. I am a farmer in Mavoko area where I went in 1971. In 1970 the then President, Hon. Daniel Arap

Moi gave a group of us about 6,000 acres. The land was planned in 1971 and thereafter subdivision ensued.

The land was divided into 64 plots and 62 people were allocated one plot each leaving one plot for a church and the other for public utility. Marinie Ole Tiranti Makaita also got his letter of allocation. I produce a copy of the allocation letter. It is marked WI. Each of us paid Kshs. 5,000 for the planning and processing of the titles.

In 1984 those of us who had paid got their titles. Our surveyor was Gikonyo Mwangi. All the plots were fully occupied.

I hear that someone is claiming to have been given land by President Moi in 1991 in the same area but this cannot be possible because all the plots had owners. I knew all the 62 allottees. There were 64 plots. One of these plots was given to the Church and the other for Shopping Centre. The material land was given to Marinie Ole Tiranti Makaita. It is number LR. 14759. I live near this *shamba* and I have never heard that the deceased sold this land to anybody.

Bishop William Nkaangi

This witness testified as follows:

I am a Bishop with Pentecostal Churches. The late Marinie Ole Tiranti Makaita was a husband to my sister Agnes Nenkao. Marinie and his family lived on the disputed land and I used to visit them there. My sister was cultivating part of the land and a friend of the family, Mr. Kilonzi was also cultivating part of the land. The remaining part was used for grazing their animals. In 2002 Marinie died and his family moved back to his father's land as his mother became mentally sick and needed assistance.

The land parcel that belonged to the late Marinie was LR.14759. On or about 2003, my sister came to my home and

informed me that she had gone to their above land and had found that Kilonzi had pulled down her house and had used the iron sheets to build a shed for his animals. She was quite shaken but I assured her that all would be well as I would take her to the land office where the land issue would be sorted out.

When we visited the land office we found the file and the letters of allotment in the name of her late husband but my sister was told she must produce the letters of administration to enable the land officer to transfer the land to her name. I helped her to file a succession suit but before she got the letters of administration, a School was put up on the land by people who said they got the land from Kilonzi. When we asked Kilonzi how he sold the land he said we should not bother him as he had been given the land by the President Moi.

Buckson Semei

This witness testified as follows:

I was a member of the Committee dealing with the Shamba in question. A group of about 62 people were given land by President Moi. We had to pay Ksh. 5,000 to the surveyor so that we could get our title deeds. I was the treasurer and I used to receive this money and then I would forward it to the Surveyor. I know the land in question belonged to Marinie Ole Tiranti Makaita. He never informed me he was selling the land and I don't know how Kilonzi got the land. He was not one of the original beneficiaries.

Agnes Nenka Marinie

This witness testified as follows:

I married Marinie Ole Tiranti Makaita in 1982 and we got our first child in 1984. My husband died in 2002.

One day after the 1984 drought, my husband came home with three friends and we slaughtered a goat. Thereafter when it started raining one of these friends came and asked to be allowed to cultivate part of our land and my husband agreed on condition that he would cultivate 10 acres for himself and then plough three (3) acres for us.

In 2002, my husband contracted tuberculosis and he died. His mother became mentally ill soon thereafter and my father-in-law requested me to go and assist her. So I took the children and we moved to my father-in-law's land. Unfortunately, she also died after sometime.

I then came back to Mavoko to check on our land as I wanted to come back so that the children would start going to school. To my shock, I found our so called friend Kilonzi had taken possession of our land and had built a house thereon. He had brought down our small house and he had used the iron sheets to put a shed for his animals. I asked him what was going on and he told me that he had been given the land by the President and I should not go there again. He threatened to kill me if I dared set foot on that land.

I thereafter went to my brother's home to seek assistance. This was about 2003. My brother, Bishop Nkaangi, took me to the Lands office where a search showed that our land was intact and it had not changed hands. I was however, advised to get Letters of administration from court so that the land could be transferred to my name.

I was assisted to file a succession suit but before I obtained the letters, I noticed a school was being built on our land. I got information that the school owners had bought the land from Kilonzi. I went to the offices of FIDA to seek help which has not been forthcoming.

I now appeal to you Members to help my children and I to get back our land. My late husband never informed me that he had sold the land. I would also like Kilonzi to produce proof of payment of any money to my late husband. If he had truly bought the land, why did he lie to me that he had been given the same by the President? I need help and I want justice to be done.

Jeremiah Kaloi

This witness testified as follows:

I come from Embakasi village. I knew the deceased person who owned the land in question. I live next to Marinie Ole Tiranti's land. Kilonzi used to cultivate there and he then started building. He said that he got the land from the government.

I heard from the media that the land was going to be a Cemetery and when I asked the widow (marinie's) about it she informed me that Kilonzi had grabbed the land. When we approached Kilonzi as a community he said he didn't know anything about a Cemetery. The normal value of the land there is between ksh. 300,000 to ksh.500, 000 per acre.

MAVOKO MUNICIPAL COUNCIL

Mr. Patrick Makau

This witness testified as follows:

I am the Mayor of Mavoko Municipal Council. I heard about the material land being the proposed site for the City Council of Nairobi Cemetery from the media. As far as I am concerned the land is still agricultural as the Council has not approved change of user. The City Council of Nairobi officials never sought our opinion in respect of purchasing land within our area for a cemetery. If they had, my officers and I

would have informed them that the area is not suitable for a cemetery.

WISDOM MWAMBURI,

This witness testified as follows:

I became the Town Clerk to Mavoko Municipal Council in June 2008. In Mavoko there is no red soil which is normally suitable for a cemetery. There was no planning brief brought to Mavoko Municipal Council. The area is mainly agricultural and no environmental assessment has been carried out to show whether the area is suitable for a cemetery.

PETER MBATHA :

This witness testified as follows:

I was posted two weeks ago in Mavoko Municipal Council as a Town Planner but I am resident there. In the municipality there were no documents showing who the owner of the disputed land is. There is no registered use of the land but the area is mainly agricultural land. I have not seen any application for change of land use. As far as I know there is no approved master plan for the material area. The children's home on the land is illegally built because there was no change of user approved. Those buildings put up before 2007 without approval will be considered when owners apply for change of use.

MR.PETER MBATHA

This witness testified as follows:

I am the Deputy Treasurer in Mavoko Municipal Council. I am the planner and I have given evidence here before. I understand I was recalled to confirm whether a clearance certificate produced to the Committee originated from Mavoko Municipal Council. (Document shown to him).

The document looks genuine and the signature is that of former Town Clerk of Mavoko Municipal Council. So it is clear

Mavoko Council had knowledge of the land in issue. At the time I testified earlier I did not know that Mavoko Municipal Council had issued the clearance certificate.

SAMUEL MAKALI

This witness testified as hereunder:

Henry Kilonzi started transactions with Mavoko Municipal Council on 22nd April 2008. He paid for 3 components in the council.

(a)He paid land rates of ksh. 45,099 and it was an agricultural land rate.

(b)He also paid debt clearance of ksh.3, 000.

(c)He paid for change of user of ksh. 6,000. He wanted to change from agriculture for plot development.

He had subdivided the land into 16 plots. You cannot apply for change of user on temporary numbers but this is what Henry Kilonzi did. The change of user has not yet been approved. He made the payments in April 2008 but he has not followed up the matter. Notification of approval has not been given to him. There is no approval for the buildings on his land.

On 26th November 2008 he applied for the subdivision of the land into two portions. This was approved and new numbers were to be given. The City Council of Nairobi has never contacted us in respect of this land. The initial size of the two plots was 8.9 hectares and 48.3 hectares.

LOCAL GOVERNMENT MINISTRY

MR. SAMMY KIRUI-PERMANENT SECRETARY, MINISTRY OF LOCAL GOVERNMENT

This witness testified as hereunder:

The City Council of Nairobi wanted Cemetery land and the Town Clerk requested the Ministry of Local Government to assist as the Council had no funds. Lack of a burial ground being a National issue, the Ministry was obliged to help and asked the Council to procure the land and funds would be availed to them. As early as 5th June 2008 a meeting was held by the officers from my Ministry and officers from Nairobi City Council to deliberate on the issue. The meeting was chaired by Reuben Rotich, Senior deputy secretary and Mary Ngethe, the director of Legal affairs in City Hall was taking minutes. Copy of minutes marked W2. We released the cheque when we were told the land was available.

This was a Nairobi City Council Project.

The cheque was issued to the lawyers acting for Nairobi City Council.

The letter the Ministry received from the Council is dated 28th June 2008 and another one is dated 28th September 2009. In April 2008 part of the money was available for purchase of the cemetery land.

Yes, there were tender Committee minutes from Nairobi city Council.

The Ministry got a draft agreement for the sale.

In September 2008, the tender was advertised in the newspapers.

There was no documentation to support the cheque issued on 30th June 2008 in the name of Omotii and company advocates. All the Ministry wanted was to safeguard the money and not to return it to the treasury. It is true we did

not follow the government regulation of returning the money to Treasury. There was no bad intention in issuing the cheque. It is not normal to ask for money in two installments.

On 11th November 2008 there was a Memo from the tender Committee stating the land was unsuitable.

There was no meeting in my office in respect of Cemetery land. I didn't see the need to involve our legal department because the Nairobi City Council has its own Lawyers. So I may have directed that the legal officer in the Ministry be left out of the transaction.

The officers in City Hall involved in this transaction that have caused a lot of public money to be misused are still in office but one has retired and one is on leave.

I agree that if the price is inflated then there is fraud. It seems that this is the case in respect of Nairobi Cemetery Land Procurement.

If some of my officers were involved I was not aware. I didn't collude with the Town Clerk.

There was no intention on my part as the Permanent Secretary to defraud the Government. I have never been corrupt and I have worked in various departments of the Government.

I will give all the support that this Committee may need.

THE DEPUTY PRIME MINISTER AND MINISTER FOR LOCAL GOVERNMENT

This witness testified as hereunder:

It is true there are issues surrounding this matter and I hope the Committee can unveil the grey areas.

KOMBO MWERO

This witness testified as hereunder:

I was employed by the Government as a surveyor. I served for 28 years. In 2005 I was the Permanent Secretary in the Ministry of Local Government until 2007 when I was transferred to the Ministry of Wildlife.

The transaction of the proposed Cemetery land took place after I had moved from the Ministry of land. It is irregular to give a title deed to a member who was not originally given land after the original allottee has died.

SOLOMON BOIT

This witness testified as hereunder:-

I am a retired civil servant. I was a Permanent Secretary in the Ministry of Local Government until April 2008. The Minister then directed that some senior officials from the Ministry should meet senior officials from Nairobi city council so that the process of acquiring a cemetery land would be started. Apparently a delegation had seen the president and it had been agreed that there was need to assist the City Council of Nairobi to acquire another cemetery land.

The current cemetery was over used. I led a group of officers to Treasury to request for finances. At first treasury was reluctant but the matter was revisited after the post election violence and it was agreed that funds would be availed.

I know the Minister for Local Government is executive just like the finance Minister. Minister had to be notified of what is going on before any transaction can be concluded. This may be done orally but also preferably in writing. Normally the Permanent Secretary will consult the in house counsel

for legal matters e.g. land sale and if it is felt the ministry has no capacity, the Attorney General is consulted.

EDITH TOROME

This witness testified as hereunder:

At present, I am a State Counsel in the Ministry of Higher Education. Before this, I was the State Counsel in the Ministry of Local Government. I am totally unaware of the procurement of cemetery land by the City Council of Nairobi although I attended the initial meeting in the Finance Ministry when we went to request that funds be availed for purchase of the cemetery. The Chief Finance Officer in the Ministry had noted that the tender documents were defective as they did not provide the required specification of land suitable for a cemetery and had requested that I give a legal opinion but the Permanent Secretary, Mr. Sammy Kirui said that the City Council had competent lawyers. Letter is marked W3

As a state counsel, I should give advice on all legal matters but in this particular case I was not involved. I saw the comment by the Permanent Secretary to keep me out of the transaction in the file. The procurement was completed in February 2009 and in March 2009 I was transferred to the Ministry of Higher Education.

THE MINISTRY OF LANDS

Mr Zablon Mabae

This witness made the following statement:-

I am the Commissioner of Lands in the Ministry. In respect of the land in question, I want to state the following:

The Ministry's main function is to keep records of all land transactions.

On 7th August 2008 we received a letter to give a valuation for negotiation purposes. It was signed by N.W.Otido. It is marked W4. We didn't get a follow up but after talking to Mary Ngethe, she said the Council was not interested in the enquiry. Our letter to confirm this communication is dated 26th September 2008 and is marked W5

(iii) The Ministry again received a letter dated 4th November 2008 from Nairobi City Council (signed by Mary Ngethe) asking that a valuation be carried out on the same land parcel LR.NO. 14759 in Mavoko Township. The letter is marked W6

(iv) The Ministry wrote back on 13th November 2008 asking for an officer from Nairobi City Council to take the Ministries's officers to the Ground. The letter is marked W7

(v) No action was forthcoming from the City Council of Nairobi until we received the letter asking us to confirm that we had valued the land. This was the letter from Auditor general marked W8

(vi) We hadn't done any valuation and when we scrutinized the letter we confirmed it was a forgery. We didn't have any staff named A. Otieno and the letter head on the letter was already abandoned by the Ministry. We wrote back to the Auditor General explaining all this in our letter of 10th March 2009. Same is marked W9. I don't know why Mary Ngethe, a lawyer would act on a one page valuation report (marked W10) without checking with the Ministry as to whether we had valued the land.

On 15th January 2009 subdivision of the material land was approved.

Our officer went to the land and valued the land at 200,000 per acre since it is agricultural land. This valuation is marked W11

City Council is exempt from paying stamp duty but in this case they never applied to be exempted.

On 3rd February 2009 the City Council of Nairobi was issued with a title after the sale agreement (marked *W12*) transfer (marked *W13*) was submitted. Copy of title is marked *W14*

HON JAMES ORENGO –MINISTER FOR LANDS

The Minister made the following remarks:-

The alterations on the transfer document were meant to correct an anomaly in the acreage. Embakasi ranching group was the initial owner of the land. The land was subdivided and shared among the 62 members of the group.

The transfer document is drawn by E.N. Omotii & Co. Advocates but the alteration is signed for by Alphonse Mutinda advocate. This is illegal but my officers overlooked this fact. In a court of law the document would be found defective and the sale can be annulled.

We shall put a restriction on the land in question until the investigations are complete.

The City Council of Nairobi is a body corporate and has power to deal with their property as they please.

CITY COUNCIL OF NAIROBI

PETER MBURU KABINDA

This witness testified as follows:-

I deal with planning and especially future urban development. In 2003, I was transferred to Thika Municipality and was there until 2008 when I came back to work for Nairobi City Council. At this particular time, the council was worried because Langata cemetery was said to be full and the Council needed to buy another burial ground. Towards this end, the Local Government Ministry facilitated

a meeting between Mary Ngethe, the legal officer and other Council officials with Mr. Kinyua, the Permanent Secretary in the Ministry of Finance. The purpose of the meeting was to request for funds to buy land for a cemetery. The Ministry of Finance agreed to provide funds to buy land for a cemetery.

The Council then started to look for land to purchase. In the first advertisement the Council only got three people interested in selling land for a cemetery.

When the Council officials visited these lands, it became clear that these lands did not qualify since they didn't have red soil which is more than 6 feet deep and they were not serviced by an all weather road. The land near Kapa industry would have been suitable but its title had encumbrances.

In 2008 we visited several sites in search of a suitable cemetery land. I was not in the technical team but my deputy Tom Odongo and Mr. J.Barreh were in it. The Chairperson of the technical committee was Mary Ngethe.

When the land in issue was identified I and my colleagues in the planning department wrote two memos, both dated 11th November 2008(marked *W15* and *W16*) to the Town Clerk stating that in our opinion the land was not suitable for a cemetery and we gave our reasons. I don't know how the contents of this memo leaked to the Ministry but the Permanent Secretary in the Ministry of Local Government wrote to the Town Clerk referring to the same. The Town Clerk did not take our objections kindly and he asked us to explain. We did this by our memo of 19th December 2008. The same is marked *W17*.)The Town Clerk called a meeting of the evaluation technical team. It was three days after I wrote the Memo. No minutes were taken in that meeting. I was asked to give the genesis of the contents of the above Memo and I wrote another memo to the Town Clerk to explain. I suggested that since the open tender was proving ineffective, we needed to either compulsory acquire the land or negotiate with sellers with land having red soil.

The Clerk had some reservations and stated that the issue had taken too long and it needed to be finalized. A meeting was called at the Ministry of Local Government which was attended by the finance officer, Permanent Secretary, Procurement officer, Director of legal affairs from Ministry, Edith Torome and also the funeral superintendent. The meeting was to discuss a report of progress made on the issue of procuring the cemetery land. The Council had no budget to buy land and that is why we involved the Ministry of Local Government.

A meeting of the tender Committee was called and I attended the meeting for a short period since I had other engagements. Before I left, however, I made it clear that the proposed land was not suitable and no tender should be awarded. The Town Clerk was aware of what was going on in respect of the purchase of cemetery land. There was no meeting in City hall by Councillors to endorse the purchasing of cemetery land by the City Council of Nairobi.

The general purpose Committee never met to deliberate on this matter. There was no full Council meeting to approve the purchase of the Cemetery land.

The matter has not even been brought to the Council for ratification.

The Deputy Town Clerk signed the transfer documents and he was still the Chairman of the tender Committee. This is illegal.

The Mayor or Councilors never attended any of the above meetings.

I know Maina Chege the Director of Naen Rech Ltd. He comes from Maragwa. He is the proprietor of marchant auctioneers.

JOHN GAKUO

This witness testified as follows:

In 2004 – 2008 I was the Town Clerk of Nairobi City Council. As the Chief Executive Officer of the Council then, I referred the matter of the procurement of cemetery land to the Procurement Committee. In September 2008 the process of buying cemetery land started. The tender was open and was put in the media. The members of procurement committee are Deputy Clerk, Treasurer, Medical Officer of Health, Engineer, Director of City Education, Legal Officer and Director of Procurement.

The memo of 11th November 2008 questioning the suitability of the land to be procured for a cemetery came to me and I personally gave a response. The reply is in the office of the Clerk of the City Council of Nairobi. Permanent Secretary then in the ministry of Local Government was Mr. Sammy Kirui. The payment was made directly to a lawyer who was representing the City Council of Nairobi. There is a valuation department in the Council but for this transaction valuation was to be done by a government valuer.

I don't know whether the valuation department was requested to value the land.

I relied on the technical committee advice.

I was informed that the valuation was done by the Ministry of lands.

JOHN GAKUO

This witness was recalled as he had been very guarded the first time he appeared before the Committee and now he testified as follows:-

I am the Former Town Clerk of Nairobi City Council. I called a meeting after 11th November 2008 when I received a letter

from the Permanent Secretary, Mr. Sammy Kirui. With procurement the buck does not stop with me. For any government land to be purchased, valuation had to be done. If not the procurement is defective. That is all I have to say.

MR. GEOFFREY MAJIWA-HIS WORSHIP THE MAYOR OF NAIROBI CITY

Takes the Oath by the Bible and then states as follows:-

I Geoffrey Majiwa, swear by the Almighty God that the evidence I will give before this Committee, shall be the truth, the whole truth, so help me God.

I know that sometimes in the year 2004 Members of the Council had a resolution that the council should acquire land for a Cemetery. We wanted the land next to the current Cemetery but this did not materialize. The Council then had to look for land elsewhere and we sought funds from the Local Government Ministry. Thereafter the council was dissolved and we resumed again in 2008.

Individual lands were looked at in early 2008 but the earmarked lands were found not to be available. Later it was agreed that the land be identified by a team from the City Council.

On 30th October 2008 a letter from Mr. Sammy Kirui, the Permanent Secretary gave the Council 5 days to conclude the matter otherwise the Ministry would take over the procurement. I was aware that there were complaints about the land by some member of the tender committee stating that the land was unsuitable for a cemetery. However, when I was asked to sign the transfer for the land to Nairobi City Council, I agreed.

On 18th September 2008 advertisement was done, so I don't know why the Permanent Secretary was writing on 30th

October 2008 giving 5 days for the Council to complete the transaction.

The Permanent secretary had said that only Government valuer would give the valuation.

I was told the land is in Mavoko. I didn't talk to the Mayor of Mavoko to inform him that Nairobi City Council was buying cemetery land in Mavoko.

I don't handle cash transactions and so I don't know whether stamp duty was paid.

The Permanent Secretary had given instructions for the purchase of the Cemetery land. If there is anything that was done improperly, then it was behind my back.

On September 2008 officers were called for a meeting to deliberate on the procurement of the Cemetery Land.

The Council bought 120 acres. These changes on the transfer document were signed for by the lawyer.

If what is in these papers is the correct position of the purchase of Cemetery land, then I was misinformed when I signed.

The Deputy Town Clerk signed but on approval by the clerk. The Chief executive of the Council is the Town Clerk and the buck stops with him. There is micro-management by the Local Government in respect of Nairobi City Council.

MARY NGETHE

This witness testified as follows:-

I am the Director of legal affairs in the City Council of Nairobi. In 2007 the tender of Cemetery land was done and a sale agreement dated 13th January 2006 was drawn. Before the purchase could be completed, we realized there was a

problem and the tender was cancelled. Ardhi developers Ltd and West End Butchery had a dispute in respect the land ownership.

In June 2008 we readvertised for land. The Permanent Secretary in the Local government called the officials from the City Council of Nairobi for a meeting on 16th June 2008 and Mr. Rotich advised us to go for a direct sale. We looked for land but were unable to get land in Nairobi. We identified several parcels of land and on 7-8-2008 we requested the government to do valuations.

One parcel was on Mombasa road but Kenya Railways warned us not to buy the land as it belonged to them. The Permanent Secretary again wrote to tell us to advertise. I was appointed as the Chair of the tender technical Committee. There were twelve bids. Seven of them responded but five did not. We made site visits on all the lands and the Committee settled on the land at Mavoko.

On 5-11-08 we wrote to the procurement Committee informing them of our decision.

The criteria agreed on earlier was that:-

- ❖ Land must be within Nairobi Metropolitan**
- ❖ Easily accessible by public**
- ❖ Soil must be preferably red and more than 6 feet deep**

The land at Mavoko is not easily accessible and the soil is not red. The soil is only 4 feet deep. Tender Committee sat on 12-11-08 and officers in the planning department raised objections on 14-11-08. I did not object to the procurement because the Medical officer of health was present and confirmed the land was suitable for a cemetery. The Permanent Secretary of the Local Government had written to the Clerk on 30th October 2008 threatening that the Ministry would take over the process if we did not conclude it within 5 days. The letter is marked W18. The land was valued but I

later learnt that the letter of valuation was a forgery. I have nothing more to say in respect of the sale.

KARISA IHA

This witness testified as follows:

I am a deputy director in Nairobi City Council. I was involved in the purchase of the proposed Cemetery land. The Council wrote to the treasury through the Minister of Local Government for funds to buy Cemetery Land.

When the first cheque was forwarded it was in the name of Omotii Advocates who acts for Nairobi City Council. The advocate was instructed on 26th November 2008(The appointment letter is marked W19) but the cheque in his name was done on 30th June 2008(marked W20).I forwarded the first cheque of ksh.175,000,000 to Nairobi City Council on 22nd December 2008(letter marked W21) and the second for ksh.108,000,000 on 16th January 2009(My forwarding letter is marked W22)

I don't know why the cheque was done in June to the lawyer before he was instructed by Nairobi City Council to act in this particular transaction. The second cheque of Kshs.108,000,000 was forwarded to the same lawyer by the Director.

I have no proof that the land was suitable for a Cemetery but it was reported by the procurement Committee that the land was suitable. I was not a member of the procurement Committee but I believe the procurement process was properly done. I can't remember any other property that was purchased by the City Council of Nairobi in this manner.

N. W. OTIDO

This witness testified as follows:

I was a Deputy Town Clerk in Nairobi City Council but now I am retired. I joined the Council in September 2006 as

Deputy Town Clerk in charge of administration. By a letter dated 20th January 2007 I was appointed by the Town Clerk as the Chairman of the tender Committee. I was also appointed as the chief land registrar for Nairobi City Council. Some of my duties involved signing all land documents and I was also a bank signatory for the Council. There are four signatories, that is, the Town Clerk, his Deputy Clerk, the Treasurer and his Deputy.

I was the Chairman of the tender Committee at the time of purchase of Cemetery land. I was not aware of the letter addressed to the Clerk stating the land was unsuitable for the land. On 13th November 2008 I wrote to Naen Rech Limited informing the Company that it had won the tender and requesting for a performance bond. Letter is marked W23. The bond was not given and this is against government regulations.

When I discovered there were complaints about the soil structure from the technical team I did nothing. I saw the memos a week after the tender was awarded. The clerk never showed me the memos from the planning department. Even after seeing the memos I didn't take any action to stop the procurement. I had seen a letter from Mr. Sammy Kirui informing the Clerk the process had to be concluded because the first cheque was almost stale. This letter is marked W24

On 19th December 2008 I signed the agreement for sale. I will share the blame if there was something wrong but the mistake started with the legal department. I have nothing to add that can help the Committee.

E.N. OMOTII ADVOCATE

This witness testified as follows:-

I am a practicing lawyer. On 26th November 2008 my law firm was instructed by the City Council of Nairobi to represent it in an intended purchase of land. The instructions

were in writing and there attached was a notification of award of a tender. It was a public open tender. Henry Musyoki Kilonzi was the vendor and the land to be bought was 120 acres out of LR 14759. The Purchase price for one acre was 2,360,000. I had meetings with the head of the legal department Mary Ngethe. I prepared a sale agreement between the vendor and the Nairobi City Council. Total amount released to my firm on 18th December 2008 was ksh.283, 000,000. The first cheque for ksh.175, 000,000 was drawn on 30th June 2008 and the second cheque for ksh. 108,000,000 was drawn on 15th January 2009. The cheques were drawn by the Ministry of Local Government. My firm of advocates was instructed to act in this matter on 26th November 2008 but I don't know why the cheque was drawn in the name of my firm in June 2008 before the firm was appointed to act in the matter. I released the money to the other lawyers after we got the title documents.

ALPHONCE MUTINDA ADVOCATE

I am a partner in Alphonse Mutinda & Co. Advocates and a lawyer by profession. I request to have my lawyer Mr. Mutisya present.

EVIDENCE

This witness then gave the following evidence:-

Henry Kilonzi is my client. I handle his business. He informed me in August 2008 that he wanted to sell his property. He told me he was selling part of his 140 acres. He wanted to keep 10 acres for himself and he had sold 10 acres to a school. He wanted me to look for a buyer.

Towards end of August 2008 I was introduced to one Maina Chege by Cephas K. Mwaura who is a surveyor. Maina Chege wanted to buy the 120 acres. I called Kilonzi and Maina to

my office and they met and negotiated a price. Maina Chege is the Director of Naen Rech Company.

Kilonzi wanted to sell the land for Kshs. 800,000 per acre. Finally after negotiations we agreed at Kshs.110, 000,000 for 120 acres. Mr Maina Chege had his own advocates.

We wanted a deposit of 10% which is 11,000,000. We got a post dated cheque in two names.

In September 2008 he said he won a tender from the City Council of Nairobi to sell the land he wanted to buy from Henry Kilonzi.

The agreement was that Kilonzi would be paid after transfer to Nairobi City Council. The land had not been subdivided and there was need to have consent from Mavoko Municipal Council and a clearance certificate.

L.R NO. 14759 was the land being sold to the City Council of Nairobi.

The City Council of Nairobi lawyer, E.N. Omotii lawyer sent me a draft sale agreement. Mrs Mutua from lands did a valuation for the purpose of stamp duty.

The City Council of Nairobi had paid or issued a cheque for the stamp duty and so the title was issued to them.

Henry Kilonzi sold to the children's home 10 acres at 500,000 per acre.

MAINA CHEGE

This witness testified as follows:-

I am a business man and a director of Naen Rech Co. Ltd. This Company was incorporated in 1996. Share holders have changed. There were three directors, Maina Chege. John

George Kamau and Winnie Wanjiku. The two have since left. They were replaced by Einswick Van Sen from Israel.

The company was incorporated to do business and horticulture farming. On 18th September 2009, there was an advertisement in the newspaper asking for suitable land for a Cemetery by the City Council of Nairobi.

As a business man I wanted to tender. I had started negotiation with Henry Kilonzi for his land at Mavoko for I wanted to plant trees.

I bought the tender documents and since Kilonzi was selling the 120 acres at 110,000,000 I quoted 2,360,000 per acre. I engaged P.C. Onduso advocates to represent my interest in the transaction.

The other Director owns 15% in Naen Rech. By the time I tendered we had agreed that Henry Kilonzi was going to sell the land to me.

The lawyers I engaged have swindled me and have refused to release my money. I have therefore filed Milimani High court no. 181/2009/05 Naen Rech Ltd versus Onduso & Co. Advocates where I am claiming 42,050,000 from them. The case is yet to be finalized.

I have also filed Civil suit Case No.518/2009, Maina Chege versus Odero & Co. Advocates where I am claiming ksh.87,000,000. Stephen Kibuya advocate is acting for me.

About 9.2 Million was put in my account. A further 2 million was given to me. I expected 273 million out of the transaction but 133 million is still with the lawyers.

BISHOP DAVID M.THAGANA

This witness stated as follows:-

In January 2008 Merciful Redeemer Children's Home and Henry Kilonzi entered into an agreement whereby he agreed to sell ten acres on LR.No.14759 Machakos to the Home. The

purchase price was agreed at 400,000 per acre and so the ten acres cost 4,000,000.

On 14th January 2008 we paid Henry Kilonzi KSH.200, 000

On 18th January we paid him KSH. 1,000,000 vide cheque no.00743

On 27th March we paid him a further 1,200,000 vide cheque numbers 000059(ksh.200, 000) and 000060(ksh.1, 000,000)

We had intended to pay the balance on transfer of the property but Alphonse Mutinda advocate wrote to us to clear the balance to enable him transfer the land to us. We referred this letter to our lawyers, M/s Maina Wachira advocates who advised us to pay.

On 9th July 2008 we paid the balance of ksh.1, 600,000 vide cheque number 001564.

We have built a children's home on the land although we haven't yet received approval of the buildings from Mavoko Municipal Council.

From July 2008 we have been asking our lawyer for the title to our land but we haven't received the same to date.

BANK OF AFRICA

James Gichuki from the above bank stated as follows:-

The bank account was opened in February 2009 by three lawyers,namely Mutinda, Onduso & Osiemo Advocates. We know that the money was from another account in our bank (from Omotii Advocates) account. We have come to produce these clear copies of the transactions in this account. (The statements are handed over to the secretary of the Committee).

ENYA ANTI CORRUPTION COMMISSION

Dr. J.P. MUTONYI, MBS- ACTING DIRECTOR KENYA ANTI CORRUPTION COMMISSION

This witness testified as follows:-

I am an acting director in the Kenya Anti-Corruption Commission. We have conducted investigations into the alleged procurement of Cemetery Land by Nairobi City Council.

From our investigations, we have established that Henry Kilonzi was approached by Maina Chege who was a Director of Naen Rech Ltd to sell the land in question to him. Naen Rech then purported to sell the land to Nairobi City Council even before the title passed to his Company. It is not legally possible to sell land that one does not own.

We have information showing that Maina Chege was used for furthering the whole fraud. This is best explained by Mr. Tabu Lwanga, the officer who has been gathering our evidence.

TABU LWANGA

The evidence by this witness was as hereunder:-

I have a chart here that illustrates the way the money from the Ministry of Local Government has been handled. It is marked W25.

That the Ministry of Local Government provided a total of Ksh. 290,694,000

That E.N.Omotti & Co.Advocates received Ksh.283, 000,000

That the Commissioner of Domestic Taxes received ksh.5, 664,000 for stamp duty

That E.N.Omotii's legal fees were ksh.2, 030,000.

That the interest generated by the amount received by E.N.Omotii was ksh.1, 800,000 and he retained the same.

That a joint account was opened and was operated by three advocates, namely, Odero Osiemo & Co.Advocates, P.C.Onduso &Co advocates and Alphonse Mutinda & Co.Advocates. A total of Ksh.281, 300,000 was deposited in this account.

That Alphonse Mutinda received Ksh135, 900,000 out of the above account

That P.C.Onduso transferred ksh.9, 600.000 to his KCB account

That Naen Rech Limited received ksh.9, 450,000

That Ksh.9, 300,000 went to Celhas Kamande Mwaura who introduced Henry Kilonzi to Alphonse Mutinda advocate.

That Odero Osiemo & Co Advocates received Ksh.117, 000,000

Part of the ksh.117, 000,000 received by Odero Osiemo was distributed as follows:-

Cibiya World Wide Ltd whose director is Newton Osiemo, a brother to Odero advocate received a total of Ksh.29, 860,000. He spent 20,000,000 in buying 5 acres of land from James Mwangi and 1,660,000 to buy a van from James Mithamo.

Janet Kabura Nguku who is the wife of Dr. Nguku, the Medical Officer of Health at Nairobi City Council received a total of Ksh.7, 000,000 out of which she used P.J. Kakad advocates to purchase a house at Mlolongo for ksh.4,000,000 and 2,000,000 to buy construction material for a house being built by Dr. Nguku at Mwingi.

Stephen Githinji Kamau received 8,000,000 on behalf of Alexander Musee who is the Deputy Director of Procurement in Nairobi City Council.

Peterson Gichana received ksh.10, 000,000 on behalf of Boniface Misera who is the director of procurement in the Ministry of Local Government.

Omotii advocate was given ksh.13, 000,000

Alice Mayaka ,a former permanent secretary in the ministry of National Heritage received ksh.4,000,000 and it has not been established why she got the money.

Item 14 – It has not been established why Moeckings General Contractors took the 2,000,000

Item 19 – Likewise it is not yet known why or on whose behalf Doreen A.Oyugi received ksh.3, 000,000.

The remaining money was withdrawn by cheques by Odero advocate.

Conclusion

Kenya Anti-corruption Commission is almost at the end of the investigations and it will recommend court charges in respect of all the people who were involved in this fraud.

The Commission further requests that it be given back the power to compel suspects to produce documents and to disclose all information to us.

EXECUTIVE SUMMARY

From the evidence adduced above, the committee has ascertained the following pertinent issues:-

- **The advice of the director of city planning on the tender documents and search for land for use as cemetery, important as it was, was not considered during the entire process of the procurement.**

- **The council does not appear to have established the existence or otherwise of contractual relationship between M/S Naen Rech Ltd and Musyoki Kilonzo before awarding the tender to the company or how such a relationship if it existed would have influenced the pricing of the land.**
- **The council was not diligent on establishing the status of the company before awarding the tender as required by law; no performance bond (KSH.14,160,000) appeared to have been secured before the award of the tender.**
- **The municipal council of Mavoko did not grant approval of change of user of the land in question from agricultural to cemetery.**
- **National Environmental Management Authority did not grant clearance on environmental impact once use of the land has changed.**
- **The fact that the area is dry grassland and is a wildlife migratory corridor was ignored during the procurement process.**
- **The site inspection showed that the land is situated at approximately 12kms west of Kitengela Township and borders Merciful Redeemer Children's home.**
- **The access of the land is rough road which is not all weather usable and is impassible during wet seasons.**
- **The soil is not red and it is shallow with a rocky base and cannot attain a depth of 6 feet.**
- **The land has not been marked with beacons and can be encroached.**
- **There are no amenities on the land eg water, telephone etc**

- **That Naen Rech Company Ltd purported to sell and pass a good title to the City Council of Nairobi when it indeed did not legally own the land.**
- **The transfer document was drawn by Omotii and Company Advocates and the alteration of the acreage from 48.63 hectares to 52.22 hectares was done by Alphonse Mutinda Advocates which is irregular. That this alteration was only a sham because the actual document of title actually reads 48.30 hectares.**
- **That Henry Kilonzi purports to have bought the land in question from Mariinie ole Tianti Makaita but there is no evidence of a sale agreement and the payment of purchase prize to the vendor.**
- **That the widow, Agnes Tirainti insists that Henry Kilonzi defrauded them of their land as it had only been leased to him.**
- **That for some unknown reasons the Town Clerk and the top officials in the Ministry of the Local Government decided to ignore the objections in relation to soil unsuitability and went ahead with the procurement of the land.**
- **That there is evidence of corruption because the vendor only got 110,000,000 and the rest has been shared among the key players.**
- **There is no evidence to show that Henry Kilonzi had appointed Naen Rech as his agent. The verbal claim by Maina Chege should not have been relied upon by the officials of the City Council.**
- **There was clear evidence from the Mayor and the Clerk of Mavoko Municipal Council that the City Council of Nairobi did not apply for change of user of land for the land in question.**

- **The officials in the City Council of Nairobi accepted a suspect valuation report which was only one page.**

GENERAL OBSERVATIONS

(1)ACQUISITION OF THE LAND

The Committee is in agreement that the evidence adduced by the first five witnesses, that is, Richard Ngangi, Bishop William Nkaangi, Buckson Semei, Agnes Nenka Marinie and Jeremiah Kaloi was credible.

These witnesses testified that they were not aware of any sale of the land in issue to Henry Kilonzi. In fact, they all stated that when confronted by them and asked why he was selling Marinie Ole Tianti Makaita's land, he told them that he was given the land by President Moi. When he appeared before the committee, Henry Kilonzi said he had bought the land from Marinie Ole Tiranti Makaita but he did not produce any sale agreement or proof of payment of the purchase price.

Hence there is credible evidence that points to Henry Kilonzi having fraudulently acquired the land from the deceased. The Committee believed the evidence adduced that as late as 2003, records at the land office registry in Ardhi house showed that the land still belonged to Marinie Ole Tiranti Makaita.

(2)SUITABILITY OF LAND AS CEMETERY

From the evidence adduced by officers from the Kenya Wildlife Services and the above six witnesses, the land is not suitable for a cemetery as it does not have red soil that is six feet deep, it is not easily accessible and it is on the animal migratory corridor.

There is further evidence from the City Planning department that is from, P.T. Odongo and J.K. Barreh that the land is not suitable for a cemetery.

The Maasai communities living around the area are also opposed to the land being used as a cemetery.

National Environmental Management Authority did not do any impact assessment as required by the law.

(3) PROCESS OF PROCURING THE LAND

Although there was a genuine need for another cemetery, some people saw this as an opportunity to milk money from the government. This was taken advantage of by some unscrupulous businessmen and corrupt government officials.

The committee observed that there is overwhelming evidence that the process of obtaining the land was a well thought out, premeditated plan to defraud the government of the public funds which seem to have involved the city council, ministry officials, businessmen and advocates.

Only KShs.110, 000,000/= went to the purported owner and the rest was distributed to the perpetrators of the fraud.

The committee also observed that the Ministry of Local Government was leading the process from the inception till the end.

The committee also observed that the price of the land was inflated and the government procedure on procurement was not followed. This was meant to assist the fraudsters in their mission.

(4) ILLEGALLITIES and IRREGULARITIES

The committee observed that there were a lot of illegalities and irregularities bordering on criminal acts. For example, instead of returning the Kshs. 175,000,000/= to the Treasury because suitable land had not been identified, a cheque was drawn in favour of Omotii and Company advocates for this amount in June 2008 without any

supporting documents and the same was forwarded to the lawyers in December 2008. It is to be noted that the advocates had not been appointed to act in this transaction by the time the cheque was drawn in their favour.

(5) KENYA ANTI CORRUPTION COMMISSION

The committee observed that there is need to amend the law to give KACC more power to summon witnesses and compel them to give evidence.

(6) MINISTRY OF LOCAL GOVERNMENT

The committee observed that the Local Government Ministry seemed not to have taken any action to mitigate any future fraud unlike the Lands Ministry where the minister undertook to make sure that any land transaction concerning government or a government agency and involving above twenty million(20,000.000) must be approved by him.

The committee further noted that the Minister for Local Government has not even gone to see the land. Besides, despite the knowledge of the fraud and public outcry of the misuse of funds the ministry has shown no real steps of trying to avoid a repetition. The Committee noted with concern that all the officers involved in the fraud are still in offices. It is also to be observed that most of the Ministry officials who appeared before the committee withheld vital evidence. In Parliament, the minister's statement was aimed at covering and exonerating his officers. (Refer to the hansard attached and marked W26).

SPECIFIC OBSERVATIONS

MAVOKO MUNICIPAL COUNCIL AND KENYA WILDLIFE SERVICE

It appears to the Committee that Mavoko Municipal Council was not involved in the process of buying the cemetery land and there is evidence that if their opinion had been sought

they would have guided and warned the City Council of Nairobi against buying the land. (Refer to the evidence of the Mayor, Town Clerk and the Town Planner of Mavoko Municipal Council). Kenya Wildlife Service officials were also clear in their evidence that the land is not suitable for a cemetery.

HENRY KILONZI

There is credible evidence to show that he illegally and fraudulently got the land from Marinie Ole Tiranti Makaita.

It is also clear that he was involved in the fraud and may have been used by the City Council of Nairobi officials and the Ministry of Local Government officials to perpetuate the fraud. This is proved by the fact that he had agreed to sell the land in question at Kshs. 800,000/=per acre totaling ksh.96, 000,000 but in the advocate's office the price was raised to Kshs. 110,000,000/=.

It is clear from the evidence that he got the land irregularly and illegally and defrauded the family of the late Marinie Ole Tiranti Makaita.

The committee further noted that Henry Kilonzi might have been used by the officials of the city council to inflate the price of the land so as to further the fraud they had hatched.

MAINA CHEGE

The committee observed that he played an integral part in the whole scam. It noted that he is one of the registered auctioneers with the City Council of Nairobi. His tentacles appeared to have spread further to the Ministry of Local Government.

The Committee is convinced that he is one of the main architect and implementer of this cemetery land buying project. He had intended to defraud the public of a lot of money by inflating the purchase price but other players who wanted to have the same money outsmarted him. He

instructed three lawyers to protect his interest but he still has not received the money he had hoped for. The Committee therefore questioned his motive of bringing on board two lawyers to watch over other lawyers he had contracted.

CEPHAS K. MWAURA

The committee noted that Celphas Mwaura introduced Henry Kilonzi to Alphonse Mutinda advocate. This advocate then arranged for Mwaura, Maina Chege and Henry Kilonzi to meet in his office. The committee has received credible evidence that Cephas Mwaura was paid Kshs. 9,300,000/= after the procurement of the cemetery land. He was therefore directly involved in the fraud. Why else would he be receiving this money and he did not own the land?

ALPHONCE MUTINDA ADVOCATE

The Committee has received actual evidence that this advocate received Kshs. 135,000,000/after the procurement of the land in issue. Even assuming he was the lawyer for the vendor, he should only have received ksh.110, 000,000 for Henry Kilonzi and not ksh.135, 000,000. He should disclose who received the balance of the money.

The committee noted that he played more than the role of an advocate in respect of this transaction. He arranged a meeting of Maina Chege, Mwaura and Henry Kilonzi in his office.

The Committee is convinced that he was a facilitator of the fraud and distributor of money fraudulently obtained.

E. N. OMOTII ADVOCATE

The committee noted that this advocate has connections both in the City Council of Nairobi and the Ministry of Local Government.

The committee further observed that he did not question why Naen Rech Co. Ltd could win the tender when it had no land to sell. This was professional negligence. The committee noted that he failed in his duty when he did not disclose that he was not dealing with the person who won the tender in this particular transaction. It is also questionable why he drew the agreement of sale between Henry Kilonzi and the City Council of Nairobi while there was no evidence to show that Naen Rech Co.Ltd was legally appointed as an agent of Henry Kilonzi.

The Committee also noted that he banked Kshs. 283,000,000/= in his bank account and this money earned an interest of Kshs. 1,800,000/= which he retained on top of the Kshs. 13,000,000/= given back to him by Osiemo and Co. Advocates and the Kshs. 2,030,000/= he had retained as legal fees.

ODERO OSIEMO ADVOCATE

The Committee observed that he is the distributor of money to various accomplices and also hides behind Cibiya World Wide ltd. whose director is his brother Newton Osiemo.

The committee noted that he was one of the advocates who opened a joint account into which Kshs. 281,300,000/= was deposited. He thereafter received money he has not accounted for and was therefore clearly involved in the fraud.

He should be investigated fully and be made to refund ksh.117, 000,000 or disclose for what purpose he has retained the money.

MINISTRY OF LANDS

MINISTER

The committee observed that Hon. James Orenge had no knowledge of the transaction. When the matter came to his attention, he ordered that all land transactions involving the

government or a government agency of over twenty million (Kshs. 20,000,000) must be approved by him. He also advised the Committee that the procurement may be nullified on account of the altered transfer document. He undertook to place a caveat.

COLLECTOR OF STAMP DUTY

The committee observed that he collected stamp duty on the sale prize in accordance with the law and therefore he did his work diligently. The committee noted that the City Council of Nairobi could have asked for exemption but they did not apply for it.

REGISTRAR OF LANDS

The committee noted that she accepted the altered transfer document and also facilitated the process within a day.

The Committee wondered if she compared the sale agreement and the transfer document. The transfer originally read 48.562 hectares and it was altered to read 52.22 hectares and yet the title deed issued reads 48.30 hectares. She failed to explain these anomalies to the Committee and this led to the conclusion that she was compromised and assisted in the fraud.

COMMISSIONER OF LAND

The committee noted that he issued the title deed whose acreage was different from the transfer document and the sale agreement.

It was noted that he did not question the validity of the valuation document and seemed to give credibility to the fraudulent valuation by allowing his officers to accept the stamp duty.

It was also noted that he approved sub division of the land even after knowing the process was not above board.

CITY COUNCIL OF NAIROBI

JOHN GAKUO

The committee noted that he did not cooperate with it at all during his two interviews and failed to answer any questions put to him. Instead he choose to conveniently hide behind the procurement and tender committee.

He feigned ignorance in the whole matter and wanted the committee to believe his only guilt is incompetence and that he never participated. This is negated by the fact that he held onto the memorandum which advised the land was not suitable for a cemetery. He had also originally denied holding a meeting to discuss the procurement of the cemetery land only admitted it in his second appearance before the Committee when he was confronted with the evidence adduced by one of his officers.

The committee further noted that he failed to protect the City Council of Nairobi as its Chief Executive Officer. In fact, after the allegations of corruption in the process came to his attention he chose to do nothing about it.

The committee noted and is convinced that he is part and parcel of the scandal.

PROCUREMENT COMMITTEE FOR NAIROBI CITY COUNCIL

The committee noted that they played a critical role in implementation of the fraud and totally ignored all safeguard procedures in the Procurement Act.

The deputy clerk as the chair of the tender committee confirmed that the Town Clerk withheld the memoranda from the Town Planner pointing to the fact that the land was

not suitable for a cemetery but even after he got the information he took no action to arrest the situation.

The committee noted that the Treasurer is part of the cover up as he is a member of the committee that oversaw the fraud and never raised a finger.

The committee noted that the Technical Evaluation committee headed by Mary Ngethe chose to ignore the criteria set for a cemetery land and went further to clear the land as suitable when they clearly knew it was not. One of their own members (Mr. P.T. Odongo) raised the concern that the land was not suitable for a cemetery but they still gave it a clean bill of health. Besides, J K Barreh also raised the concern about the same but the chairman ignored both of them.

MAYOR GEOFFRY MAJIWA

The committee noted that he was aware about the complaints by some members of the committee but ignored their complaints. He claimed that he was misinformed.

The committee noted that his claim was that he signed as a ceremonial mayor but the Committee knows he is an executive Mayor and should have questioned why so much money was being spent on a rocky land that is not suitable for a cemetery.

MARY NGETHE, DIRECTOR LEGAL AFFAIRS

The committee noted that she failed totally as a legal adviser and is one of the major players in this fraud and her involvement was noted throughout the whole process.

It was noted that she had been working in cahoots with the Town Clerk and the ministry of local government officials to the extent that the local government ministry excluded Edith Torome, the legal Counsel from the entire process.

It was also noted that she failed to look at all documents before the process was complete to ascertain that they were proper and above board.

It is to be noted that on 7th August 2008, N. W. Otido wrote a letter to the chief valuer in the lands ministry requesting for a valuation of L.R No. 14759 but she wrote another one on 4th November to the same valuer asking for a valuation for the same land. Thereafter, a forged valuation was received by the City Council of Nairobi.

The Committee believes she knew about this forged valuation and that is why she accepted it without raising any objections.

KARISA IHA, DEPUTY DIRECTOR LEGAL AFFAIRS

At the time of procurement of the cemetery land he was the deputy Director of legal affairs and consequently he was fully involved in the process. The committee noted that he was obliged to highlight any anomalies he might have found but did not do so. This negligence of duty enabled the fraud to be perpetrated.

DR. NGUKU-MEDICAL OFFICER OF HEALTH

The committee noted that he knew the requirements for a cemetery land but did not insist on them and further declared the land to be suitable knowing very well it was not. Obviously he was compromised and the Committee has credible evidence that he was given Kshs. 7,000,000/= after the fraudulent deal was concluded.

PETER M. KIBINDA, DIRECTOR CITY PLANNING

The committee noted that this is one of the few officials in Nairobi City Council who objected to the procurement of the land in issue. He and two other officers, P.T. Odongo and Barreh wrote a memo to the town clerk stating the land was unsuitable for a cemetery.

EDITH TOROME-LEGAL COUNSEL MINISTRY OF LOCAL GOVERNMENT

The committee noted that initially she was involved in the meeting at the ministry of finance to request for the funds, thereafter she was specifically excluded from the transaction by the Permanent Secretary in the ministry of Local Government.

Her legal advice on the procurement was not sought and soon thereafter she was transferred to another ministry.

H.S.CHAVERA, CHIEF FINANCE OFFICER

The committee noted that there is factual evidence that he raised an objection on a letter dated 18th Dec to the Permanent Secretary Local Government about the defective process and suggested to him that the state counsel should peruse the documents before the procurement process was carried out. The Permanent Secretary in the Ministry of Local Government ignored his objections and specifically excluded the legal officer from the process.

It was noted that he wrote the cheque dated 30th June 2008 and there were no supporting documents for the same. This was not in tandem with his earlier objections.

The committee noted that the Chief Finance Officer seemed to be under intense pressure to write and release the cheque.

BONIFACE MISERA, DIRECTOR OF PROCUREMENT

The committee noted that he failed in his duties of ensuring that the government regulations are followed and there is

evidence he was compromised and he actually received ksh.10, 000,000 after the fraudulent deal.

REUBEN K. ROTICH, SENIOR DEPUTY SECRETARY

There is factual evidence that he held meetings with the then Town Clerk and his officials and even after of the defective tender documents and the unsuitability of the land, he still facilitated the procurement.

The committee is convinced that he was involved in the fraud.

SAMMY KIRUI, PERMANENT SECRETARY

The committee observed that he took direct action by pushing the officers in City Council of Nairobi to conclude the process within five days (see his letter dated 30th October 2008 and marked W18). There is evidence that he was involved in the process from the beginning to the end.

The committee also noted that the Kshs. 108,000,000/= sought as the additional purchase price was exactly the balance required in the fraudulent purchase. The committee therefore wondered whether the officials involved knew exactly the amount they needed long before the tender was advertised. This is enough evidence that the fraud was hatched long before the land negotiations began.

The permanent secretary himself admitted that the law was not followed as the cheque of ksh. 175,000,000 was written without supporting document which is contrary to the law and to government regulations.

It was also noted that to date he has not visited the land and that he deliberately sidelined the state counsel whose responsibility was to advise the ministry on legal issues such as land procurement.

DEPUTY PRIME MINISTER AND MINISTER FOR LOCAL GOVERNMENT

The committee noted that the minister is executive and is expected to be briefed or to have known about the current procurement of land for cemetery.

The committee is further concerned that the minister has not taken any action in this matter against those who were involved despite the fact that his attention has been drawn to it.

The Committee did not believe him when he said that his Permanent Secretary did not update him on the procurement of the cemetery land.

The Committee therefore observed that he failed to ensure proper procedures were followed and should take political responsibility.

RECOMMENDATIONS

From the evidence adduced before the Committee, it is clear that the process of the procurement of the cemetery land by the City Council of Nairobi is riddled with corruption and illegality and all officers involved should be relieved of their duties and charged in court for the appropriate offences.

1. MR. SAMMY KIRUI, PERMANENT SECRETARY IN THE MINISTRY OF LOCAL GOVERNMENT

As the Chief Executive and Accounting officer he was shown to be personally involved in the process to the extent of ignoring the advice given by his officers. The Committee has enough evidence to show that he was one of the main architects of the fraud.

He was informed by the Chief Finance Officer that the tender documents were defective and the legal officer should examine them but he ignored this advice. (See his remarks on attached letter dated 17th Dec.2008 and marked W3)

He caused a cheque of Kshs. 175,000,000/= to be drawn on 30th June 2008 to Omotii & Company advocates and this was irregular for the following reasons:

- a) He was supposed to return the money to the Treasury as the land to be purchased had not been identified.**
- b) There were no supporting documents to warrant issuing the cheque as required by government regulations.**
- c) The advocate had not been instructed to act for the City Council of Nairobi in respect of procurement of this particular land.**

On 30th October 2008 he wrote a letter to the Town Clerk asking him to conclude the procurement of the cemetery land within five days otherwise the ministry would take over the process. (See his attached letter dated 30th October 2008 and marked W18)

Evidently he had a lot of interest in the matter and the Committee recommends that he steps down to allow Kenya Anti Corruption Commission to carry out thorough investigations into the fraud.

2. MR. R. K. ROTICH, THE SENIOR DEPUTY SECRETARY IN THE MINISTRY OF LOCAL GOVERNMENT

The Committee received enough evidence to show he played a major role in the fraud. He chaired the meeting of 5th June 2008 from which the procurement process started. (See attachment W2). He forwarded the cheques of ksh.175, 000.000 and of ksh.108, 000,000 to Mary Ngethe who in turn

sent them to Omotii & Company advocates.) Clearly he was involved in the fraud and it is recommended that he be interdicted and be investigated.

3. MR. BONIFACE MISERA- DIRECTOR OF PROCUREMENT

From the evidence the Committee received, it is clear that the procurement committee in the Ministry was very involved in the process of acquiring the cemetery land. Consequently there is no doubt that Boniface Misera was involved in this fraud. Further more there is factual evidence that he received ten million (ksh.10, 000,000) after the fraudulent deal. The Committee therefore recommends that he be interdicted, investigated and charged.

4. MR. H. S. CHAVERA, THE CHIEF FINANCE OFFICER.

The Committee noted that he actually wrote to the Permanent Secretary, Ministry of Local Government, Mr. Sammy Kirui, raising his concerns in respect of the defective tender documents. His concerns were ignored and it is possible he was coerced into writing and releasing the cheques. The Committee therefore does not recommend any adverse action against him.

5. EDITH TOROME, THE STATE COUNSEL was evidently precluded from the procurement transactions. She is therefore not responsible for the fraud and no adverse action should be taken against her.

6. THE DEPUTY PRIME MINISTER AND MINISTER FOR LOCAL GOVERNMENT, HON. MUSALIA MUDAVADI

The Deputy Prime Minister should take full responsibility since he is an executive minister and cannot feign ignorance. The Committee finds his inaction inexcusable and if he was not truly involved in the fraud, he should have taken action

against his Permanent Secretary and all those involved in defrauding the public. At the time of writing this report, there is evidence that he has not even gone to visit the site to ascertain its suitability or otherwise.

It is recommended that the minister steps down to allow thorough investigations into the fraud.

NAIROBI CITY COUNCIL

7. MR. JOHN GAKUO, THE FORMER TOWN CLERK,

As noted above, the former town clerk has been very obstructive and totally unhelpful to the committee. When he first appeared before the Committee he hid vital information which was revealed by some of his officers in their evidence. He was recalled and confronted with the evidence and it is only then that he reluctantly admitted some of the evidence. The Committee is convinced he is one of the architects of this fraud. He withheld the memo written to him by the Town Planner, Peter Kibinda which stated that the land was not suitable for a cemetery. The Committee finds him totally and directly involved in the fraud.

The Committee recommends that he should not be allowed to hold any public office and that Kenya Anti Corruption Commission should investigate to determine his actual involvement.

8. MR. N. OTIDO, THE DEPUTY TOWN CLERK.

He was the Chairman of the tender committee and a signatory in all land transactions. The Tender committee awarded the irregular tender and ignored the written correspondence dated 11th November 2008 which questioned the suitability of the land as a cemetery. Though he had power to cancel the process or put it into abeyance, he didn't do so and actually went ahead to sign the sale

agreement. Though he is retired, the he should be investigated and charged with the appropriate offence.

9. DR. NGUKU, MEDICAL OFFICER OF HEALTH

He illegally and irregularly confirmed that he was satisfied by the suitability of the land in question.

This was false and fraudulent because there is factual evidence to show that the land has no red soil, it is rocky and is not easily accessible. Further evidence has shown he certified the land as suitable due to financial gain. It has been proven that he received Kshs.7, 000,000/= after the conclusion of the fraudulent procurement of the land.

The Committee recommends that he be interdicted, arrested and charged.

10. G. K. NJAMURA, DIRECTOR OF PROCUREMENT

Evidently the Procurement Committee, whose director was G.K. Njamura was very involved in the procurement of the Cemetery land. There is evidence to show he oversaw and facilitated the irregular and illegal process for financial gain. There is actual evidence that he received four million (ksh.4, 000,000) after the fraudulent deal. The Committee recommends that he be interdicted, charged and be investigated further.

11. EVALUATION TEAM chaired by Mary Ngethe endorsed a false report which was the basis of the whole fraud. This Committee was comprised of David Wanjohi, Tom Odongo, I Ngacha, Akotha Gitonga, M. Ouko and Alex Musee. The Committee recommends that all these officers with the exception of Tom Odongo be interdicted, investigated and charged with appropriate offences.

11(a) TOM ODONGO

The Committee notes that he is one of the officers from the planning department that wrote a memo to the Town Clerk stating that the land proposed to be bought was not suitable for a cemetery. (See his memo dated 11th November 2008 and marked W16). The Committee therefore commends his effort and recommends that no adverse action should be taken against him.

12. MARY NGETHE, DIRECTOR OF LEGAL DEPARTMENT

The Committee noted with a lot of concern that Mary Ngethe failed to protect the interest of the City Council of Nairobi. Evidently she was involved in the fraud from the beginning to the end. She attended the meeting of 5th June 2008 whereby the process of acquiring the current land started and she was taking the minutes.

She called the Ministry of Lands to inform them that no action should be taken against the letter of N. Otido which had requested for a valuation of the current land (see the Ministry's letter of 26th September 2008 and marked W5). Soon thereafter she wrote a letter on 4th November 2008 requesting for valuation on the same land. (Letter is marked W6). It is to be noted here that on 10th November 2008, she received a one page letter (marked W10) purporting to be valuation of the Mavoko land and which she accepted without raising any concerns. This letter turned out to be a forgery.

She chaired the Technical Committee and ignored the observations of her colleagues in the planning department when they raised the issue of the unsuitability of the land as a cemetery.

She appointed lawyer Omotii & Company advocates to act for Nairobi City Council in the fraudulent procurement of the cemetery land and she frustrated the inclusion of the state

counsel at the Ministry of Local Government in the transaction.

As the legal Director, she failed in her duties as she did not ensure that the performance bond of ksh.14, 160,000 was executed and that all the documents relied on by the Council were genuine.

The Committee is convinced she played a major role in perpetrating the fraud. It is recommended that she be interdicted and be investigated further.

13. KARISA IHA, DEPUTY DIRECTOR LEGAL AFFAIRS

He was not in the procurement Committee but there is evidence to show he was involved in the procurement process. He should have acted when he realized there was impropriety but he did nothing. He should be interdicted and investigated.

14. MR. ALEXANDER MUSEE: DEPUTY DIRECTOR PROCUREMENT

There is evidence he was a member of the Committee that deliberately prepared defective tender documents thus facilitating the fraud. Further evidence reveal that he received Kshs. 8,000,000/= after the process was concluded. The committee recommends he be interdicted, investigated and charged.

15. COUNCILLOR MAJIWA, HIS WORSHIP THE MAYOR OF NAIROBI CITY,

As a signatory, he signed the sale agreement and the transfer document for the mavoko land which is unsuitable for a cemetery. He claimed he was misinformed when he signed the documents but the Committee did not believe him. He further claimed the Permanent Secretary was micro-managing the whole process.

The Mayor should have shown more interest in the transaction of this magnitude. He should take political responsibility and step down.

16. MAINA CHEGE

He is one of the directors of Naen Rech Co.ltd which purported to sell land to Nairobi city Council when the company had not acquired any title to the land. Maina Chege, Celphas Mwaura, Henry Kilonzi and Alphonse Mutinda advocate met and hatched the plan to defraud the public and then worked with the Ministry of Local government officials and the Nairobi City Council officials to realize the fraud.

There is credible evidence to warrant them to be investigated for obtaining money under false pretenses and fraud.

Their assets should be seized to recover public funds.

17. HENRY KILONZI should be further investigated for obtaining the land fraudulently and illegally and subsequently selling it fraudulently.

18. CELPHAS KAMANDE MWAURA, there is actual evidence that he received Kshs. 9,300,000/= after the fraudulent procurement and it is recommended that he be charged with the appropriate offence.

19. E. N. OMOTII ADVOCATE, ODERO OSIEMO ADVOCATE, P.C. ONDUSO ADVOCATE AND ALPHONCE MUTINDA ADVOCATE.

There is credible evidence that all these lawyers facilitated this fraud and illegal transaction in various capacities through collaboration with various government officials. They all received huge sums of money which they have not accounted for and part of which they have distributed to the accomplices.

Odero Osiemo has personally received ksh.29, 860,000 and has used ksh.20, 000,000 to buy 5 acres of land at Karen and

has bought a van for 1,660,000. The owner of the land and the van have confirmed the transactions.

P.C ONDUSO received ksh.9, 600,000 and banked it in his Kenya Commercial bank account.

ALPHONCE MUTINDA received ksh.135, 000,000 and since it has been proved that this procurement was fraudulent he should be made to disclose why and on whose behalf he received this money.

Clearly then all these lawyers should be investigated by Kenya Anti Corruption Commission, Kenya Law Society and Kenya Revenue Authority.

The property they have purchased using public funds should be confiscated and sold to recover the funds. The Law society should take the appropriate action.

Where fraud is established, like in the present procurement, lawyers should not be allowed to withhold information citing advocate client privilege.

20. The Committee has evidence that ALICE MAYAKA, a former permanent secretary in the Ministry of National Heritage received ksh.4,000,000, DOREEN A.OYUGI received ksh.3,000,000, MOECKINGS GENERAL CONTRACTORS received ksh.2,000,000 and all these recipients should be investigated and charged with the appropriate offences. CIBIYA WORLD WIDE LIMITED, whose director is Newton Osiemo, a brother to Odero Osiemo advocate and which received 29,860,000 should be thoroughly investigated and charged.

All other persons who will be proved to have received money after the fraudulent procurement of the cemetery land should be investigated and charged with the appropriate offences.

21. All those involved in this financial scandal should be reported to Kenya Revenue Authority so that the authority may take the appropriate action.

22. There is need to amend and strength the following:-

- a) Law on restitution.**
- b) Local Government Act to ensure that officials do not misuse public funds like they did in the present scandal.**
- c) Kenya Anti-Corruption Commission should be strengthened so that it has power to compel witnesses to give information that can be used in court.**

Mr. Speaker Sir,

The Report of the Committee was adopted in a committee sitting held on 2010.

Mr. Speaker Sir,

On behalf of the Committee, it is now my pleasant duty to lay on the Table of the House the report of the Committee on the procurement of cemetery land by Nairobi City Council, pursuant to provisions of Standing Order 181(3).

Hon. SHAKEEL SHABBIR, MP
Chairman, Select Committee on Local Authorities

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