



Kinuthia & 2 others v Anyanga & 4 others (Environment and Land Case Civil Suit 160 of 2011) [2022] KEELC 3997 (KLR) (28 July 2022) (Judgment)

Neutral citation: [2022] KEELC 3997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 160 OF 2011**

LC KOMINGOI, J

JULY 28, 2022

BETWEEN

**HIRAM BERE KINUTHIA 1ST PLAINTIFF
ELIZABETH WANJIRU NGIGI 2ND PLAINTIFF
ROBERT MATATHIA NGIGI 3RD PLAINTIFF**

AND

**EDICK OMONDI ANYANGA 1ST DEFENDANT
ANNE ANYANGA 2ND DEFENDANT
THE REGISTRAR OF TITLES 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT
COMMISSIONER OF LANDS 5TH DEFENDANT**

JUDGMENT

1. The Plaintiffs instituted this suit *vide* the plaint dated April 11, 2011 which was amended on August 23, 2011, and re-amended pursuant to this court's orders of November 26, 2014. They pray for judgement against the Defendants jointly and severally for:-
 - a) A declaration that the registration of the suit property known as L.R no 25763 (formerly LR Number 28/14) in the names of the 1st and 2nd Defendant was and is null and void.
 - b) An order directing the 1st and 2nd Defendants to deliver the Grant of Title improperly issued to them for cancellation by the 3rd Defendant and the 5th Defendant.
 - c) An order directing the 3rd Defendant to cancel the Grant of Titles issued to the 1st and 2nd Defendants in respect of L.R no 25763(formerly LR Number 28/14).



- d) An order directing the 3rd Defendant to comply with the order made by this court on March 16, 2000.
 - e) In the alternative, an order directing that the title to the property does vest in the rightful owners, the Plaintiffs herein.
 - f) In further alternative, the Plaintiffs' claim against the Defendants, the prevailing market value of the land at the time of trial in the sum of ksh 160,000,000/=.
 - g) Mesne profits from November 28, 2001 on a sum found to be due until payment in full.
 - h) Costs of this suit and interest thereon.
 - i) General damages.
2. Pursuant to this court's ruling of March 8, 2012, the 2nd and 3rd Plaintiffs were enjoined and they filed the Notice of appointment of Advocates dated November 16, 2012 filed through the firm of Mwaniki Gitau & Company Advocates.
 3. The Plaintiffs averred that at all material times, the 1st Plaintiff and one Francis Ngigi Matathia (now deceased) were the registered joint proprietors of all that piece of land known as L.R Number 28/6 situated in Nairobi and comprised of approximately 70 acres and that they held it for an estate in fee simple as joint tenants in common in equal shares.
 4. They further averred that about 1983, the 1st Plaintiff together with the deceased caused the suit property to be subdivided and submitted a subdivision scheme for approval by the Commissioner of Lands who approved it by a letter dated July 25, 1983 subject to certain express conditions. They stated that the City Council of Nairobi approved the subdivision scheme by a letter dated June 22, 1984 subject to certain express conditions.
 5. The Plaintiffs averred that one of the conditions for approval was that the 1st Plaintiff and the deceased would surrender plot number L.R Number 28/14 which was a subdivision of LR Number 28/6 free of cost for public use as a nursery school but they were dissatisfied with the said condition and they successfully appealed against it and the position was confirmed by the Commissioner of Lands *vide* the letters dated July 10, 1984 and May 12, 1985.
 6. They contended that another condition for approval was that they surrender the subdivision earmarked as a road reserve as per the subdivision scheme and they surrendered plot number LR 28/6/11 and LR no 14702/1 in compliance. The Plaintiffs contended that on September 14, 2009, they discovered that a certificate of title in respect of the suit property had been issued to one Joseph Kinyanjui Mwai without the knowledge, consent and/or authority of the 1st Plaintiff and the deceased. It is their case that 1st Plaintiff and the deceased instituted proceedings against the 3rd Defendant in Miscellaneous Civil Case no 1291 of 1999, *Republic v The Registrar of Titles*, seeking to quash the Certificate of Title issued to the said Joseph Kinyanjui Mwai and the title was quashed *vide* the court's order issued on March 16, 2000.
 7. They contended that though served with the said orders, the 3rd Defendant refused to issue the 1st Plaintiff and the deceased with a Certificate of Title yet they continued to pay rates to Nairobi City Council. They further stated that in November 2005, the council declined to accept payments from them on the basis that the property belongs to the 1st and 2nd Defendants. The 1st Plaintiff's case is that stated that upon conducting a search on the title, he discovered that the 1st and 2nd Defendants acquired title to the suit property through a grant issued to them by the Government for Kenya.



8. The Plaintiffs case is that the 1st and 2nd Defendants working in cahoots with the 3rd and 5th Defendants or officers working at the Ministry of Lands devised a scheme to forcibly acquire private land. They accused the Defendants of fraud, misrepresentation and breach of trust and gave the particulars of the alleged breach of trust, fraud and misrepresentation.
9. The Plaintiffs also averred that the 1st Plaintiff and the deceased filed a Notice of Motion seeking the 3rd Defendant to appear before court in Miscellaneous Civil Case no 1291 of 1999, *Republic v The Registrar of Titles* to show cause why the title was irregularly issued to the 1st and 2nd Defendants in contravention of orders of March 16, 2000 and by a ruling delivered on December 9, 2010, the court directed the Plaintiff to file a fresh suit against the Defendants herein.

The 1st and 2nd Defendant's case

10. The 1st and 2nd Defendants filed the Notice of appointment of Advocates dated July 18, 2011 through M/S Ochieng Onyango & Ohaga Advocates. They filed a joint statement of defence dated August 18, 2011 and amended it on September 19, 2011 by introducing a counterclaim. They denied the allegations contained in the plaint and contended that they, trading as Anocma Enterprises Limited, sometime in the year 2000, made an application to the Commissioner of Lands for the allocation of the property LR no 28/14, Nairobi, then available as unallocated land and free for alienation.
11. They averred that they were allocated the suit land measuring 1.597 hectares by the Commissioner of Lands on or about September 4, 2001 for a term of 99 years starting from September 1, 2001 subject to payment of stand premium and annual rent which conditions they met. They also contended that pursuant to the allocation, the suit property was resurveyed and on or about November 26, 2001, title in respect to the suit property was issued to them being Grant Number IR 87523 under LR no 25763 formerly L.R no 28/14 and under Deed Plan no 238203. They stated that they are in control of the suit land since then and they have been paying rates.
12. In their counterclaim, they accused the Plaintiffs in the main suit who are the Defendants in the counterclaim of fraudulently and illegally interfering with their rights to the suit property. In their counterclaim they seek:-
 - a) A declaration that the title issued on November 26, 2001 in respect of the suit property in favour of the Plaintiffs being Grant Number IR 87523 under LR no 25763 formerly LR no 28/14 under deed plan no 238203 is lawful and valid.
 - b) A permanent injunction be issued restraining the Defendants by themselves, agents, employees, servants, workers, hirelings and or any other person acting on their behalf from interfering in any way whatsoever with the Plaintiffs' rights and or benefits in any way over the suit property.
 - c) General damages.
 - d) Mesne profits from 2011.
 - e) Interest on (c) and (d) above.

The 3rd, 4th and 5th Defendant's case.

13. They filed a joint statement of defence dated June 4, 2012 and amended on February 20, 2015. They denied the allegations against them contained in the plaint. The 3rd and 5th admitted that in 1983, the



then registered proprietors of L.R 28/6 (the 1st Plaintiff and Francis Ngugi Matathia (deceased)) applied for its subdivision into a number of plots.

14. They averred that certain conditions were imposed by the Government as recommended by the City Council of Nairobi and that without prejudice, the said conditions were provisional and subject to compliance by the registered owners to the satisfaction of the city council of Nairobi. They stated that the conditions included *inter alia*;
 - i. That L.R 28/14 would be surrendered to the government free of cost.
 - ii. That the public purpose plot would be surrendered to the City Council free of cost.
15. They averred that the scheme of subdivision was finalized and titles issued to the registered owners and the suit property was left intact as government land pursuant to the implementation of the subdivision scheme. They further averred that there is no procedure for lodging an appeal against subdivision conditions and that none was lodged. They stated that they were never aware of Miscellaneous Civil Case no 1291 of 1999 *Republic v The Registrar of Titles*. They also disputed the existence, service and registration of the court order allegedly issued on March 16, 2000.
16. The 3rd and 5th Defendants admitted that the Commissioner of Lands *vide* the letter of allotment dated September 4, 2001 allocated the suit land to the 1st and 2nd Defendants trading as Anocma Enterprises and the Director of Surveys remitted Deed Plan no 238203 in respect of L.R 25763 and a grant was registered as IR 87423 in favour of the 1st and 2nd Defendants.
17. It is their case that the Plaintiffs have consistently committed fraudulent acts intended to secure their registration over the suit land (LR 28/14). He particularized the alleged acts of fraud against the Plaintiffs.

The 1st Plaintiff's reply to the 1st and 2nd Defendant's amended statement of defence and defence to the counterclaim.

18. It is dated April 24, 2015. The 1st Plaintiff joined issue with the 1st and 2nd Defendants in their defence and reiterated the contents of the re-amended plaint. He denied allegations against him in the counterclaim and averred that any proposed approvals for subdivision submitted by the 1st Defendant to the City Council of Nairobi were submitted by the 1st Defendant in his capacity as co-owner of the suit property.

The 1st and 2nd Plaintiff's Reply to the 1st and 2nd Defendants amended statement of defence and defence to the counterclaim.

19. It is dated July 3, 2015. The 1st and 2nd Plaintiffs denied allegations contained in the 1st and 2nd Defendants counterclaim and contended that the property known as LR 28/14 is private land and as such was incapable of allocation to anyone including the 1st and 2nd Defendants.

Evidence of the Plaintiff

20. PW1, Charles Gitonga Kinuthia, the 1st Plaintiff's son and co-administrator of his estate, testified on March 28, 2019. He told the court that the prayers in the plaint are his late father's claim against the Defendants. His witness statement dated 16th January 2019 was adopted as part of his evidence in chief. He stated that his father Hiram Bere Kinuthia (deceased) and one Francis Ngugi Matathia (deceased) were joint proprietors of all that piece of land known as L.R Number 28/6 situated at Garden Estate in Nairobi and comprised of approximately 70 acres and that they held it as tenants in common with equal shares.



21. He stated that in 1983, his late father and the Late Francis Ngigi Matathia caused LR no 28/6 to be subdivided and submitted a subdivision scheme for approval to the Commissioner of Lands who approved it by a letter dated 25th July 1983 and the City Council of Nairobi which approved it by a letter dated 22nd June 1984 subject to certain conditions.
22. He stated that one of the conditions for approval was that his late father and late Francis Ngigi Matathia would surrender plot number L.R Number 28/14 which was a subdivision of LR Number 28/6 free of cost for public use as a nursery school but they were dissatisfied with the said condition and they successfully appealed against the said decision and the position was confirmed by the Commissioner of Lands *vide* the letters dated July 10, 1984 and May 12, 1985.
23. He stated that another condition for approval was that they would surrender the subdivision earmarked as a road reserve as per the subdivision scheme and *vide* two deeds of surrender dated 7th November 1988, they surrendered plot number LR 28/6/11 and LR no 14702/1 in compliance.
24. He stated that on September 14, 1999, his late father came across an advertisement in the East African Standard Newspaper for the sale of a four (4) acre piece of land at Garden Estate to be used as a Nursery School. He added that his late father posed as a prospective buyer and discovered that the property being offered for sale was his property being LR no 28/14 which was a subdivision of LR no 28/6 and that a certificate of title had been issued to one Joseph Kinyanjui Mwai without his consent and/or authority. He stated that the Plaintiff and the deceased instituted Judicial Review proceedings against the Registrar of Titles in Miscellaneous Civil Case no 1291 of 1999, *Republic v The Registrar of Titles*, seeking to quash the certificate of title issued to the said Joseph Kinyanjui Mwai and the title was quashed *vide* the court's order issued on March 16, 2000.
25. He stated also stated that the 3rd Defendant refused to issue the Plaintiff and his co-owner with a certificate of title but they continued to pay rates to Nairobi City Council. He stated that in November 2005, the council declined to accept payments from the Plaintiff on the basis that the property belongs to the 1st and 2nd Defendants. He further stated that upon conducting a search on the title, he discovered that the 1st and 2nd Defendants acquired title to the suit property through a grant issued to them by the Government of Kenya. He alleged that the 1st -3rd Defendants fraudulently colluded in acquisition of the said title. He averred that he filed an application in Miscellaneous Civil Case no 1291 of 1999, *Republic v The Registrar of Titles* seeking the 3rd Defendant to show cause why the title was irregularly issued to the 1st and 2nd Defendants in contravention of orders of 16th March 2000 and by a ruling delivered on December 9, 2010, the court directed the Plaintiff to file a fresh suit against the Defendants herein.
26. When he was cross-examined, he stated that that there was an application for subdivision by the Plaintiff and that it may not be in court but it exists. He also stated that Racom Limited was the Plaintiff's surveyor but he did not have any instructions to the said surveyors from the Plaintiffs. When referred to the deed plan annexed to the latter dated August 28, 1985, and condition (iv) contained in the letter dated July 25, 1983 addressed to Racom Limited by the Commissioner of lands, He stated that the colour blue does not show on the deed plan. When referred to condition (vii), he stated that the deed plan is not shaded red. When referred to the letter dated June 22, 1984 addressed to the Commissioner of Lands by Director of City Planning stating that he had no objection to the subdivision scheme of LR 28/6 provided the proprietors surrendered the plots marked red and blue free of cost, he stated that the properties marked blue and red do not show in their documents. When referred to the letter dated July 10, 1984 addressed to the 1st Plaintiff by the Commissioner of Lands stating that the plot earmarked for public purpose will not be surrendered to the government free of charge, he stated that the said letter is copied to the Director of City Planning by hand and the said alteration is not counter signed.



27. He stated that they did not have a problem with the proposed conditions set by the Commissioner of Lands but their challenge was giving up LR no 28/14 free of cost. He further stated that the Plaintiffs requested to be allowed to develop it but the letter is not in court. He added that the Plaintiffs never surrendered LR no 28/14 to the Government of Kenya.
28. He stated that in 1988-89, mr Joseph Mwai tried to acquire LR no 28/14 fraudulently but he did not succeed. He added that the said Mwai advertised the suit property for sale in the East African Standard classifieds. When referred to the said advertisement dated September 1999, he stated that mr Mwai's name does not appear therein. He further stated that they were directed to the said Joseph Mwai who took them to the land but they have nothing to show that they met him.
29. When referred to HCCC 1291 /1999, he stated that he cannot tell if Joseph Kinyanjui Mwai was served with the said proceedings and if he appeared. When referred to the orders issued therein on 16th March 2000, he stated that the said order was not obeyed by the Commissioner of Lands but he does not know whether an application for contempt was filed against the Commissioner of Lands.
30. He stated that his late father was paying rates for the suit land upto 2001 but he did not have the receipts for payment from 1990-2001 .He added that he does not have any documents to show that his father presented any documents to the City Council to process rates. He stated that he cannot say how many titles the Mother Title produced as he was not involved in that process. He added that the Plaintiffs did not acquire title for LR no 28/14.
31. When referred to the proposed subdivision of L.R no 28/14 Garden Estate dated 5th September 2001, he stated that the signature endorsed under his father's name looks like his father's signature. When referred to the application for search of LR no 25763 (IR no 87523/1) dated December 2, 2008 and June 2, 2010 done by HH& Mathews Advocates, he stated that they were instructed by Hiram Bere Kinuthia (deceased). When referred to the Plaint, he stated that the 1st and 2nd Defendants claim to be the registered owners of the suit property but he does not know how. He further stated that the Plaintiffs seek to be registered as owners of the suit property.
32. He stated that LR 28/12 was approximately 7.5 hectares and it was further subdivided and three parcels emanating from the subdivision were in the name of Francis Matathia while others were sold. He stated that LR no 28/16 does not exist as it was subdivided into eight (8) plots and the registered owners are his brothers and sisters. When referred to the letter dated July 25, 1983 written by the Commissioner of Lands approving subdivision of LR 28/6 subject to conditions, he stated that conditions i, ii, iii, iv, v, vi were complied with. He added that for condition vii, they did not surrender the parcel of land Marked red. He further stated that they got the approval for subdivision of LR 28/6 and that the reason of not complying with condition vii was that it was too costly and not suitable for the Plaintiffs.
33. When referred to the letter dated July 10, 1984 addressed to Hiram Bere Kinuthia by the Commissioner of Lands stating that the plot earmarked for public purpose will not be surrendered to the government free of charge, he stated that he had no plan from City Council to support the said letter. When referred to the letter dated 28th May 1985 addressed to H,B Kinuthia and F.N Matathia by the Commissioner of Lands, he stated that that the conditions therein were for parcel number LR 28/12 and that the subdivision scheme for LR 28/12 is not in court.
34. When referred to the Memorandum of surrender of LR no 28/6/1, he stated that it is a surrender of a 9 meter road which was a condition of approval as per the letter dated July 25, 1983. He further stated that they did surrender the original title for subdivision as per the conditions. He stated that the Plaintiffs did not have a title for LR no 28/14 but all the other subdivisions received titles and LR 28/14 was later allocated and registered in the name of the 1st and 2nd Defendants.



35. He stated that from the year 1984 to 2000, they were not given a letter of allotment to LR no 28/14, that he did not have a search of the same and that they did not sue Joseph Kinyanjui Mwai. He added that they have not produced a search for IR no 76580 to confirm that it is registered in Joseph Mwai's name. He further stated that they were issued with an invoice for rates to the suit land in 2003 but they did not pay and they have a rates demand for 1999 but not in court.
36. When referred to the consent order issued on June 2, 2009 in HCCC no 2912 of 1997, he stated that Francis Ngige Matathia and Hiram Bere Kinuthia consented to have seven (7) plots each while LR no 28/14 is not distributed to anyone. He added that it is not part of the estate of H.B Kinuthia and that the court order of 2000 in the aforementioned suit never gave rise to any registration. He also stated that JR Misc. Application no 1291 of 1999 was struck out with costs.
37. PW1 was recalled for cross-examination on the further documents allowed by this court's ruling of September 25, 2019. He produced plan no 120400 dated 21st August 1985 which shows L.R no 28/14, originally contained in LR 28/6 marked red which he stated it was the plot referred to in the letter dated June 22, 1884 as the plot to be surrendered free of charge and which condition was later revoked *vide* the Commissioner's letter dated July 10, 1984. He further stated that in the proposed plan of subdivision of LR 28/14, public purpose plot is shown as LR 28/14 whose value is now ksh 160 million and prayed that it reverts to the Plaintiffs. He also produced a subdivision plan for LR no 28/12 dated January 1985 and stated that the public purpose plot is shown as LR no 28/14. He also produced the proposed subdivision of LR no 28/16 which shows that the roads are marked blue.
38. When he was cross-examined and referred to the letter dated July 25, 1983, he stated that the said letter enclosed a subdivision scheme plan for LR 28/6 but he did not have it in court and that the documents he produced are not referred to in the said letter. He further stated that the plot referred to in condition (viii) of the letter dated 2 July 5, 1983 as "marked red" is not marked red in the plan dated January 1985 that he produced. He told the court that he subdivision of LR 28/12 started in 1982 and it gave rise to plots A,B,C and D as shown in the proposed subdivision scheme for LR no 28/12. He also stated that plot 28/14 is also shown in the drawing of LR 28/16 which was approved on August 19, 1997. He reiterated his averments in examination in chief during re-examination.
39. PW2, Robert Matathia Ngigi, the 3rd Plaintiff herein, testified on January 29, 2020. His witness statement dated September 23, 2015 was adopted as part of his evidence in chief. He associated himself with the evidence of PW1. He told the court that the value of the suit property is over ksh 200 million.
40. When he was cross examined, he stated that LR 28/6 was originally 70 acres and that he cannot recall when it was subdivided but could have been in 1987 or thereabouts. He stated that he does not know the number of plots generated out of it. He further stated that he knew that his father and the 1st Plaintiff owned LR 28/6 and that there was a dispute between his late father and PW1 over the distribution of the plots
41. When referred to the letter dated July 10, 1984 addressed to mr Hiram Bere Kinuthia by the Commissioner of lands and the letter dated May 28, 1985 concerning subdivision of LR 28.6 and the plot earmarked for subdivision for public purpose, he stated that he had no comment to make over the said letters. He also stated that most of the transactions were undertaken by Hiram Bere Kinuthia.
42. He told the court that their interest is over LR 28/14, a two acre plot in Garden Estate occupied by the 1st and 2nd Defendants. He stated that he does not know the parties and the outcome of Misc. Case no 1291 of 1999. He stated that they have been paying rates for LR 28/14 but he did not have the receipts. He also stated that to his knowledge, the suit parcel is not developed and was not surrendered to the Government of Kenya and his late father did not receive anything for it.



Evidence of the 1st and 2nd Defendants

43. DW1, Edick Omondi Anyanga, the 1st Defendant testified on March 15, 2021. On the same date, he amended the defence 1st and 2nd Defendant's defence and counterclaim dated September 19, 2004 orally by deleting part of paragraph 5 of the statement of defence and paragraph 2 of the Counterclaim without any objection by the other parties.
44. His witness statement dated August 18, 2011 was also adopted as part of his evidence in chief with the amendment to paragraph 2, being deletion of the words, "for the allocation...of property LR no 28/14..." He told the court that LR no 28/14 is his property.
45. It was his testimony that together with the 2nd Defendant, they made an application for allocation of the suit land in the year 2001 and they were allocated the suit land *vide* the letter of allotment dated September 4, 2001. He stated that they made all the requisite payments. He also paid stamp duty and continues to pay rates. He added that Anocma Enterprises is a business which he partners with the 2nd Defendant and that they have a title deed in their names. He produced Grant no (IR 87523) LR no 25763 (Deed plan no 2382003).
46. He told the court that he was not aware of Misc. Case no 1291 of 1999 *R v Registrar of Titles Ex parte Hiram Bere Kinuthia*. He added that when the said case against Joseph Kinyanjui Mwai was filed, he already had a title as he was the owner by December 5, 2001. It was his testimony that that he does not know Joseph Kinyanjui Mwai and that he has never met him and he did not acquire the suit property fraudulently. When referred to paragraph 7 of the counterclaim, he stated that the Plaintiffs in this case are guilty of fraud. He pointed out that the title to the suit land is in the 1st and 2nd Defendants name but there was a conspiracy to subdivide the suit land without his knowledge by Hiram Bere Kinuthia.
47. It was also his testimony that he has not been able to utilize the suit property because of this case but he has put up a fence and secured it with a gate and pays rent. He told the court that he seeks an injunction to restrain the Plaintiffs and prays that his counterclaim be allowed.
48. When he was cross-examined, he stated that he has been paying rates and claims by the Plaintiffs that they have been paying rates is not true, it is fraud. He stated that he owns LR 28/14 which was later given (IR 87523) LR no 25763 but he cannot tell which number is older but LR 28/14 was available for allocation. He stated that when they made an application for allocation to the Commissioner of lands in 2000, they did not apply for the suit plot in particular but that is what they were allocated. He added that the said application was not in court and that the suit land was government land and that is why it was allocated to him.
49. He stated that the suit land was allocated to them through Anocma Enterprises which exists and was registered on April 1, 1997 and it is based in Karen though he did not have documents to that effect in court. He added that it is now Anocma Enterprises Limited and it is compliant. He further stated that he has fenced the suit land and that there is a tarmac road upto the land but he is not aware if the land was advertised in the Kenya Gazette.
50. When referred to the conditions contained in the letter of allotment dated September 4, 2001, he stated that he has a letter of acceptance but he does not have it in court. He added that the letter of allotment has a special condition to be used for commercial purposes and it is signed by J.M Gitau Mwangi (mrs).
51. When referred to the title, he stated that it is 1.596 hectares but stamp duty as valued by County Government of Nairobi refers to 1.597 hectares. When referred to special condition no 2 of the letter



of allotment requiring plans for development to be submitted within six (6) months, he stated that he did make an application to develop within six (6) months due to the pendency of this suit.

52. He stated that on the Letter of Allotment, the user is for shops, offices, flats, sale of motor oils while on the title, the user is business cum residential and that in his opinion, it is the same user. He stated that the deed plan for their title is no 238203 of October 18, 2001 while the deed plan for LR 28/14 has a different number being 120400 and it is signed by a licensed surveyor D.R Gitau for Director for Surveys but he does not know its fate. He added that a deed plan ought to be accompanied by other documents and he does not know the surveyor who surveyed his land and he has no drawings from the said surveyor.
53. When referred to their title, he stated that it is granted by the President of the Republic of Kenya through the Commissioner of Lands and it is signed by Mr Thuita, and Katherine Kungu for the Registrar of titles and that he does not have a copy of the recent search of the same in court.
54. He stated that he has not prayed that LR 28/14 be cancelled. When referred to the proposed scheme of subdivision of the suit land into 8 plots approved by City Council of Nairobi, he stated that City Council had evidence of existence of his title hence the scheme of subdivision is a fraud. He further stated that he has not taken action against persons who tried to have the land subdivided and they have not filed any complaint to the City Council of Nairobi in respect of the attempted sub-division.
55. When re-examined, he reiterated his evidence in chief and stated that he has documents relating to Anocma Enterprises but they were not requested for. He further stated that he has the letter of application for allocation, and the letter accepting allocation but not in court. He also stated that there is no title in the name of Hiram Bere Kinuthia and his partner and that their attempt to subdivide the suit land was fraudulent.

Evidence of the 3rd, 4th and 5th Defendants

56. DW2, Gildine Gatwiri Karani, a Principal registration Officer in the office of the Chief Land Registrar, Ministry of lands testified on November 9, 2021. Her witness statement dated October 14, 2021 was adopted as part of her evidence in chief. She stated that according to records held by the Chief Land Registrar LR no 28/14 (New LR no 25763) with IR no 87523 and measuring 1.596 hectares is registered in the name of one Edick Omondi Anyanga and Anne Anyanga carrying on business under the business name of Anocma Enterprises. She further stated that the property has never been registered in the name of one Joseph Kinyanjui Mwai and that the Registrar of Titles does not allocate land but only registers parcels of land which have been allocated.
57. She also stated that the Registrar of titles has never been served with the court order as per the Plaintiff's claim and that even if the order was to be received, its implementation would be impossible because the property had not been registered as at March 16, 2000.
58. When she was cross-examined, she stated that LR 28/14 has a new number LR no 25763 (IR no 87523) but the land parcel is the same. She stated that it is a new grant given by the Commissioner of Lands and the new number came from survey. She also stated that title Number I.R 87523 was issued on November 28, 2011 by the Registrar of Lands and that it was referenced to LR no 28/14.
59. She stated that she had the registration particulars but she did not know where L.R no 28/14 came as she does not know the history of the land from but LR no 25763 came from LR no 28/14. When referred to her statement that LR no 28/14 has never been registered in the name of Joseph Kinyanjui Mwai, she stated that it is true as per their records from the registry. When shown the title registered to one Joseph Kinyanjui Mwai, she stated that the title numbers are different as the said title reads I.R



no 76580 LR no 28/14. She further stated that the references are different numbers on the deed plan. She also stated that a grant is issued by the Commissioner of Lands and it ought not to be issued in the name of someone else. She added that the deed plan to the title in the name of Joseph Kinyanjui Mwai has no land survey plan no attached and that deed plan no 120400 dated 14th August 1984 LR no 28/14 approximately 1.597 hectares is attached to the title. She stated that the deed plan attached to the 1st and 2nd Defendants title is LR no 25763 (Original 28/14) measuring 1.597 hectares is different from Mwai's being LR no 28/6/2.

60. When referred to the Deed Plan dated October 18, 2001, no 238203, she stated that it is signed but it has no name thus she cannot identify who made it and she did not see its correspondence file. When referred to entry no 6 on the 1st and 2nd Defendant's title, she stated that it is a memorandum of registration of transfer of land but she did not have a copy of the documents being transferred. She further stated that entry no 10 is a certificate of stamp duty entered on November 26, 2001 which is part of land administration. She stated that a memorandum of transfer of land was entered on November 26, 2001 and that entry no 12 is registration of a new grant IR no 87523 and that the user is business cum residential. She also stated that the Registrar who affirmed has retired and that there is no current search on the title.
61. She stated that she is not an expert on allocation of land but a registration officer such that they register what has been allocated. She further stated that IR no 87523 is in the names of the 1st and 2nd Defendants and it is the original of L.R no/28/14 and Hiram Bere Kinuthia and Francis Ngigi Matathia are not grantees. She also stated that she is not sure if a parcel surrendered to the government can revert back to the owner.
62. When she was re-examined, she stated that LR no 28/14 is not registered in the name of Joseph Kinyanjui Mwai. She further stated that LR no 25763 is the correct title in the records and that a search will yield the same results.
63. DW3, Gordon Ochieng a Director Land Administration Officer at the Ministry of Lands testified on November 9, 2021. His witness statement dated August 30, 2012 was adopted as part of his evidence. He stated that the suit land LR 25763 originally formed part of parcel LR 28/6 which was registered in the names of Francis Ngigi Matathia and Hiram Bere Kinuthia. He added that they applied for subdivision in 1983 and as part of conditions for approval of the subdivision, certain conditions were imposed by the Government as recommended by the City Council of Nairobi *vide* the letter dated July 25, 1983. He further stated that condition no (iv) of the approval letter stated that the area of land colored in blue on the attached plan(L.R 28/14) would be surrendered to the Government free of cost, and condition (viii) stated that the public purpose plot marked red on the deposited plan be surrendered to the City Council "free of cost". He added that the said conditions were provisional subject to compliance by the registered owners to the satisfaction of the City Council of Nairobi.
64. He stated that upon compliance with the conditions, the Commissioner of Lands granted his final approval to the scheme of subdivision and the act of acceptance of the conditions of approval and or compliance with the conditions effectively meant a surrender of the portions that were required to be surrendered and marked blue and red and the suit portion was left intact as government land. He further stated that *vide* the allotment letter dated November 4, 2001, it was allocated to Anocma Enterprises by the Commissioner of Lands and the Director of Surveys remitted the Deed plan no 238203 in respect of L.R 25763 and a grant was registered as IR 87523 in favour of Edick Omondi Anyanga and Anne Anyanga trading as Anocma Enterprises. He also stated that he is aware that there was an attempt by one Joseph Kinyanjui Mwai to fraudulently obtain registration of the suit land



- where a certificate of lease is purported to have been issued and registered as IR 76580 but the said registration was found to be fraudulent/fake and the same was not registered.
65. When he was cross-examined, he stated that he is familiar with the history of the suit parcel. He stated that the parent title was LR no 28/6 and that LR 28/14 was hived from it and surrendered to the Government of Kenya as a result of conditions for subdivision of LR no 28/6 thus it became Government land and available for alienation. He further stated that if it was not surrendered, the subdivision could not have been approved and the whole portion would have remained with the original owners.
 66. When referred to the approval dated July 25, 1983, he stated that condition no 6 was that the land marked blue was to be surrendered. He added that no other letter spoke of surrender. When referred to the letter dated June 22, 1984 addressed to the Commissioner of lands by Director of City Planning, Nairobi City Commission, he stated that the parcel marked blue and red were surrendered. When referred to the letter dated July 10, 1984 addressed to Mr Kinuthia by the Commissioner of Lands, he stated that it revoked condition 8 of the letter dated July 25, 1983 as it provided that the plot earmarked for public purpose will not be surrendered to the Government free of charge. He stated that the letter dated 10th July 1984 was the final approval but he did not have the approved plan and that the blue and red markings would be on the subdivision approval scheme.
 67. He stated that the plot for public utility, LR 28/14 was not surrendered and a title was never issued but the subdivision went through. He further stated that the land became available for alienation after failure to comply with the conditions for re granting. When referred to the letter dated May 28, 1985, addressed to H.B Kinuthia and F.N Matathia, by the Commissioner of Lands stating that the Ministry of lands would assess rent payable for the parcel to be surrendered, he stated that he does not have the records showing that they paid rent. He added the rent was not assessed so the offer lapsed.
 68. When referred to the title issued to Joseph Kinyanjui Mwai, he stated that it is not a valid title since it is a Registered Titles Act title created from a Government Lands Act over LR no 28/14 and that he could not recall whether the Plaintiffs went to court over the said title. When referred to the order dated April 5, 2000 issued in Misc. Application no 1291 of 1999, he stated that he is not the Registrar of Titles and as such, he does not know if it was complied with. He also stated that the 1st and 2nd Defendants applied for L.R no 28/14 and they were granted since it was available for alienation.
 69. When referred to the letter of allotment dated 4th September 2001 issued to the 1st and 2nd Defendants in respect of LR 28/14, he stated that there was no need for a map and that there is no letter of application by the 1st and 2nd Defendants in their documents. He further stated that payment for the said allotment was to be made within 30 days and the 1st and 2nd Defendants paid on October 30, 2001. When referred to the special conditions thereof, he stated that the special conditions provided that development plans were to be submitted within six (6) months and there is no evidence that the condition was met.
 70. He stated that survey was done but there is no evidence that survey fees were paid. He further stated that a survey plan would contain details of the parcel of land and that they would rely on the deed plan. He added that a beacon certificate is not a registrable document but a deed plan is. When referred to the deed plan for LR no 25763 (original LR no 28/14) showing that the suit land measures 1.596 hectares and the letter of allotment dated 4th September 2001 stating that the suit land measures 1.597 hectares, he stated that it is the same parcel of land but the director of survey would answer on the variance in the acreage. When referred to the Memorandum of Registration of Transfer dated November 28, 2001 showing that the acreage is 1.596 hectares, he stated that it did not require a re-survey and the difference is negligible.



71. When referred to the letter dated 25th June 2002 addressed to the Commissioner of Lands by the Town Clerk, he stated that he was directed to write a reply to the said letter by the commissioner of lands vide the letter dated 25th August 2004. When referred to the title of Joseph Kinyanjui Mwai, he stated there is no indication that it was ever registered and there is no title to LR no 28/14. When referred to the memorandum of surrender signed by Hiram Bere Kinuthia and Francis Ngigi Kinuthia, he stated that it was a draft surrender of areas marked for roads.
72. When he was re-examined, he stated that the letter dated July 25, 1983 written by the Commissioner of Lands contains conditions for approval of subdivision of L.R no 28/6 on recommendation by the City Council of Nairobi. He added that parties did not execute a document of surrender in respect of the plots, they executed the subdivision. He added that the suit land became public land vested in the Government of Kenya. He also stated that if the land reverted back to the Plaintiff, they ought to have obtained title together with the other portions.
73. He also stated that the suit land had already been surveyed and dimensions given and that LR 28/14 refers to a marked public purpose plot and the acreage is known and boundaries delineated. He further stated that plaintiffs had surrendered LR 28/6/I & 26/II being subdivisions of LR 28/6 and that the Plaintiffs benefited from the subdivision and that if they did not accept the conditions, the subdivision would be a nullity.
74. At the close of the oral testimonies, parties tendered final written submissions.

The 1st Plaintiff's written submissions

75. They are dated December 8, 2021. Counsel for the 1st Plaintiff framed what he considered the 1st Plaintiffs' issues for determination as follows;
 - a) Was the plot L.R no 28/14 ever surrendered to the government?
 - b) Was plot Number 28/14 available as alienated government land capable of being granted to anyone else?
 - c) Are there existing court orders issued by judges of concurrent jurisdiction which orders are in force, have not been set aside or successfully appealed against?
 - d) What appropriate orders should this court make?
76. It was counsel's submission that the suit property was never surrendered to the government as the condition for its surrender was waived by the government. He added that it remained the property of the Plaintiffs thus allocation to the 1st and 2nd Defendants is void ab initio. He further submitted that even if the land was surrendered, it was surrendered for public purposes and the government can only use it for the purposes intended and not otherwise. He relied on the case of *Niaz Mobammed v The Commissioner of Lands & 4 others* [1996]eKLR and on the case of *Kenya Anti-Corruption Commission v Lima Ltd & 2 others*[209]eKLR.
77. He also submitted that there exists court orders issued in HCCC Misc. Civil Case no 1291 of 1999 that are valid and are unchallenged and as such, a contradiction would lead to judicial inconsistency, irregularity and injustice. Relying on the case of *Bukabi Investment Ltd v National Land Commission and 2 others* [2015] eKLR and the case of *John Kabwai Kabucho v Johnson Njuguna Gathiongo* [2021] eKLR, counsel for the 1st Plaintiff submitted that even if it is found that the suit plot was actually surrendered to the government and that the government was right in alienating the land, the 1st and 2nd



Defendants' title cannot be clean. He pointed out that the 1st and 2nd Defendant did not apply to be allocated the land and they did not comply with the conditions in the offer of allotment issued to them.

78. It was also counsel's submission that the 1st and 2nd Defendant's title was obtained illegally, unprocedurally or through a corrupt scheme and it cannot stand the test of time. He relied on the case of *Alice Chemutai Too v Nickson Kipkurui Korir and 2 others* [2015] eKLR and the case of *Kogo Flats Limited v Sammy Cherunya and another* [2019] eKLR. He urged the court to be guided by the court of Appeal's decision in *Benaj Properties Limited v HH Dr. Syedna Mohammed Burbannudin Sabed and 4 others* [2015] eKLR on cancellation of illegal, fraudulent and irregularly acquired titles.

The 2nd and 3rd Plaintiff's submissions

79. They are dated February 10, 2002. It was counsel for the 2nd and 3rd Plaintiffs' submission that the evidence adduced shows that 2 parcels were surrendered and parties duly executed the surrender document but no evidence was adduced to show how parcel no 28/14 was surrendered to the government. He relied on the case of *Edick Omondi Anyanga v National Social Security Fund Board* [2003] eKLR, the case of *Mwinyi Hamisi Ali v Attorney General & Another* [1977] eKLR and the case of *Antony Milimu Lubulela County Government of Kakamega & Another* [2019] eKLR.
80. On the issue of the legal status of Anocma Enterprises, counsel submitted that no evidence has been adduced to show that Anocma Enterprises was registered as a business name or refute the online search shown by Plaintiffs showing that the firm is not registered and as such, the title issued in the firm's name is illegal for being issued contrary to Section 59(1) of the *Registration of Titles Act* Cap 280.
81. It was also counsel's submission that the Commissioner of lands could not allot the suit land in the name of the President without authority as it would be a contravention of Section 82 of the retired *constitution* and Section 3 of the *Government Land's Act*. He added the present *constitution* does not offer any constitutional protection to property illegally acquired. He relied on the case of *David Kiptugen v Commissioner of Lands & 4 others* [2015] eKLR, the case of *Kenya Anti-Corruption Commission v Lima Limited & 2 others* and the case of *James Joram Nyaga & another v The Hon. Attorney General & another* [2007] eKLR. Counsel further submitted that Section 41 of the *Limitation of Actions Act* excludes public land from acquisition. He also submitted that City Hall approved the subdivision presented by the Plaintiff for LR 28/14 and no objection or appeal has ever been raised in accordance with Section 41 of the *Planning Act* 1996 (Repealed). He relied on the case of *Commissioner of Lands v Kunste Limited*, Nakuru Civil Appeal no 234 of 1995 and the case of *Republic v Commissioner of lands & 4 others Ex parte Associate Steel Limited* [2004] eKLR.
82. Counsel for the 2nd and 3rd Plaintiffs also submitted that a deed plan duly registered constitutes a description of the boundaries yet no sealed deed plan was produced by the 1st and 2nd Defendants and there is no reference to the fate of the existing duly registered and sealed deed plan no 120400 with respect to LR no 28/6.
83. Counsel also submitted that the Plaintiffs have never parted with possession and that the Commissioner of lands could not unilaterally superimpose a user change that completely altered the land landscape of the land without the participation and input of the Plaintiffs.

The 2nd Defendant's submissions

84. They are dated March 21, 2021. Counsel for the 2nd Defendant submitted that the following issues arose for determination;
- a) Whether the parties can submit on issues not pleaded.



- b) Capacity
 - c) The Plaintiff's claim is time barred.
 - d) Whether the letter of allotment dated 4th September 2001 was valid.
85. Relying on the case of *Daniel Toroitich Arap Moi & another v Mwangi Stephen Murithi & another* [2014] eKLR, the case of *Patrick Muiru Kamunguna v Kaylift services Ltd & another* [2021] eKLR and the case of *Stephen Ndolo Wambua v Beatrice Mbula Mutilu & 2 others* [2019] eKLR, counsel for the 2nd Defendant submitted that parties are bound by their own pleadings therefore the Plaintiffs should not be allowed to submit on issues not pleaded in their re-amended plaint but merely raised in their submissions. He pointed out that the Plaintiffs did not plead that the suit property was surrendered for public purposes and neither did they plead that the 1st and 2nd Defendants did not comply with the terms and conditions of the letter of allotment dated September 4, 2000 thus they must be excluded as submitted.
86. On the issue of capacity, counsel submitted that the Plaintiffs have described the 1st and 2nd Defendants as trading as Anocma Enterprises thus their capacity as pleaded by the Plaintiff is not subject of proof. He also submitted that the Plaintiffs were aggrieved in 1983 and should have commenced their claim within 12 years thus their claim is brought out of time.
87. It was counsel's submission that the letter of allotment dated September 4, 2001 was valid and that the Plaintiffs neither pleaded nor tendered evidence on the allegations of the non-compliance with the terms and conditions of the letter of allotment. He relied on the case of *Presbyterian Church of East Africa (Uthiru Church) & another v Kiboro & 3 others* (Civil Appeal 303 of 2018) [2022] KECA 49 (KLR) (Civ) (4 February 2022) (Judgment).
88. Counsel also submitted that the 1st and 2nd Defendants have proved that they obtained grant IR no 8752 procedurally and legally and settled rates when demanded by Nairobi County Council. He further submitted that the Plaintiffs' allegation that the 1st and 2nd Defendants acquired the said grant by fraud, collusion, misrepresentation and breach of trust were not distinctly alleged but left for the court to infer and that they were not proved. He relied on the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR and the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR.
89. It was also counsel's submission that that the Plaintiffs surrendered the suit property. Relying on the case of *Wareham t/a A.F. Wareham & 2 others Kenya Post Office Savings Bank* [2004] 2 KLR 91, he submitted that the plaintiffs failed to adduce evidence to support their allegation that they appealed the conditions of the surrender of the suit land. He added that surrender is not compulsory acquisition and that courts have affirmed that the actual surrender, even without registration, cannot be impeached after the fact. He relied on the case of *Chief Land Registrar & others v Nathan Tirop Koeh & 4 others* [2018] eKLR and the case of *Hubert L Martin & 2 Others v Margaret J Kamar & 5 others* [2016] eKLR.

The 3rd, 4th and 5th Defendants' submissions

90. They are dated March 28, 2022. The Attorney General submitted that the following issues arose for determination;
- a) Whether the Plaintiff surrendered the suit land for subdivision.
 - b) Whether the Plaintiffs were entitled to retain the portion of LR 28/14.



- c) Whether the registrar of titles defied the court order claiming registration of Joseph Kinyanjui Mwai in JR no 1291 of 1999.
 - d) Whether the Government had authority to allocate the suit land.
 - e) Costs.
91. It was the AG's submission that that the Plaintiffs did surrender the original parcel for subdivision and obtained subdivision parcels which he passed to other 3rd parties therefore they have no locus to challenge the allocation of the suit land to the 1st and 2nd Defendants. He submitted that upon compliance with the letters dated July 25, 1983 and 22nd June 1984, retainer of the portion of the suit land herein meant that the whole approval of the subdivision scheme was to revert to the original number.
92. It was also his submission that there was no registration of the suit land as of the year March 16, 2000 and hence there was nothing to effect registration on. It was also his submission that that upon compliance of the conditions of subdivision by the Plaintiff herein and surrender of the suit property for free to the government, the government allocated the suit land to the 1st and 2nd Defendant who hold a legitimate title and are therefore protected under Section 24(a) and Section 26(1) of the Land Registration Act. He relied on the case of Elijah Makeri Nyagw'ra v Stephen Mungai Njuguna & another [2013]eKLR.
93. I have considered the pleadings and the evidence on record. I have considered the written submissions filed on behalf of the parties and the authorities cited. The parties did not agree on the issues. The issues for determination are:-
- (i) Whether LR 28/14 was surrendered to the Government of Kenya.
 - (ii) Whether the suit land was available for allocation to the 1st and 2nd Defendants.
 - (iii) Was the Registrar of Titles in contempt court orders issued in Nairobi Hc Misc. JR 1291 of 1999?
 - (iv) Whether the Plaintiffs are entitled to reliefs sought in the Plaint.
 - (v) Whether the 1st and 2nd Defendants are entitled to the reliefs sought in their counterclaim.
 - (vi) Who should bear costs of this suit?

Whether LR. NO 28/14 was surrendered to the Government of Kenya

94. There is no contention that LR 28/6 (Original Number 28/6/6) was registered in the names of Francis Ngigi Matathia and Hiram Bere Kinuthia both deceased and represented in this suit by their personal representatives. The said land is described on Deed Plan no 124330 dated 21st August 1985 and produced in evidence. It is also not disputed that through their surveyors Racom Limited, the proprietors of the above stated parcel prepared a sub-division scheme plan for subdivision of the parcel and applied for its approval by the Commissioner of lands and Nairobi City Commission.
95. The subdivision of LR 28/6 gave rise to several parcels including the suit land which is LR no 28/14. The Plaintiffs claim ownership of the suit land. The 3rd, 4th and 5th Defendants contend that it was surrendered to the government and subsequently allocated to the 1st and 2nd Defendant and it is now known as LR no 25763 (Grant no IR 87523) under deed plan no 238203.



96. By a letter dated 25th July 1983 from the Commissioner of Lands to Ramcom Limited two portions out of subdivision LR 2816 were to be surrendered to City Council free of costs. The contents of the letter are as follows:-

“Department of Lands

PO. Box 30089

NAIROBI

25th July 1983

Ramcom Limited

PO. Box 54884

NAIROBI

LR 28/5-NAIROBI

Enclosed herewith is a sub-divisional scheme plan for the above plot duly endorsed with my provisional approval subject to the following conditions.

- (i) Conditions imposed by the Director of City Planning in his letter Ref CP/DC/000377/LR 28/6 dated March 2, 1982, being complied with.
- (ii) Application for water supply to each sub-plot to be made to the General Manager (Water & Sewerage Dept.) and his conditions for such supply to be met.
- (iii) The proposed road through the plot to be constructed to non adoptive murrum standard including surface water drainage. Plans and specification to be approved by council.
- (iv) 9 X9 metre truncations to be provided at the junction with the proposed 18m road reserve.
- (v) The 9m strip of land along the western boundary of the plot marked blue to be surrendered to the council free of costs.
- (vi) A 3m drainage wayleave to be provided along existing anti-malaria drain.
- (vii) Area of land coloured blue on the deposited plan to be surrendered to Government free of cost.
- (viii) A tree planting and landscaping scheme to be submitted to council for approval and to be implemented by the developer to the satisfaction fo the Director of City Planner.
- (ix) Public purpose plot marked red on the deposited plan to be surrendered to Council free of cost.

Final approval will be granted when and after recommendations by the Director, of City Planning.

Amiani (mrs)

For: Commissioner of Lands



CC Director of Surveys, Nairobi

The Director of City Planning, Nairobi”

97. There is also a letter dated June 22, 1984 from the Nairobi City Commission to the Commissioner of Lands. The contents are as follows:-

“City Planning Department

June 22, 1984

The Commissioner of Lands,

PO. Box 30089

Nairobi

Dear sir,

RE: Surrender Of Lr 28/6-garden Estate

I refer to the above mentioned subdivision scheme approved under Min. no 24 of the Town Planning Committee meeting held on March 1, 1982.

This is to inform you that I have no objection to your according final approval to the same subject to the condition of surrender being complied with:-

1. The 9m strip of land along the western boundary of the plot marked blue to be surrendered to the Commission free of costs.
2. Area of land coloured blue on the deposited plan to be surrendered to Government free of cost.
3. Public purpose plot marked red on the deposited plan to be surrendered to Government” free of cost.

Yours faithfully,

Mwangi H. C. Dang’onde

Director Of City Planning

CC H. B. Kinuthia

PO. Box 32241

NAIROBI”

98. From this letter, it is clear that in condition no 3 the Nairobi City Commission reiterated that the public purpose plot ought to be surrendered for free. This confirms the contents of the letter dated July 25, 1983. The Plaintiff relied on the letter dated May 28, 1985 which makes reference to LR no 28/12 which is different from the documents under consideration by the Commissioner of Lands and Nairobi City Commission. There is therefore no variation of the terms and conditions of subdivision of the suit land under subdivision. It is not disputed that the Plaintiffs surrendered the original title upon subdivision. The resultant parcels have been passed on to third parties.
99. I find that the Plaintiffs’ act of acceptance of the conditions of approval for subdivision and or compliance with the said conditions meant a surrender of the portions that were required to be surrendered and marked blue and red. By a surrender which is undated in 1988 but executed by Hiram



Bere Kinuthia and Francis Matathia Ngigi on November 7, 1998 before D. Oyatsi Advocate, the two surrendered two portions out of LR no 28/6/1 and LR no 28/6/11.

100. I agree with the 2nd Defendant's submissions that all surrenders pursuant to the conditions in the letters approving the subdivision were factual as per condition for subdivision of LR 28/6. In the case of *Mwinyi Hamisi Ali v Attorney General* Civil Appeal no 125 of 1977, the Court of Appeal stated thus:-

“But section 44 does not envisage a situation whereby lack of such registration would make null and void *de facto* surrenders. From the evidence before the superior court there can be no doubt that Captain Townsend and his three co-owners had factually surrendered plot no 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr Hamisi Ali any title to the suit land..... The Commissioner had *de facto* control of plot no 334 and if he proceeded, as he did, to allot the land to other persons,, their titles cannot be impugned except as provided for in section 24 of the Act’

Similarly in *Chief Land Registrar & Others v Nathan Tirop Koech & 4 Others* [2018] eKLR the Court of Appeal stated thus:-

“86. Guided by the *dicta* in *Mwinyi Hamisi Appeal v Attorney General*, Civil Appeal no 125 of 1997,

“We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.”

I am persuaded that LR no 28/14 was surrendered to the Government of Kenya upon subdivision of LR no 28/6. The 1st Plaintiff's claim that the condition to surrender was revoked cannot be true as the letter referred to is in respect of LR no 28/12. It cannot be a mere typing error. In the case of *Ngimu Farm Limited v Attorney General* [2019] eKLR. After setting out the law, the court observed:-

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

Whether the suit land was available for allocation to the 1st and 2nd Defendants

101. It is the Plaintiffs' submissions that the plot not having been surrendered to the Government of Kenya or the Nairobi City Commission, remained the property of the Plaintiffs. The 1st and 2nd Defendants trading as Anocma Enterprise applied for allocation of unalienated government land. The 5th Defendant by a letter dated September 4, 2001 allocated to them the suit property.



102. It is the 3rd to 5th Defendants' evidence that the 1st and 2nd Defendants complied with the conditions for payment of stand premium and acceptance. They were issued with a receipt no E896333 for ksh 1,092,020/-. The 1st and 2nd Defendants were duly registered on November 26, 2001. DW2, Gildine Gatwiri Karani, Principal Land Registrar told the court that LR no 28/14 is now LR no 25763 (IR no 85723). She produced the registration particulars of the suit property. She also confirmed that LR no 28/14 was never registered in the name of Joseph Kinyanjui Mwai. She stated that LR no 25763 was allocated by the Commissioner of Lands and registered in the Department. DW3 Gordon Odeka Ochieng, a director land administration told the court that LR no 28/14 was surrendered to the Government of Kenya upon subdivision of LR no 28/6. When he was cross examined he told the court that the suit property was surrendered though he did not have the actual registration documents of surrender or the executed Deed of Surrender. He stated that the original land was subdivided based on the terms and conditions set out by the Nairobi City Commission and the Commissioner of Lands. He stated that the Plaintiffs had benefitted from the subdivisions. The 1st and 2nd Defendants are now the registered proprietors of LR no 25763 (IR no 87523). They have been paying rates to the Nairobi City Council since 2002. The Plaintiffs did not establish that they are paying rates in respect of the suit property. Section 26(1) of the Land Registration Act, 2012 provides that:-

- “(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

103. It is the Plaintiffs' case that the 1st and 2nd Defendants acquired Grant IR no 87523 by fraudulent misrepresentation and breach of trust. It is well settled that allegations of fraud, collusion and breach of trust must not only be pleaded but must be proved beyond the standard of balance of probability. In the case of *Vijay Morjaria v Nansingh Madhusing Darbar & another* [2000] eKLR where Tunoi JA (as he then was) stated as follows:-

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

Similarly in *Kinyanjui Kamau v George Kamau* [2015] eKLR where the court stated that:-

“It is trite law that any allegations of fraud must be pleaded and strictly proved. *See Ndolo v Ndolo (2008) 1 KLR (G&F) 742* wherein the Court stated that:

“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was



making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts”.

104. I find that PW1 and PW2 did not adduce evidence to prove that the 1st and 2nd Defendants had committed any fraud, collusion or breach of trust. I find that the 1st and 2nd Defendants were lawfully allocated the suit property.

Was the Registrar of Titles in contempt of the orders issued in Nairobi HC JR 1299 of 1999?

105. Having stated that the 1st and 2nd Defendants were lawfully allocated the suit land, I find that the registrar of Titles was not in contempt of the orders issued in Nairobi HC JR 1291 of 1999 as submitted by the 3rd – 5th Defendants. “There was no registration of the land as of March 16, 2000 and hence there was nothing to effect registration on”. In fact it was the 3rd – 5th Defendants’ case that the suit property has never been registered in the name of Joseph Kinyanjui Mwai.

Whether the Plaintiffs are entitled to the reliefs sought in the Plaintiff

106. I find that the answer is no after having found that the suit property had been surrendered to the Government of Kenya and lawfully allocated to the 1st and 2nd Defendants. The Plaintiffs suit is hereby dismissed.

Whether the 1st and 2nd Defendants are entitled to the reliefs sought in the counterclaim.

107. Having found that the 1st and 2nd Defendants did not acquire the title through fraud, misrepresentation or breach of trust, I find that the answer is yes.
108. I find the act of the 1st Plaintiff submitting a subdivision plan for approval in respect of LR no 2814 on October 23, 2001 when he had no title document was an act in futility. It was an attempt to defraud the 1st and 2nd Defendants of the suit property. It is not in dispute that the Plaintiffs have never been registered as the owners of the suit property. PW1 and PW2 admitted that they went to court in HC JR 1291 of 1999 seeking to be registered as the owners of the suit property. The orders were not complied with.
109. I find that the 1st and 2nd Defendants are entitled to the reliefs sought in prayer (a) and (b) of the counterclaim.
110. The 1st Defendant (DW1) submitted in evidence that “...I have not been able to utilize the suit property because of this case. I have put up a fence. I have incurred huge losses.....”.

From the foregoing, it is clear that the 1st and 2nd Defendants are in possession of the suit property. I would therefore decline to grant them *mesne* profits.

111. It is not in dispute that it is the Plaintiffs who instituted this suit. It is because of this suit that the 1st and 2nd Defendants have not been able to develop and or utilize the suit property. I find that they have suffered loss and damage. As the court was not guided in quantum I award ksh 500,000/- which I think is adequate to compensate the 1st and 2nd Defendants.

Costs

112. Costs follow the event. I order the Plaintiffs to bear costs of this suit.



113. In conclusion, I dismiss Plaintiff's suit and enter judgement in favour of the 1st and 2nd Defendant in the counterclaim as follows.

- (a) That a declaration is hereby issued that the title issued on November 26, 2001 in respect of the suit property in favour of the 1st and 2nd Defendants being Grant Number (IR 87523) under LR no 25763 (formerly LR no 28/14) under deed plan no 238203 is lawful and valid.
- (b) That a permanent injunction be issued restraining the Plaintiffs by themselves, agents, employees, servants, workers, hirelings and or any other person acting on their behalf from interfering in any way whatsoever with the 1st and 2nd Defendants rights and or benefits in any way over the suit property.
- (c) General damages ksh 500,000/-.
- (d) Costs of the suit and interest

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF JULY 2022.

L. KOMINGOI

JUDGE

In the presence of:-

Mr. Wananda for Mr. G. Murugara advocate for the 1st Plaintiff

Mr. Mwaniki advocate for the 2nd and 3rd Plaintiffs

Mr. Abidha advocate for the 1st and 2nd Defendants

Mr. Motari advocate for the 3rd to 5th Defendants

Steve - Court Assistant

