



**Kimemiah v Miriam Wairimu Wambugu (Sued as the Legal Representative of the Estate of Jacob Juma, Deceased) & 6 others (Environment and Land Case Civil Suit 351 of 2008) [2022] KEELC 3370 (KLR) (4 August 2022) (Judgment)**

Neutral citation: [2022] KEELC 3370 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 351 OF 2008  
SO OKONG'O, J  
AUGUST 4, 2022**

**BETWEEN**

**AURIEL MARIE JOY KIMEMIAH ..... PLAINTIFF**

**AND**

**MIRIAM WAIRIMU WAMBUGU (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JACOB JUMA, DECEASED) ..... 1<sup>ST</sup> DEFENDANT**  
**MARY WANJIRU CHEGE ..... 2<sup>ND</sup> DEFENDANT**  
**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> DEFENDANT**  
**WILLIAM TUMATE SIALALA SANO ..... 4<sup>TH</sup> DEFENDANT**  
**LATOO ENE PRIAKANGA NCHEPAI ..... 5<sup>TH</sup> DEFENDANT**  
**SUAKEI OLE PARKIRE ..... 6<sup>TH</sup> DEFENDANT**  
**KENYA UNITED SPORTS LIMITED ..... 7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1 The plaintiff brought this suit through a plaint dated 23<sup>rd</sup> July 2008. The plaint was amended on 3<sup>rd</sup> October 2008 and further amended on 13<sup>th</sup> February 2015. In her further amended plaint filed on 16<sup>th</sup> February 2015, the plaintiff averred that she was a Kenyan residing and working in Harare, Zimbabwe. The plaintiff averred that at all material times, the plaintiff and her deceased husband, Stephen Gitau Kimemiah (hereinafter referred to only as “the deceased”) were the registered owners of all that parcel of land known as L.R No. 13873, Grant No. I.R 78509 measuring 2.226 hectares (hereinafter referred to only as “the suit property”). The plaintiff averred that they held a leasehold interest in the suit property from the Government of Kenya as joint tenants for a term of 99 years with effect from 1<sup>st</sup> August 1985.



- 2 The plaintiff averred that the Grant in respect of the suit property was issued on 30<sup>th</sup> December 1991 and registered on 24<sup>th</sup> November 1998. The plaintiff averred that the deceased died on 19<sup>th</sup> May 2000 and since the suit property was jointly owned, she became the sole owner thereof. The plaintiff averred that the deceased had put up a fence around the suit property upon taking possession thereof in 1995. The plaintiff averred that she later on built a site office on the suit property to manage and oversee the activities on the property while planning to put up a residential house thereon.
- 3 The plaintiff averred that she came across a fraudulent title for the suit property issued to an entity known as Nectel (K) Limited (hereinafter referred to as “Nectel”) whose majority shareholder was the 1<sup>st</sup> defendant. The plaintiff averred that Nectel purported to transfer the suit property to the 1<sup>st</sup> defendant on 25<sup>th</sup> December 2005. The plaintiff pleaded several particulars of fraud in relation to the purported acquisition of the suit property by Nectel and subsequently the 1<sup>st</sup> defendant. The plaintiff averred among others that Nectel was incorporated on 3<sup>rd</sup> January 2006 under Certificate of Incorporation No. C121508 seven years after it allegedly acquired the suit property. The plaintiff averred that the Grant in respect of the suit property was purportedly issued to a non-existent entity from which the 1<sup>st</sup> defendant purportedly acquired the property. The plaintiff averred that when Nectel was purportedly issued with a Grant in respect of the suit property, the property was already registered in the name of the plaintiff.
- 4 The plaintiff averred that a search that she carried out on the title of the suit property revealed that the property had another fraudulent and forged title in the name of the 2<sup>nd</sup> defendant bearing the same particulars as the title held by the plaintiff. The plaintiff pleaded several particulars of fraud against the 2<sup>nd</sup> defendant. The plaintiff averred that she came to discover that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants also held a fraudulent title in respect of the suit property. The plaintiff averred that while this suit was pending and in the cause of the hearing of the same, she learnt that the 7<sup>th</sup> defendant also held a fraudulent title in respect of the suit property and that the 7<sup>th</sup> defendant had purported to subdivide the property into 10 portions of ½ acre each.
- 5 The plaintiff averred that the 7<sup>th</sup> defendant had forged the title for the suit property with the connivance and collusion and/or omission on the part of the 3<sup>rd</sup> defendant. The plaintiff averred that the 7<sup>th</sup> defendant attempted to forcefully take possession of the suit property. The plaintiff averred that the 7<sup>th</sup> defendant filed a suit in the lower court against fictitious defendants and purported to obtain orders of eviction and possession of the suit property. The plaintiff averred that the 3<sup>rd</sup> defendant had refused and/or neglected to nullify and/or cancel the fraudulent titles and to take appropriate precautions to safe guard the interest of the plaintiff in the suit property despite several requests by the plaintiff for it to do so.
- 6 The plaintiff averred that on 3<sup>rd</sup> and 7<sup>th</sup> April 2008, the 1<sup>st</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants together with their servants, agents and/or assigns entered the suit property without the plaintiff’s consent or legal authority and demolished the fence that the plaintiff had put up around the suit property and the plaintiff’s site office thereby occasioning loss and damage to the plaintiff to the tune of Kshs. 336,520/-.
- 7 The plaintiff sought judgment against the defendants jointly and severally for:
  1. A declaration that the suit property is wholly owned by the plaintiff and that the plaintiff holds the true title in respect thereof and that the titles held by the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants for the suit property are fraudulent, null and void and should be cancelled by the 3<sup>rd</sup> defendant.
  2. A declaration that the purported subdivision of the suit property by the 7<sup>th</sup> defendant is illegal null and void and an order cancelling the same.



3. A permanent injunction restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants and their servants, agents and/or assigns from trespassing or interfering in any way with the suit property and the plaintiff's quiet possession of the same.
4. Special damages of Kshs. 336,520/- as against the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants jointly and severally for trespass upon and destruction of the plaintiff's properties.
5. Costs and interest.

#### **The 1<sup>st</sup> defendant's defence:**

- 8 The 1<sup>st</sup> defendant filed a statement of defence on 29<sup>th</sup> July 2008. The 1<sup>st</sup> defendant denied that the plaintiff was the owner of the suit property. The 1<sup>st</sup> defendant averred that the Grant that was issued to the plaintiff that was allegedly registered 8 years after execution without payment of penalty Stamp Duty was not only suspect but was a nullity. The 1<sup>st</sup> defendant averred that the Grant was also a nullity for the reason that a similar Grant was issued to the 2<sup>nd</sup> defendant contemporaneously with the one that was allegedly issued to the plaintiff. The 1<sup>st</sup> defendant averred that in view of the existence of the two Grants one in favour of the plaintiff and the other in favour of the 2<sup>nd</sup> defendant, the suit property was not allocated to either of them and as such the same was available for alienation by the Commissioner of Lands to any other person.
- 9 The 1<sup>st</sup> defendant averred that he was the lawful owner of the suit property. The 1<sup>st</sup> defendant averred that he acquired the suit property at a consideration of Kshs. 25,000,000/- through a transfer dated 20<sup>th</sup> February 2005 that was registered on 29<sup>th</sup> December 2005. The 1<sup>st</sup> defendant averred that sometimes in July 2006, the 1<sup>st</sup> defendant put up a fence around the suit property and a structure on the suit property at a cost of Kshs. 485,000/- and posted one of his workers to take care of the suit property. The 1<sup>st</sup> defendant averred that the plaintiff's husband did not put up any fence around the suit property and did not take possession of the same in 1985 as alleged. The 1<sup>st</sup> defendant denied further that the plaintiff constructed a site office on the suit property. The 1<sup>st</sup> defendant averred that the title held by the plaintiff in respect of the suit property was a forgery and could not defeat the 1<sup>st</sup> defendant's title that was acquired for valuable consideration.
- 10 The 1<sup>st</sup> defendant contended that Nectel acquired the suit property lawfully. The 1<sup>st</sup> defendant averred that Nectel was a separate legal entity from the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant averred that the 3<sup>rd</sup> defendant was bound by the transfer in his favour. The 1<sup>st</sup> defendant averred further that the Grant that was issued to the Plaintiff was null and void in that the plaintiff never paid Stand Premium and other charges that were payable to the Commissioner of Lands under the letter of allotment of the suit property. The 1<sup>st</sup> defendant averred that his title to the suit property took precedence over that held by the plaintiff.
- 11 The 1<sup>st</sup> defendant averred further that it was always in possession of the suit property since he acquired the same on 29<sup>th</sup> December 2005. The 1<sup>st</sup> defendant averred that sometimes on or about 7<sup>th</sup> April 2008, some hooligans invaded the suit property and the 1<sup>st</sup> defendant alerted the Police of the invasion. The 1<sup>st</sup> Defendant averred that one of the hooligans, William Sialala Sano was arrested and charged with malicious damage to property. The 1<sup>st</sup> defendant denied the plaintiff's special damages claim of Kshs. 336,520/-. The 1<sup>st</sup> defendant averred that he held an indefeasible title over the suit property and as such the reliefs sought by the plaintiff could not be issued against him. The 1<sup>st</sup> defendant averred further that the plaintiff was guilty of laches and as such she was estopped from impeaching the 1<sup>st</sup> defendant's title. The 1<sup>st</sup> defendant urged the court to dismiss the plaintiff's suit with costs.



### **The 3<sup>rd</sup> defendant's defence:**

- 12 I have not seen on record the 2<sup>nd</sup> defendant's statement of defence. The 3<sup>rd</sup> defendant filed a statement of defence on 22<sup>nd</sup> October 2010. The 3<sup>rd</sup> defendant averred that it was a stranger to the plaintiff's alleged ownership of the suit property. The 3<sup>rd</sup> defendant averred that if any title in respect of the suit property was fraudulently issued to Nectel, the fraud was committed by the 1<sup>st</sup> and 2<sup>nd</sup> defendant and that the 3<sup>rd</sup> defendant was not involved. The 3<sup>rd</sup> defendant pleaded several particulars of fraud on the part of the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The 3<sup>rd</sup> defendant denied that it had refused to cancel the parallel fraudulent titles for the suit property. The 3<sup>rd</sup> defendant averred that it had no machinery for detecting fraud and that it referred all cases of fraud to the Criminal Investigations Department for investigation and necessary action should anyone be found culpable. The 3<sup>rd</sup> defendant averred that in any event, only a court of law could cancel a title to land.

### **The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' defence and counter-claim:**

- 13 The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants filed a mended statement of defence on 18<sup>th</sup> March 2015. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants denied that the plaintiff was the owner of the suit property and that she had been in possession and had constructed a site office thereon. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that they had all along been in actual possession of the suit property since 1970 and that in 1989, a Grant was issued in their favour in respect thereof by the Government. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that as at the time a Grant was purportedly issued in favour of the plaintiff in respect of the suit property, the property had already been allocated to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and as such the same was not available for alienation. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the purported title held by the plaintiff in respect of the suit property was fraudulent, irregular and a nullity and as such not capable of sustaining any cause of action. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the titles purportedly issued to the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> defendants in respect of the suit property were similarly fraudulent and as such void since the property was owned by the plaintiff.
- 14 The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that they were the first allottees of the suit property and that they held a first indefeasible title over the suit property. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that they were in possession of the suit property and that their titles superseded all other interests claimed over the property. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants denied that they trespassed on the suit property. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that they had occupied the suit property actively and constructively over the years and such the issue of trespass could not arise. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the plaintiff was a stranger to them.
- 15 In their counter-claim, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants reiterated the contents of their defence. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that they were the lawful owners of the suit property and they had occupied the same lawfully since 1970. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that on 15<sup>th</sup> July 2008, the 1<sup>st</sup> defendant in the company of hired goons trespassed on the suit property and caused destruction of property and grievous harm. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that on or about 16<sup>th</sup> August 2008, the 1<sup>st</sup> defendant while still in the company of his hired gang encroached on the suit property and started putting up a structure thereon. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that on 22<sup>nd</sup> September 2008, the 1<sup>st</sup> defendant once again trespassed on the suit property at night and together with his usual goons threatened to shoot the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in an attempt to forcefully evict them from the suit property.



16 The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that similar attempts were made on 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> November 2008 during which period the 1<sup>st</sup> defendant and his goons were joined by police officers who were acting under his instructions. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the 1<sup>st</sup> defendant and his team harassed them and caused the arrest of their family members. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that all these incidences of harassment at the hands of the 1<sup>st</sup> defendant were reported to the Police but no action was taken against the 1<sup>st</sup> defendant. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the 1<sup>st</sup> defendant's said acts of trespass were without any lawful justification as the 1<sup>st</sup> defendant had no lawful title to the suit property the same having been allocated to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and a title issued in their favour. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the titles that were purportedly issued to the plaintiff, 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> defendants or any other person in respect of the suit property were fraudulent, irregular and illegal. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants pleaded several particulars of fraud against the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> defendants. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that the 7<sup>th</sup> defendant had forged a title in respect of the suit property during the pendency of this suit and purported to subdivide the property into 10 parcels.

17 The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants reiterated that they were the legal owners of the suit property holding an indefeasible title in respect thereof to the exclusion of all and sundry, the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> defendants inclusive. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants averred that they had suffered loss and damage as a result of the acts and omissions on the part of the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> defendants. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants sought judgment by way of a counter-claim against the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> defendants for;

1. A declaration that the suit property belongs to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and an order directing the 3<sup>rd</sup> defendant to re-call, revoke, cancel and/or nullify the certificates of title issued in favour of the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 7<sup>th</sup> defendants in respect of the suit property.
2. An order of rectification directed against the 3<sup>rd</sup> defendant to rectify the records or register at the Land Registry, Nairobi to read and/or reflect the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants as the joint registered owners of the suit property.
3. A permanent injunction restraining the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 7<sup>th</sup> defendants by themselves, their agents, employees and/or any other person howsoever from trespassing, encroaching into, remaining on and/or in any other way whatsoever interfering with the suit property.
4. Costs of the suit.

#### **The 7<sup>th</sup> defendant's defence and counter-claim:**

18 The 7<sup>th</sup> defendant filed amended defence and counter-claim against the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants dated 12<sup>th</sup> July 2021. The 7<sup>th</sup> defendant denied that the plaintiff and the deceased were at all material times the registered owner of the suit property. The 7<sup>th</sup> defendant denied further that the deceased had taken possession of the suit property and put up a fence around the same. The 7<sup>th</sup> defendant averred that it was the 7<sup>th</sup> defendant which had had been in possession of the suit property. The 7<sup>th</sup> defendant averred that one, Moses Roptui Lowasikou and Weston Kipkosgei Langat applied to the Commissioner of Lands on 26<sup>th</sup> June 1996 to be allocated the suit property which they had occupied since 1989. The 7<sup>th</sup> defendant averred that through a letter of allotment dated 14<sup>th</sup> April 1998, the Commissioner of Lands allocated the suit property to the said Moses Roptui Lowasikou and Weston Kipkosgei Langat (hereinafter referred to only as "Moses and Weston) who accepted the



allotment on 6<sup>th</sup> July 1998 and paid a sum of Kshs. 577,950/- being the fees and other charges that were payable to the Commissioner of Lands for the allotment.

19 The 7<sup>th</sup> defendant averred that as at 9<sup>th</sup> August 2000, Moses and Weston had not been issued with a title in respect of the suit property. The 7<sup>th</sup> defendant averred that on 3<sup>rd</sup> May 2011, Moses and Weston requested the Commissioner of Lands to issue a title in respect of the suit property in the name of the 7<sup>th</sup> defendant in which the two were directors. The 7<sup>th</sup> defendant averred that on 26<sup>th</sup> May 2014, the Commissioner of Lands acting on the said request issued a certificate of title for the suit property to the 7<sup>th</sup> defendant. The 7<sup>th</sup> defendant averred that it sought approval from the City Council of Nairobi to subdivide the suit property into 10 portions which approval was granted on 19<sup>th</sup> May 2014. The 7<sup>th</sup> defendant denied that it acquired the suit property fraudulently. The 7<sup>th</sup> defendant averred that the acquisition and subsequent subdivision of the suit property was conducted procedurally and in accordance with the law. The 7<sup>th</sup> defendant averred that as the lawful proprietor of the suit property it had the right to deal with the same as deemed appropriate.

20 In its counter-claim, the 7<sup>th</sup> defendant reiterated the contents of paragraphs 1 to 18 of its statement of defence and averred that it was the sole and indefeasible owner of the suit property. The 7<sup>th</sup> defendant averred that the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants had no proprietary interest in the suit property. The 7<sup>th</sup> defendant averred that the titles held by the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants purportedly over the suit property were forgeries and had no force of law. The 7<sup>th</sup> defendant sought judgment against the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants by way of a counter-claim for;

1. A declaration that the suit property is wholly owned by the 7<sup>th</sup> defendant and that the 7<sup>th</sup> defendant holds the true title to the suit property and that the titles held by the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants purportedly over the suit property and/or the claims to the suit property by the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants are fraudulent, null and void and have no substance.
2. A declaration that the sub-division of the suit property by the 7<sup>th</sup> defendant was lawful and that the said subdivisions are valid.
3. A permanent injunction restraining the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and/or their servants, agents and/or assigns from trespassing into and interfering in any way with the suit property and with the 7<sup>th</sup> defendant's right to peaceful and quiet possession thereof.
4. An order directed to the 3<sup>rd</sup> defendant to cancel all the forged title documents in the possession of the plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants.
5. General damages.
6. Costs.
7. Interest on (e) and (f) at court rates.
8. Any other or such further reliefs as this court may deem fit and just to grant.

**The plaintiff's reply to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' defence and defence to counter-claim:**

20 The plaintiff filed a reply to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant's defence and defence to their counter-claim on 28<sup>th</sup> November 2008. The plaintiff denied that the suit property was allocated to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants prior to the allocation of the property to the plaintiff. The plaintiff averred that even if it is



true that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants were allocated the suit property prior to the allocation of the suit property to the plaintiff which was denied, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants did not accept the allotment and make payment of the fees and other charges for the allotment within the 30 days period that was prescribed in the letter of allotment. The plaintiff averred that following the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' failure to accept the allotment and to make the requisite payment as aforesaid, the suit property was allocated to the plaintiff who accepted the allotment and made the necessary payment within the 30 days period that was given in the letter of allotment within which such acceptance and payment was to be made.

- 21 The plaintiff denied all the other allegations contained in the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' statement of defence. In her defence to counter-claim, the plaintiff reiterated that at all material times the suit property was owned by her and the deceased as joint tenants. The plaintiff averred that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants had no legal right or claim over the suit property and denied that they were entitled to the reliefs sought in their counter-claim. The plaintiff reiterated that the title held by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants over the suit property was a forgery and that the same was fraudulently obtained. The plaintiff pleaded several particulars of fraud against the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. The plaintiff urged the court to dismiss the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants counter-claim and to enter judgment against them as prayed in the plaint.

**The 1<sup>st</sup> defendant's defence to counter-claim by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants:**

- 22 The 1<sup>st</sup> defendant denied that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants were the owners of the suit property. The 1<sup>st</sup> defendant averred that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants had not occupied the suit property at any time either actively or passively. The 1<sup>st</sup> defendant averred that he was the lawful owner the suit property having acquired the same lawfully from Nectel on 29<sup>th</sup> December 2005 at a consideration of Kshs. 25,000,000/-. The 1<sup>st</sup> defendant denied that he trespassed on the suit property in the company of hired goons and caused destruction of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' properties thereon in an attempt to evict them. The 1<sup>st</sup> defendant averred that on 7<sup>th</sup> April 2008, some hooligans invaded the suit property. The 1<sup>st</sup> defendant averred that he reported the invasion to the police and the 4<sup>th</sup> defendant was arrested and charged. The 1<sup>st</sup> defendant averred that as a result of the said invasion, a small building that he had put up on the suit property and a fence that he had built around the suit property were destroyed. The 1<sup>st</sup> defendant averred that he was at all material times in possession of the suit property and that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants were unknown to him and he had never attempted to evict them forcefully from the suit property which in any event they had never occupied. The 1<sup>st</sup> defendant averred that a part from a small structure on the suit property that was occupied by his workers, there were no other structures on the suit property. The 1<sup>st</sup> defendant averred that it was the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants who had made several attempts to invade the suit property.
- 23 The 1<sup>st</sup> defendant averred the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants had no title over the suit property which they could be defrauded. The 1<sup>st</sup> defendant reiterated that the purported title held by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants was a forgery and that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants had been charged with criminal offences in relation to the purported acquisition of the suit property. The 1<sup>st</sup> defendant averred that the titled held by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants over the suit property had been disowned by the 3<sup>rd</sup> defendant. The 1<sup>st</sup> defendant averred that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants were not entitled to the reliefs sought against the 1<sup>st</sup> defendant in their counter-claim and urged the court to dismiss the same.



**The evidence tendered by the parties in proof of their respective cases:**

- 24 At the trial, the plaintiff (PW1) adopted her witness statement dated 10<sup>th</sup> February 2011 as her evidence in chief and produced her bundle of documents dated 2<sup>nd</sup> February 2009 filed on 3<sup>rd</sup> February 2009 as exhibits. In her statement, the plaintiff narrated how the deceased and she acquired the suit property. She stated that the original Grant in respect of the suit property that was issued to them by the 3<sup>rd</sup> defendant was collected by her deceased husband's brother, one, Daniel Mwangi Kimemiah from the Land Registry who kept the same in a safe at Barclays Bank. She stated that her said brother in law wrote to them informing them of that arrangement. She stated that after the death of the deceased on 19<sup>th</sup> May 2000, she became the sole owner of the suit property since the same was jointly owned with the deceased. The plaintiff stated that after the death of the deceased she did a search on the suit property which revealed that the same was registered in the name of the 2<sup>nd</sup> defendant. The plaintiff stated that she requested the 3<sup>rd</sup> defendant to place a *caveat* on the title of the suit property pending confirmation that she was the owner of the property.
- 25 The plaintiff stated that she put up a site office on the suit property which had been fenced by the deceased. She stated that as she continued to put pressure on the 3<sup>rd</sup> defendant to put a caveat on the title of the suit property, the 3<sup>rd</sup> defendant asked her to produce the original Grant for the suit property that was issued to the deceased and she. She stated that she informed the 3<sup>rd</sup> defendant that the same was kept by her brother in law who could not remember where it was as it was not at the Bank where the said brother in law had told them to have kept it. The plaintiff stated that she informed the 3<sup>rd</sup> defendant that the original title was lost. The plaintiff stated that since the 3<sup>rd</sup> defendant insisted that she had to produce the original title before the 3<sup>rd</sup> defendant could take any action, she instructed her advocates to file this suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff stated that she learnt later that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants also had a purported title to the suit property and joined them to the suit. She reiterated that the titles allegedly held by the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant and the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants were fraudulent. She stated that after filing this suit, the defendants had entered the suit property from time to time and had damaged the fence that had been put up around the property and the site office. The plaintiff stated that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants used to occupy a government land adjacent to the suit property. The plaintiff stated that the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants had never occupied the suit property. The plaintiff urged the court to grant the prayers sought in her amended plaint.
- 26 On cross-examination by the advocate for the 1<sup>st</sup> defendant, the plaintiff (PW1) stated that the original grant in respect of the suit property was with her brother in law Daniel Mwangi Kimemiah who had indicated that he had kept the same in a bank. She stated that she went with her said brother in law to the bank where he indicated that he had kept the original title but did not find it in the safe where it was said to be. She stated that the original grant had not been traced and that it was reported missing to the Commissioner of Lands.
- 27 She stated further that when the deceased was a live, she visited the suit property from time to time. She stated that she visited the property for the first time in 1995/1996 and again in 2007. She stated that when she visited the property in 1995, the same was fenced and it was vacant. She stated that when she visited the property in 2007, she found some animals on the property but there were no structures apart from a structure that they had put up thereon for their caretaker. PW1 stated further that she constructed a site office on the suit property in 2007. She stated that prior to the construction of the said office, there was no one residing on the property. She stated that the said site office was burnt down. She stated that she heard that the 1<sup>st</sup> defendant was also claiming to have a title over the suit



- property. PW1 stated that the title that was held by the 1<sup>st</sup> and 2<sup>nd</sup> defendants over the suit property could only be fraudulent.
- 28 On cross examination by the advocate for the 3<sup>rd</sup> defendant, PW1 stated that the original grant that was issued to them was kept in a safe deposit at Barclays Bank in the name of her brother in law. PW1 stated that she did not know how the 2<sup>nd</sup> defendant obtained a title that bore the same particulars as the title that was held by them. PW1 stated that she paid land rates and administration fees in respect of the suit property. On cross-examination by the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants, PW1 stated that the suit property was allocated to them as unsurveyed Plot G, L.R No. 11641/R. She stated that the parcel of land was indicated as measuring 2 hectares. She stated that after the land was surveyed the acreage was ascertained to be 2.226 hectares. PW1 reiterated that when she visited the suit property with the deceased in 1995, the same was vacant and that on her subsequent visit, she found herdsmen grazing cattle on the property an act which they reported to the police. PW1 stated further that the Grant number for the title held by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in respect of the suit property was different from that in the title held by her for the same property and that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' letter of allotment and Grant seemed to have been issued earlier than the letter of allotment and the Grant that were issued in their favour. PW1 stated that her husband (the deceased) died in 2000. PW1 reiterated that they had put up a structure on the suit property.
- 29 On cross-examination by the advocate for the 7<sup>th</sup> defendant, PW1 stated that she had in her possession the original letter of allotment that was issued to the deceased in respect of the suit property. PW1 stated that there was no time limit within which the allotment was to be accepted or the property developed. She stated that the deceased accepted the allotment and made payment of the requisite charges on 20<sup>th</sup> December 1985. She stated that they made payment outside the 30 days provided in the letter of allotment and that the suit property was not developed because it had been the subject of a court case since 2008. She stated that prior to 2008, they did not develop the property because they were out of the country. PW1 stated that the 7<sup>th</sup> defendant took possession and occupied the suit property forcefully. He stated that that was after the 1<sup>st</sup> defendant had also attempted to forcefully take possession of the suit property by destroying the site office that they had put up on the property. PW1 reiterated that the original Grant that was issued to them got lost and that they made a report to the police and the Commissioner of Lands about the loss. PW1 stated that when she applied for the resealing of the grant of letters of administration in respect of the estate of the deceased in Kenya, she carried out a search on the suit property that revealed that the property was registered in the name of the 2<sup>nd</sup> defendant. PW1 stated that the suit property was not lawfully allocated to the 7<sup>th</sup> defendant as the same had already been allocated to the deceased. PW1 stated that the property was subdivided in breach of an order of status quo that was made by the court on 10<sup>th</sup> December 2008 which was duly served upon the 3<sup>rd</sup> defendant.
- 30 In re-examination, PW1 explained the changes in the land reference for the suit property. PW1 stated that if the Commissioner of Lands had any problem with the late payment that they made for the allotment of the suit property, he should not have accepted the same. She stated that the 3<sup>rd</sup> defendant accepted the payment and issued a receipt for the same unconditionally. She stated that the 3<sup>rd</sup> defendant was informed on several occasions that the original Grant for the suit property that had been issued to the deceased and she was lost. PW1 stated that the 3<sup>rd</sup> defendant was not supposed to allow the subdivision of the suit property to take place while there was an order of status quo in force.
- 31 The plaintiff's second witness was Wambugu Gitonga(PW2). PW2 was an advocate of the High Court of Kenya. PW2 told the court that he met the plaintiff in 2005 and that in 2006, the plaintiff instructed him to act for her in the resealing of a grant of letters of administration in respect of the estate of the deceased that had been issued in Zimbabwe. He stated that in the cause of handling the said succession



matter, the plaintiff instructed him on other matters. He stated that the suit property was mentioned in the succession cause. He stated that the property was jointly owned by the plaintiff and the deceased. He stated that he was instructed to register the death certificate of the deceased against the title of the property. He stated that he wrote to the Land Registry requesting to pay the land rent and was informed that the file for the suit property was not available at the Land Registry. He stated that he decided to conduct a search on the title of the suit property which search revealed that the property was registered in the name of the 2<sup>nd</sup> defendant. PW2 stated that he thereafter wrote to the Commissioner of Lands on 3<sup>rd</sup> September 2007 forwarding several documents to him in proof of the plaintiff and the deceased's title to the suit property and requesting that a *caveat* be placed on the title. He stated that despite reminders, no response was received to the said letter. PW2 stated that he was informed that the original title for the suit property that was issued to the plaintiff and the deceased was kept by the plaintiff's brother in law at Barclays Bank. He stated that he accompanied the plaintiff's said brother in law to Barclays Bank to get the document but they did not find the same. He stated that the Registrar of Titles was notified of this development. He stated that the Registrar of Titles summoned the 2<sup>nd</sup> defendant to appear at his office to explain how she acquired a title to the suit property but she did not turn up. PW2 stated that he was surprised when he received a letter dated 6<sup>th</sup> December 2007 from the 3<sup>rd</sup> defendant asking him to produce original title for the suit property that had been issued to the plaintiff and the deceased. He stated that despite several requests the Land Registrar did not register a caveat against the title for the suit property.

32 PW2 stated that he visited the suit property in 2007 together with the plaintiff and found it vacant. He stated that the plaintiff instructed him to put up a site office on the suit property which he did in September 2007. He stated that when he filed this suit, he obtained photographs from google maps showing the status of the suit property as at 22<sup>nd</sup> January 2007 which showed that the property was vacant. He stated that there was an attempt to stop the contractor that his firm had engaged from carrying out the construction of the site office but the contractor managed to complete the assignment with the assistance from the area chief who kept off those who attempted to interfere. He stated that the site office was later brought down. He stated that he reported the incident to the police and some people were arrested and charged with the offence of malicious damage to property. He stated that he was never bonded to attend court although he was the complainant and had recorded a statement with the police. He stated that on 19<sup>th</sup> December 2008, the court issued an order that the status quo in relation to the suit property be maintained which order he caused to be registered against the title of the suit property on 7<sup>th</sup> January 2009. PW2 produced the order as PEXH. 2 and the original documents that he had in his possession as PEXH.3. He stated that when the construction of the site office was being resisted, he was approached by another client who informed him that the suit property had been offered to him for sale by the 2<sup>nd</sup> defendant. He stated that it was at that point that he learnt of the 2<sup>nd</sup> defendant's title.

33 On cross-examination by the advocate for the 1<sup>st</sup> defendant, PW2 stated that he neither applied for a provisional title nor a duplicate deed plan. He reiterated that the loss of the original title was reported to the police. He stated that he was not able to register the deceased's death certificate against the title of the suit property because the original title was lost. He stated that he got a copy of the title for the suit property from the deceased's file that he produced in court as part of DEXH3. He denied that the correspondence and other documents that he produced in evidence were made up after the deceased's death. He stated that the 1<sup>st</sup> defendant was not summoned to appear before the Land Registrar because as at the time the said summon was issued they were not aware of the existence of the 1<sup>st</sup> defendant's title. He stated that the title that was held by the 1<sup>st</sup> defendant was not a copy of the plaintiff's and the 2<sup>nd</sup> defendant's titles that looked similar in all material respects. PW2 disagreed with the statement



- that had been made by Fredrick Lubulellah, Senior Land Registrar. He stated that there was a delay in the registration of the grant in favour of the plaintiff and the deceased and that as at the time of registration of the said grant, it appeared that there was already another grant registered in favour of the 1<sup>st</sup> defendant.
- 34 On cross-examination by the 3<sup>rd</sup> defendant's advocate, PW2 stated that the Land Registrar had denied issuing any grant in favour of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants in respect of the suit property. He stated further that he did all that he could to protect the plaintiff's interest in the suit property. On cross examination by the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants, PW2 stated that he learnt of them when they came to the suit property when the contractor was constructing the site office for the plaintiff on the suit property. He stated that the site office was demolished in 2008 and that some people were arrested and charged but the 1<sup>st</sup> defendant was the one indicated as the complainant. He stated that there was another criminal case in which the land registrars were the complainants and that their complaint was that their signatures had been forged.
- 35 On cross-examination by the 7<sup>th</sup> defendant's advocate, PW2 reiterated much of what he told the court in his evidence in chief. He stated that the deceased had fulfilled the conditions for the allotment of the suit property. PW2 stated that the 7<sup>th</sup> defendant evicted the plaintiff's caretaker from the suit property. He stated that the plaintiff was the lawful owner of the property. PW2 stated that the titles relied on by the 7<sup>th</sup> defendant were forgeries.
- 36 In re-examination by the plaintiff's advocate, PW2 stated that no case was instituted by the police with the plaintiff as the complainant. He stated that the title held by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants was not genuine and that the land registrar had confirmed that position. He stated that the deceased's acceptance of the offer of allotment and payment of the requisite fees was accepted by the 3<sup>rd</sup> defendant and that is why the deceased was issued with a Grant. He stated that the 7<sup>th</sup> defendant was joined in the suit when it violently stormed the suit property after the hearing of this suit had commenced and that an order was issued restraining the 7<sup>th</sup> defendant from interfering with the suit property. He stated that an order for the maintenance of status quo had been issued earlier and that the same was registered against the title. He stated that the transfer of the suit property by the 7<sup>th</sup> defendant to another company known as Bamoja Construction Limited (hereinafter referred to only as "Bamoja") was carried out when the order of status quo was in force. PW2 stated that the 7<sup>th</sup> defendant filed a suit against fictitious defendants in the lower court where it obtained orders of eviction which it then used to evict the plaintiff's caretaker from the suit property.
- 37 The 5<sup>th</sup> defendant, Suakei Ole Parkire (DW1) gave evidence on behalf of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. DW1 adopted his witness statement filed on 9<sup>th</sup> May 2013 as his evidence in chief. DW stated that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants were the owners of the suit property and that they had occupied the same since 1970. He stated that the property belonged to the Government when they occupied the same and that the same was vacant and not fenced. He stated that the suit property was allocated to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants on 30<sup>th</sup> July 1985 and they were subsequently issued with a Grant in 1989. He stated that the 4<sup>th</sup> and 6<sup>th</sup> defendants were registered as owners of the suit property on behalf of their parents with whom DW1 had lived on the suit property. He stated that the plaintiff came to the suit property while they were in occupation and put up iron sheet structure thereon next to their huts. He stated that they destroyed the plaintiff's structure. He stated that after they destroyed the plaintiff's structure, the following day, the 1<sup>st</sup> defendant came to the suit property and started putting up a similar structure. He stated that the 1<sup>st</sup> defendant claimed that the property did not belong to the plaintiff but to him. He stated that they once again brought down the 1<sup>st</sup> defendant's structure after which they were arrested at the instance of the 1<sup>st</sup> defendant. He stated that they were charged and were subsequently



acquitted when the 1<sup>st</sup> defendant failed to prove that the suit property was owned by him. DW1 stated that they continued to occupy the suit property and that they were still in possession as at the time he was giving evidence. He stated that neither the plaintiff nor the 1<sup>st</sup> defendant put up any other structure on the suit property. DW1 stated that while this suit was pending, the 7<sup>th</sup> defendant invaded the suit property in the company of police officers and started demolishing their structures. He stated that the demolition was carried out without a court order. He stated that they managed to save few items. He stated that the demolition was stopped after he called a few people but the 7<sup>th</sup> defendant started putting up a fence around the suit property on the following day. He stated that the 7<sup>th</sup> defendant fenced them inside the suit property as they refused to vacate. He stated that the court stopped the fencing exercise but by that time, the 7<sup>th</sup> defendant was through and they remained inside the property. DW1 stated that the 7<sup>th</sup> defendant thereafter persuaded him to move out of the suit property which now had no access in exchange with the 7<sup>th</sup> defendant agreeing to assist him put up another house. He stated that he accepted the offer and moved out. He stated that the suit property belonged to them and that the same did not belong to either the plaintiff or the 7<sup>th</sup> defendant. He stated that the two held fraudulent titles. He urged the court to grant the reliefs sought in their counter-claim.

- 38 On cross-examination by the plaintiff's advocate, DW1 stated that the 4<sup>th</sup> and 6<sup>th</sup> defendants were his relatives. He stated that he entered the property as a young man and that as at the time of giving evidence, he was 63 years old. He stated that they had constructed Maasai Manyattas in the middle of the property. He stated that the plaintiff had constructed an iron sheet structure next to their Manyattas. He identified in the photographs showed to him the house that was put up by the plaintiff and which they destroyed and was rebuilt by the 1<sup>st</sup> defendant. DW1 denied that together with the 4<sup>th</sup> defendant they were charged with the offence of forgery of a title to the suit property at Kibera Law Court. DW1 denied that they had forged a search and a title in respect of the suit property. He denied that they had attempted to sell the suit property and told the court that he was a stranger to the agreement of sale dated 21<sup>st</sup> August 2008 that was shown to him. He stated that they made all the requisite payments for the suit property. DW1 denied that they were all along occupying a riparian land in the neighbourhood. He stated that they had been paying land rates for the suit property.
- 39 On cross-examination by Ms. Gachoya for the 1<sup>st</sup> defendant, DW1 stated that the letter of allotment was issued to them on 30<sup>th</sup> July 1985 and that they made payment for the same on 4<sup>th</sup> July 1986 after which they were issued with a title for the suit property. DW1 stated that after the 7<sup>th</sup> defendant fenced the suit property, they had no access to and from the suit property. He stated that that is why they agreed to move out of the property. He denied knowledge of a lady by the name, Susan Ekale.
- 40 On cross-examination by the advocate for the 3<sup>rd</sup> defendant, DW1 stated that he did not have the original title for the suit property that was issued to them. He stated that they moved out of the suit property and put up new houses outside the property after their houses were demolished and the property fenced. On cross-examination by Mr. Ondabu for the 7<sup>th</sup> defendant, DW1 stated that they were claiming the entire land comprised in the suit property measuring 5 ½ acres. He stated that he had no problem if the court was to give him the land he was occupying. He stated that he was compensated by the 7<sup>th</sup> defendant for his houses that were demolished by the 7<sup>th</sup> defendant. DW1 stated that the original title deed that had been issued to them was burnt during their eviction from the suit property. He denied that the title was taken by the police when they were charged with forgery at Kibera Law Court. He reiterated that they were paid compensation after their houses were demolished.
- 41 On re-examination, DW1 admitted that he was charged at Kibera Law Court with the offence of making false documents in which case the complainant was the 1<sup>st</sup> defendant. He stated that the case together with another one in the same court also brought at the instance of the 1<sup>st</sup> defendant was



- dismissed for lack of evidence. DW1 stated that he was born in 1965. He reiterated that Susan Ekale was not known to him. He stated that the money that was paid to him was from a company known as Bamoja and not from the 7<sup>th</sup> defendant and that it was not compensation for land but for the destroyed houses.
- 42 The next to give evidence was Westone Kipkosgei Langat (DW2) who gave evidence on behalf of the 7<sup>th</sup> defendant. DW2 stated that he was one of the directors of the 7<sup>th</sup> defendant. DW2 adopted his witness statement and further witness statement dated 17<sup>th</sup> March 2015 and 26<sup>th</sup> June 2015 respectively as his evidence in chief. DW2 produced the 7<sup>th</sup> defendant's list of documents and further list of documents filed on 18<sup>th</sup> March 2015 and 26<sup>th</sup> June 2015 as DEXH. 2 and DEXH. 3 respectively. DW2 stated that as at the time the 7<sup>th</sup> defendant was added to the suit as a party, it no longer owned the suit property. He stated that the 7<sup>th</sup> defendant sold the property to a third party on 1<sup>st</sup> October 2014. He stated that when he and his partner Moses Roptui Lowasikou applied to the Commissioner of Lands to be allocated the suit property, the property was vacant and was being used as a playing field. He stated that the property had no structures and that it remained in that state until they sold it. DW2 denied that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant were in occupation of the suit property. He stated that after applying to be allocated the land, they acquired the 7<sup>th</sup> defendant and had the title for the property issued in its name. DW2 stated that they applied for the property on 25<sup>th</sup> June 1996 and paid for the allotment on 8<sup>th</sup> July 1998 while the 7<sup>th</sup> defendant was incorporated on 18<sup>th</sup> June 2007. He stated that the 7<sup>th</sup> defendant thereafter subdivided the suit property into 10 portions in 2014 and was issued with 10 separate titles for the subplots. DW2 stated that they thereafter transferred all the subplots to Bamoja. He stated that all these processes took place before the 7<sup>th</sup> defendant was joined as a party to this suit. He denied that the plaintiff and the 1<sup>st</sup> defendant had owned the suit property or had occupied the same. He urged the court to grant the reliefs sought by the 7<sup>th</sup> defendant in its counter-claim.
- 43 On cross-examination by the advocate for the 1<sup>st</sup> defendant, DW2 stated that they applied to be allocated the suit property in 1996 while the 7<sup>th</sup> Defendant was incorporated in June 2007. He stated that the 7<sup>th</sup> defendant sold the suit property to Bamoja in 2014 although he did not have a copy of the agreement of sale. He stated that the 7<sup>th</sup> defendant sold the property at a consideration of Kshs. 100,000,000/-.
- 44 On cross-examination by the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants, he stated that when they applied for the suit property, he was residing at Embakasi Nairobi. He stated that he had a relative who was a police officer based at Hardy Police Station who informed him that there was vacant piece of land at Karen. He stated that on receipt of this information, they applied to the Commissioner of Lands to be allocated the same. He stated that when they applied for the suit property it had been surveyed and given a number but the same was not registered in the name of anyone neither was it occupied.
- 45 On cross-examination by the advocate for the plaintiff, DW2 told the court that he was 56 years old. He stated that he held 55 shares in the 7<sup>th</sup> defendant and his partner Moses Roptui held 45 shares. He reiterated that when they applied to be allocated the suit property, the property was vacant. DW2 stated that he was not aware of one, Omar Wasarme who had had sworn an affidavit in a suit that was filed in the lower court by the 7<sup>th</sup> defendant. He stated that he was not aware that the said Omar Warsame was also a director of Bamoja. He admitted that he was aware that the 7<sup>th</sup> defendant had been restrained from selling the suit property. He stated that the title that was issued to the 7<sup>th</sup> defendant in respect of the suit property was surrendered when the 7<sup>th</sup> defendant subdivided the property. DW2 stated that they took time to process the title for the suit property due to lack of money. He denied that the documents that he produced in evidence were forgeries. He stated that the people who were sued by the 7<sup>th</sup> defendant in the lower court were Maasai cattle herders who were grazing their cattle



- on the suit property. DW2 stated that they did not conduct a search on the title of the suit property before they applied for it. He stated that he had no evidence that the 7<sup>th</sup> defendant paid rates for the suit property. He denied that the 7<sup>th</sup> defendant and Bamoja were one and the same entity and that the 7<sup>th</sup> defendant transferred the suit property to Bamoja to defeat the plaintiff's interest in the property.
- 46 On cross-examination by the 3<sup>rd</sup> defendant's advocate, DW2 stated that he was aware that when the 7<sup>th</sup> defendant was issued with a title for the suit property on 16<sup>th</sup> May 2013 this suit over the suit property was already pending in court. DW2 stated that his partner and he bought shares in the 7<sup>th</sup> defendant. He could not however remember the former directors and shareholders of the 7<sup>th</sup> defendant. He could only recall the name of one, Michael.
- 47 On re-examination by the 7<sup>th</sup> defendant's advocate, DW2 stated that he had original letter of allotment dated 17<sup>th</sup> June 1998 that was issued to them in respect of the suit property. He reiterated that they acquired the 7<sup>th</sup> defendant through purchase of shares. He stated that the eviction order that the 7<sup>th</sup> defendant obtained against those who were grazing on the suit property was never appealed. The 3<sup>rd</sup> defendant's witness, Edwin Munoko Wafula (DW3) gave evidence next. DW3 adopted his witness statement dated 17<sup>th</sup> July 2020 as part of his evidence in chief. DW3 also produced the 3<sup>rd</sup> defendant's bundle of documents dated 26<sup>th</sup> June 2020 as DEXH. 1. DW3 told the court that when he checked the file relating to the suit property he found correspondence relating to the titles claimed by plaintiff, the 1<sup>st</sup> defendant and the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. He stated that as far as the 7<sup>th</sup> defendant's title was concerned, he found copies of documents in respect of which the Land Registry did not have originals. He stated that from those documents, the suit property was transferred to Bamoja by the 7<sup>th</sup> defendant.
- 48 On cross-examination by the advocate for the plaintiff, DW3 stated that he had worked at the Ministry of Lands since 2008 as a Registrar of Titles. He stated that when he recorded his witness statement he had not perused the file for the suit property. DW3 stated that the Land Registry was supposed to keep both the deed file and correspondence file for the suit property. He stated that it was the deed file that was supposed to contain the title documents. He stated that a sealed photocopy of the original title is supposed to be in the deed file. DW3 stated that what he saw in relation to the suit property were correspondence. He stated that what they had in relation to the suit property was a deed file but it only contained general correspondence. He stated that what he produced as DEXH.1 was from the said deed file including the statements. He stated that he was not sure if all the documents that he produced was from their file. He stated that what they forwarded to their advocate was what was in their deed file. He stated that a land registrar who was no longer working at the Land Registry, one George Gachihi had recorded a further statement on 4<sup>th</sup> October 2010 following an inquiry by the police to the effect that although the file relating to the suit property had been interfered with by the removal and addition of some documents, the genuine owner of the suit property was the plaintiff and the deceased. He stated that he was aware that the 7<sup>th</sup> defendant had sold and transferred the suit property to Bamoja. He stated that another land registrar Ms. Gicheha who was no longer working with the Ministry of Lands had recorded a statement in which she stated that the subdivision of the suit property was fraudulent. He stated that he was not aware if any action was taken on the findings by Ms. Gicheha. DW3 denied that there was any negligence on the part of the Land Registry. He admitted however that it was not normal for several people to hold different titles for the same property. He stated that the Land Registry had a duty to ensure that such cases do not arise. He admitted that if the normal legal procedures were followed, the situation before the court would not have arisen. DW3 stated that it was only copies of the documents relating to the 7<sup>th</sup> defendant's title that were in the deed file. He admitted that the order that was made on 10<sup>th</sup> December 2008 for the maintenance of status quo was registered. DW3 stated that land could not be allocated to a company before its incorporation. He stated that he was not aware how Nectel was allocated the suit property before it was incorporated.



- 49 On cross-examination by the advocate for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants, DW3 stated that in their file, there was no correspondence or any other document regarding the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' title. He denied that there was negligence on the part of the Land Registry. He stated that he was unable to comment on the investigations that were carried out by his colleagues.
- 50 On cross-examination by the advocate for the 7<sup>th</sup> defendant, DW3 stated that the title in dispute was I.R No. 78509. He stated that each land parcel had to have its separate title number. He stated that one Grant cannot be used to register various parcels of land. He stated that according to the statement of George Gachihi, the title I.R 78509 was used to register several parcels of land for several persons and that the first parcel of land that was registered under that title was L.R No. 20778. DW3 stated that the property that was registered in the name of the 7<sup>th</sup> defendant was registered under I.R No. 152319.
- 51 On re-examination by the 3<sup>rd</sup> defendant's advocate, DW3 reiterated that they did not have any record of the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant's title. On examination by the court, DW3 stated that on the material in their possession, he was unable to say with certainty which of the parties before the court was the lawful owner of the suit property. The 1<sup>st</sup> defendant did not tender any evidence at the trial in his defence.

### **The submissions:**

#### **The submissions by the plaintiff:**

- 52 The plaintiff filed her submissions dated 30<sup>th</sup> August 2021 on 31<sup>st</sup> August 2021. In the opening paragraphs of her submissions, the plaintiff explained the dispute before the court and the parties' respective claims and cross-claims. The plaintiff also gave a summary of the evidence tendered by each party at the trial. The plaintiff framed three issues for determination by the court which she submitted on. The issues were; whether the plaintiff is the lawful and legitimate owner of the suit property and if she is, whether the titles held by the defendants are fraudulent; whether the 3<sup>rd</sup> defendant was negligent in its dealing with the suit property and whether the plaintiff is entitled to the reliefs sought in her further amended plaint filed on 16<sup>th</sup> February 2015.
- 53 The plaintiff submitted that she had established through the evidence that she tendered in court that she was the lawful and legitimate owner of the suit property. The plaintiff submitted that she placed before the court original documents showing that her deceased husband (the deceased) applied for the suit property, the same was allocated to him, he accepted the allotment and he paid all the necessary charges. The plaintiff submitted that she also placed evidence before the court showing that the property was thereafter surveyed before a title was issued to her and the deceased. The plaintiff submitted further that she explained the circumstances under which the title of the suit property got lost and how she came to learn of the parallel titles in the possession of the defendants.
- 54 The plaintiff submitted that she demonstrated to the court that her title was the first in time. The plaintiff submitted that the 1<sup>st</sup> defendant did not tender evidence at the trial and as such he did not prove that he had a valid title over the suit property. The plaintiff submitted that in any event, the 1<sup>st</sup> defendant's title had no basis as he claimed to have acquired the property from Nectel to which the suit property was purportedly allocated in 1995 before it was incorporated in 2006. The plaintiff submitted that the 2<sup>nd</sup> defendant did not defend the suit and as such, the averments of illegality touching on her alleged title over the suit property were not controverted. With regard, to the title allegedly held by the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants, the plaintiff submitted that no evidence of the existence of this title was produced in court. The plaintiff submitted further that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants did not prove that they applied to be allocated the suit property and that after the same was allocated to them they accepted the allotment and made payment for the same.



- 55 The plaintiff submitted further that the title for the suit property that was held by the 7<sup>th</sup> defendant and which was purportedly transferred to Bamoja on 2<sup>nd</sup> October 2014 after the property was allegedly subdivided was issued in violation of the order for the maintenance of status that was made herein in 2008. The plaintiff submitted that a title to a property obtained in violation of a court order is a nullity. In support of this submission, the plaintiff cited *Margaret Wangui Karugu v John Njenga Karugu & Another* [2018]eKLR. The plaintiff submitted further that in any event, the title was acquired fraudulently. The plaintiff submitted that there were multiple letters of offer that were allegedly issued to the 7<sup>th</sup> defendant's directors by different officers in the office of the 3<sup>rd</sup> defendant for the suit property. The plaintiff submitted further that a copy of the receipt for the payment that was allegedly made by the 7<sup>th</sup> defendant for the allotment was different from the receipt that was produced in court by the 3<sup>rd</sup> defendant in several material respects. The plaintiff submitted that the said payment was also made outside the 30 days period that was prescribed in the letter of allotment for making such payment. The plaintiff submitted further that even the allotment letter that was produced in court by the 7<sup>th</sup> defendant was different from the one that was produced by the 3<sup>rd</sup> defendant. The plaintiff submitted further that the 7<sup>th</sup> defendant did not produce any evidence showing that it had made any payment on account of land rates. The plaintiff submitted further that the plaintiff's Grant predated that of the 7<sup>th</sup> defendant. The plaintiff submitted that since her title was the first in time it had to prevail over that held by the 7<sup>th</sup> defendant. In support of this submission, the plaintiff cited *Gitwany Limited v Tajmal Limited & 2 others* [2006]eKLR.
- 56 The plaintiff submitted that since the 7<sup>th</sup> defendant's directors to whom the suit property was purportedly allocated did not have a valid title over the suit property, they had nothing to transfer to the 7<sup>th</sup> defendant. The plaintiff submitted further that there was no evidence of the transaction between the said directors of the 7<sup>th</sup> defendant and the 7<sup>th</sup> defendant. The plaintiff submitted that there was no evidence that any transfer took place between them. The plaintiff submitted that since the 7<sup>th</sup> defendant did not acquire a valid title to the suit property, it has no title that it could pass to Bamoja. The plaintiff submitted that the 7<sup>th</sup> defendant had a defective and an invalid title over the suit property that could not convey any right or interest in the suit property.
- 57 The plaintiff submitted further that the 3<sup>rd</sup> defendant was negligent in the matter it handled the plaintiff's complaints regarding the suit property. The plaintiff submitted that the 3<sup>rd</sup> defendant failed to protect her interest in the suit property despite several requests made in writing. The plaintiff submitted that her request to the 3<sup>rd</sup> defendant to register a caveat against the title of the suit property was ignored. The plaintiff submitted that if the 3<sup>rd</sup> defendant had acted diligently on her complaints, the many parallel titles for the suit property would not have been generated. The plaintiff submitted that she had proved gross negligence on the part of the 3<sup>rd</sup> defendant.
- 58 The plaintiff submitted that she had proved on a balance of probabilities that she had a valid title over the suit property and that the parallel titles held by the defendants were obtained fraudulently and/or through a corrupt scheme. The plaintiff submitted that she was entitled to damages having been prevented for several years from using the suit property. The plaintiff submitted that she was entitled to nominal damages from those who have trespassed on the suit property. The plaintiff urged the court to award her a sum of Kshs. 500,000/- as general damages for trespass. In support of this submission, the plaintiff cited *Rosemary Wanjiru v Officer in Charge of Station Molo Police Station & another* [2017]eKLR.
- 59 In conclusion the plaintiff urged the court to make a finding that the plaintiff had proved her case against the defendants on a balance of probabilities and to enter judgment in her favour as prayed in her further amended plaint.



### The submissions by the 3<sup>rd</sup> defendant:

- 60 The 3<sup>rd</sup> defendant filed its submissions on 10<sup>th</sup> March 2022. The 3<sup>rd</sup> defendant gave a brief summary of each party's case as pleaded and the evidence tendered by each party in support thereof. The 3<sup>rd</sup> defendant submitted that there was only one issue for determination by the court namely, who is the lawful owner of the suit property. The 3<sup>rd</sup> defendant urged the court to consider the priority of registration of the various titles. The 3<sup>rd</sup> defendant submitted that the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not adduce any evidence at the trial while the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants gave evidence but did not produce any document in support of their title to the suit property. With regard to the title held by the 7<sup>th</sup> defendant, the 3<sup>rd</sup> defendant submitted that the same was acquired while there was a court order in force that required the status quo relating to the suit property to be maintained. The 3<sup>rd</sup> defendant submitted further that the 7<sup>th</sup> defendant did not produce evidence that it sold the suit property to Bamoja at Kshs. 100,000/-. The 3<sup>rd</sup> defendant urged the court to direct that each party bears its own costs of the suit. The submissions by the 7<sup>th</sup> defendant:
- 61 The 7<sup>th</sup> defendant filed submissions dated 10<sup>th</sup> December 2021 on 6<sup>th</sup> January 2022. The 7<sup>th</sup> defendant gave a summary of each party's case as set out in their pleadings and the evidence that each tendered at the trial. The 7<sup>th</sup> defendant also framed three issues for determination by the court. The issues were; which party holds a genuine title over the suit property? Whether any other land parcel could be registered under title No. I.R 78509 after the registration of L.R No. 20778 under that title and whether the 7<sup>th</sup> defendant is entitled to the reliefs sought in its counter-claim.
- 62 On the first issue, the 7<sup>th</sup> defendant submitted that it had proved that it was the one holding a valid title over the suit property. In support of this submission, the 7<sup>th</sup> defendant cited *Joseph Arap Ngok v Justice Moijo Ole Keiwua* [1997]eKLR and *Wreck Motors Enterprises v The Commissioner of Lands & others* [1997]eKLR. The 7<sup>th</sup> defendant submitted that the order for the maintenance of status quo was made in 2008 before it was made a party to the suit and as such the same could not invalidate its title. In support of this submission, the 7<sup>th</sup> defendant cited *Fondo Shutu & Another v Japhet Noti Charo & Another* [2021]eKLR. The 7<sup>th</sup> defendant submitted that its ownership of the suit property before it transferred the same to Bamoja was lawful.
- 63 On the second issue, the 7<sup>th</sup> defendant submitted that title No. I.R 78509 having been assigned to L.R No. 20778 that was registered on 15<sup>th</sup> October 1996 prior to the purported registration of the plaintiff and the other defendants as owners of the suit property, the same title number was not available for use in these later registrations. The 7<sup>th</sup> defendant submitted that the parcels of land that were registered after 15<sup>th</sup> October 1996 could not be assigned the same title number. In support of this submission, the 7<sup>th</sup> defendant cited *Mavoko Land Development Co. Ltd. v Kasina Housing Scheme Society & 4 others* [2019] eKLR. The 7<sup>th</sup> defendant submitted that the plaintiff and the other defendants failed to demonstrate that the titles that they held over the suit property were lawful. In support of this submission, the 7<sup>th</sup> defendant cited *Munyu Maina v Hiram Gathina Maina* [2013]eKLR. The 7<sup>th</sup> defendant submitted that the titles purportedly held by the plaintiff and the other defendants were *prima facie* fraudulent.
- 64 On the last issue, the 7<sup>th</sup> defendant submitted that it had demonstrated that it acquired the suit property lawfully and as such it transferred a valid title to Bamoja. The 7<sup>th</sup> defendant submitted that it was entitled to the reliefs sought in its counter-claim.
- 65 I have not seen on record the submissions by the 1<sup>st</sup> defendant and the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants.



### Analysis of the issues arising and determination:

66 I have considered the pleadings, the evidence adduced by the parties in support of their respective cases and the submissions by the advocates for the parties. As I have mentioned, each party framed its own issues. From the pleadings, the issues arising for determination in this suit in my view are the following:

1. Who is the genuine and lawful owner of all that parcel of land known as L.R No. 13873(the suit property) as between the plaintiff, the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and the 7<sup>th</sup> defendant?
2. Whether the plaintiff is entitled to the reliefs sought in her further amended plaint.
3. Whether the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants are entitled to the reliefs sought in their counter-claim.
4. Whether the 7<sup>th</sup> defendant is entitled to the reliefs sought in its counter-claim.
5. Who is liable for the costs of the suit?

67 Who is the genuine and lawful owner of all that parcel of land known as L.R No. 13873(the suit property) as between the plaintiff, the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and the 7<sup>th</sup> defendant?

In *Munyu Maina v Hiram Gathiba Maina*(*supra*) the Court of Appeal stated that:

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

68 In *Daudi Kiptugen v Commissioner of Lands & 4 Others* [2015] eKLR the court stated that:

“...the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein.”

69 In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), *Milankumar Shah & 2 others v The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law, and the public interest”.



70 In *Mwangi James Njebia v Janetta Wanjiku Mwangi & another* [2021]eKLR, the Court of Appeal stated as follows:

“38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have “purchased’ properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title. It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.”

71 In *Alberta Mae Gacie v Attorney General & 4 Others* [2006] eKLR the court stated as follows:

“Cursed should be the day when any crook in the streets of Nairobi or any town in this jurisdiction, using forgery, deceit or any kind of fraud, would acquire a legal and valid title deceitfully snatched from a legal registered innocent proprietor. Indeed, cursed would be the day when such a crook would have the legal capability or competence to pass to a third party, innocent or otherwise, a land interest that he does not have even if it were for valuable consideration. For my part, I would want to think that such a time when this court would be called upon to defend such crooks, has not come and shall never come....”

72 I am persuaded from the evidence on record that the plaintiff is the genuine and lawful owner of the suit property. The plaintiff placed documents before the court showing that the deceased applied to the Commissioner of Lands to be allocated land. The Commissioner of Lands by a letter dated 1<sup>st</sup> August 1985 allocated to the deceased land that was referred to as UNS. PLOT NO. G OF L.R NO. 11641/4 NAIROBI. The deceased was required to pay a sum of Kshs. 122,756/70 for the allotment. The deceased accepted the allotment through a letter dated 10<sup>th</sup> September 1985. On 20<sup>th</sup> October 1985, the deceased paid the said sum of Kshs, 122,756/70 and was issued with a receipt of the same date. The payment made by the deceased was accepted unconditionally. The plaintiff produced evidence showing that after making the payment, the Commissioner of Lands demanded from the deceased payment of land rent for the suit property from time to time which the deceased paid. The plaintiff produced a letter from the Commissioner of Lands dated 5<sup>th</sup> October 1989 in which the Commissioner of Lands asked for additional payment of Kshs. 790/- from the deceased on account of conveyancing fees and stamp duty. The deceased paid this amount on 2<sup>nd</sup> July 1990. On 22<sup>nd</sup> November 1989 the Commissioner of Lands wrote to the deceased demanding payment of Kshs. 400,000/- being the proportionate cost of developing infrastructural services on the suit property which by then had been given a new number LR. No. 13873. The deceased made this payment on 2<sup>nd</sup> July 1990 together with the said conveyancing fees and stamp duty and was issued with a receipt.

73 On 29<sup>th</sup> November 1990, the deceased requested the Commissioner of Lands to issue a title for the suit property in the name of the deceased and the plaintiff. On 29<sup>th</sup> November 1990, the deceased executed an informal transfer transferring the suit property from his sole name to the names of the deceased and the plaintiff. The transfer was consented to by the Commissioner of Lands. By a letter dated 18<sup>th</sup> June 1991, the Commissioner of Lands revised the standard premium, annual rent and stamp duty following a survey that ascertained the measurement of the suit property to be 2.226 hectares and not



2 hectares on which the earlier charges were based. The deceased was asked to pay Kshs. 1,264/- being the difference following the revision which amount the deceased paid on 19<sup>th</sup> September 1991. What all these communications between the Commissioner of Lands and the deceased show is that as at 19<sup>th</sup> September 1991, the deceased was the undisputed owner of the suit property. There was no indication whatsoever that another survey had been conducted or that another letter of allotment or grant had been issued to anyone else in respect of the suit property. On 30<sup>th</sup> December 1991, the Commissioner of Lands issued Grant No. I.R 78509 in respect of the suit property in favour of the deceased and the plaintiff as joint proprietors of the suit property. It is not clear why there was a delay in the registration of the Grant. The same was registered on 24<sup>th</sup> November 1998.

- 74 In a letter dated 28<sup>th</sup> January 1999 addressed to the deceased by his brother who had collected the Grant on his behalf, he informed the deceased who was working outside the country at the time that he had safely kept the original Grant in a safe at a bank. Under cover of that letter, the deceased's said brother forwarded to him a copy of the said Grant. The deceased who was working and residing in Zimbabwe died the following year on 19<sup>th</sup> May 2000.
- 75 It appears that it was the long period of inactivity in relation to the suit property of about 6 years following the death of the deceased that set off the scramble for the property which is situated in a prime area of Nairobi. When the plaintiff who was also residing in Zimbabwe came to Kenya in 2007 to have the grant of letters of administration in respect of the estate of the deceased that was issued in Zimbabwe resealed and to follow up the suit property that was now solely owned by her following the death of the deceased, a search on the property revealed that the same was registered in the name of the 2<sup>nd</sup> defendant. In quick succession, the 1<sup>st</sup> defendant and the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants also came up claiming to have a titles to the suit property. The plaintiff through her former advocates Makhecha & Gitonga Advocates requested the Commissioner of Lands (the 3<sup>rd</sup> defendant) to place a caveat against the title to stop any further dealings but no action was taken. It was as a result of the said developments that this suit was brought. The 7<sup>th</sup> defendant came to the picture several years after the filing of this suit to also stake a claim over the suit property.
- 76 Starting with the 1<sup>st</sup> defendant's claim over the suit property, the 1<sup>st</sup> defendant claimed to have purchased the suit property from Nectel on 29<sup>th</sup> December 2005 at a consideration of Kshs. 25,000,000/-. Nectel is said to have been issued with a Grant No. I.R 78509 in respect of the suit property on 19<sup>th</sup> May 1998 which Grant was registered on 2<sup>nd</sup> July 1998. According to the evidence before the court, Nectel was incorporated on 3<sup>rd</sup> January 2006. This means that Nectel was not in existence on 19<sup>th</sup> May 1998 when it was allegedly issued with a Grant in respect of the suit property. No evidence was placed before the court showing how Nectel acquired the suit property before it was incorporated and also sold the same to the 1<sup>st</sup> defendant who was its director and shareholder again before its incorporation. Neither the letter of allotment of the suit property to Nectel nor evidence of payment for the allotment was produced in evidence. The 1<sup>st</sup> defendant did not adduce evidence at the trial in his defence. As at the time the suit property was purportedly allocated to Nectel, the same had already been allocated to the deceased and a grant issued in favour of the deceased and the plaintiff. The suit property was therefore not unalienated government land that could be allocated by the 3<sup>rd</sup> defendant. It is my finding that the 1<sup>st</sup> defendant's purported title to the suit property is unlawful and that fraud cannot be ruled out in the acquisition of the title by the 1<sup>st</sup> defendant. There is no way in which a company incorporated in 2006 could have been allocated land in 1998.
- 77 As for the 2<sup>nd</sup> defendant, her Grant is a replica of the plaintiff's Grant word for word save for the name of the proprietor. The Grant is No. I.R 78509. It was issued on 30<sup>th</sup> December 1991 and registered on 24<sup>th</sup> November 1998 like the plaintiff's Grant. There is no way in which the 3<sup>rd</sup> defendant could have issued



two Grants for the same property on the same date and have them registered on the same date at the same time. Like Nectel, there is no evidence of how the 2<sup>nd</sup> defendant acquired the suit property. The 2<sup>nd</sup> defendant did not defend the suit. The averments by the plaintiff that the 2<sup>nd</sup> defendant's alleged title over the suit property was a forgery was not controverted. It is my finding that the purported title held by the 2<sup>nd</sup> defendant is a forgery and that the same was acquired fraudulently.

- 76 With regard to the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants, although they put up a very strong defence, they did not produce any document in evidence in support of their title. All their documents were marked for identification after the plaintiff's advocates objected to the production of the same on the ground that they were photocopies. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants told the court that they would bring the original documents which they never did with the result that their documents were never produced as exhibits. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants claimed to have been allocated the suit property on 30<sup>th</sup> July 1985 and issued with a Grant No. 69478 on 19<sup>th</sup> October 1989 which was registered on 22<sup>nd</sup> November 1989. There is no evidence of an application for allocation of the property, the acceptance of the allotment and payment of the charges. The date of the application for allotment, acceptance of the offer and payment of the necessary charges would have given an indication as to when the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants were actually allocated the suit property. In the absence of that information, the plaintiff's contention that the letter of allotment is not genuine cannot be ruled out. The plaintiff had pointed out that the measurement of the suit property of 2.226 hectares came after the property was surveyed. It was not possible therefore for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant's letter of allotment that was allegedly issued before the plaintiff's letter of allotment to have contained the measurement on 2.226 hectares for the suit property. I have also noted that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants' letter of allotment and that of the plaintiff seems to have been signed by the same person but the signature of the person is different in the two letters. I have also noted that whereas the plaintiff's letter of allotment was issued under Authority –P.A.A.C. of 24<sup>th</sup> May 1985, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants was not issued under any authority.
- 77 I have also noted further from the statement by the Land Registrar E.N.Gicheha at page 79 of DEXH.1 that the I.R No. 69478 which is the title number for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant's title for the suit property belongs to another parcel of land namely L.R No. 22008 situated in Limuru and that the title was surrendered in exchange with a new title I.R No. 70551. I have seen a copy of Grant No. I.R 69478 for L.R No. 22008 at page 105 of the 1<sup>st</sup> defendant's bundle of documents. There is no doubt that Grant No. 69478 that was issued on 12<sup>th</sup> June 1996 and surrendered on 20<sup>th</sup> September 1996 was in respect of land situated in Limuru. It is mystery how the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants title could have been assigned the same title number.
- 78 Due to the foregoing, I am not satisfied that the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants have established their title to the suit property.
- 79 As for the 7<sup>th</sup> defendant's claim to the suit property, the property was not available for allocation to Weston Kipkosgei Langat and Moses Roptui Lowasikou (hereinafter referred to as "the 7<sup>th</sup> defendant's directors) when the same was purportedly allocated to them on 17<sup>th</sup> June 1998. The suit property as at that date had been allocated to the deceased who had paid for the same and had been issued with a Grant in his name and that of the plaintiff. The suit property was no longer unalienated government land that was available for allocation. The purported allocation of the suit property to the 7<sup>th</sup> defendant's directors was therefore illegal, null and void.
- 78 The 7<sup>th</sup> defendant's directors claimed that they asked the 3<sup>rd</sup> defendant on 3<sup>rd</sup> May 2011 to issue a title for the suit property in the name of the 7<sup>th</sup> defendant. There is no evidence that was placed before



the court showing that the 7<sup>th</sup> defendant's directors transferred or assigned the purported allotment to the 7<sup>th</sup> defendant. There is also no evidence that a title was indeed issued in favor of the 7<sup>th</sup> defendant as none was produced in court. In its statement of defence, the 7<sup>th</sup> defendant contended that it was issued with a certificate of title for the suit property on 26<sup>th</sup> May 2014. A perusal of the 7<sup>th</sup> defendant's documents shows that the Certificates of Titles that were issued on 24<sup>th</sup> May 2014 were for the subplots after the purported subdivision of the suit property. The 7<sup>th</sup> defendant has not accounted for the title for the suit property that was allegedly issued to it at the request of its directors to whom the land was purportedly allocated. I believe that even if the 7<sup>th</sup> defendant had surrendered the certificate of title for the suit property, they must have remained with a copy. It is worth noting that even the 3<sup>rd</sup> defendant who produced several documents relating to the subdivision of the suit property by the 7<sup>th</sup> defendant did not produce the 7<sup>th</sup> defendant's title for the suit property that was allegedly surrendered to it. The 7<sup>th</sup> defendant appears to have proceeded to subdivide the suit property without a title.

79 That aside, when the 7<sup>th</sup> defendant's directors were purportedly requesting the 3<sup>rd</sup> defendant to issue a title in favour of the 7<sup>th</sup> defendant, the 3<sup>rd</sup> defendant was already aware that there was a dispute over the ownership of the suit property and this suit had already been filed. When the 3<sup>rd</sup> defendant purportedly issued a certificate of title for the suit property in favour of the 7<sup>th</sup> defendant on "24<sup>th</sup> May 2014", the hearing of this suit in which the 3<sup>rd</sup> defendant is a party had commenced and in fact the court had already issued an order on 10<sup>th</sup> December 2008 that the status quo in relation to the suit property be maintained. It was not contested that the said order was registered against the title of the suit property on 7<sup>th</sup> January 2009 long before the 3<sup>rd</sup> defendant issued the 7<sup>th</sup> defendant with the purported certificate of title. The order was binding upon the 3<sup>rd</sup> defendant.

80 It follows therefore that the 7<sup>th</sup> defendant's purported title was not only invalid on account of the fact that the 7<sup>th</sup> defendant's directors were not lawfully allocated the suit property but also due to the fact that the title was issued by the 3<sup>rd</sup> defendant in violation of a court order. I am in agreement with the submission by the plaintiff that an act done in breach of a court order is unlawful and cannot confer any interest on a party. In *Kenya Tea Growers Association v Francis Atwoli & 5 Others* [2012] eKLR and *Clarke and Others v Chadburn & Others* [1985] 11 ALL ER (P.C) 211, it was held that an act that is done in defiance of a court order is illegal and no advantage or benefit can be derived from it. It follows therefore that the purported certificate of title that was issued by the 3<sup>rd</sup> defendant in defiance of a court order that it was well aware of was a nullity and could not confer upon the 7<sup>th</sup> defendant any interest in the suit property. It is immaterial that the 7<sup>th</sup> defendant was not a party to the suit at the material time. The 7<sup>th</sup> defendant cannot benefit from an illegality. In *Macfoy v United Africa Co. Ltd.* (1961) 3 All E.R 1169, Lord Denning stated as follows at page 1172 concerning an act which is a nullity:

"if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".

81 Arising from the foregoing, I am in agreement with the Plaintiff that the 7<sup>th</sup> defendant's directors had no valid interest in the suit property that they could transfer to the 7<sup>th</sup> defendant and that likewise the 7<sup>th</sup> defendant had no interest in the suit property that it could convey to Bamoja which also acquired no valid interest in the suit property.



82 Due to the foregoing, it is my finding and I so hold that the plaintiff is the lawful owner of the suit property and that the titles held by the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and the 7<sup>th</sup> defendant were acquired unlawfully and/or fraudulently and as such the same are null and void.

**Whether the plaintiff is entitled to the reliefs sought in her further amended plaint.**

83 Having made a finding that the plaintiff is the genuine and lawful proprietor of the suit property and that the defendants claiming the suit property hold invalid titles over the property, the plaintiff's claim against the defendants is proved and as such the plaintiff is entitled to the declaratory and injunctive reliefs sought. The plaintiff has also claimed special and general damages. The law on special damages is that the same must be specifically pleaded and strictly proved. The plaintiff pleaded special damages in the sum of Kshs. 336,520/-. The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants admitted that they demolished the plaintiff's site office. They are therefore liable to the plaintiff for the special damages claimed. The plaintiff did not however prove that she incurred loss amounting to Ksh. 336,520/-. From the evidence before the court, the plaintiff has only proved loss of a sum of Kshs. 141,520/- that was incurred in the construction of the said site house. The plaintiff did not prove the loss claimed for the demolition of the fence and destruction and theft of materials used to erect the site office and fence. I will condemn the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants to pay the said proved amount. With regard to general damages, it is not disputed that from 2007, the plaintiff has been kept out of the suit property that she was entitled to use and enjoy as the owner thereof. The 1<sup>st</sup> defendant, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and the 7<sup>th</sup> defendant have all admitted having been in occupation of the suit property at one time or the other. They are jointly and severally liable to the plaintiff for trespass. Although the plaintiff in her submissions had urged the court to award her nominal damages in the sum of Kshs. 500,000/-, the plaintiff did not seek general damages for trespass in her plaint. The court cannot award a relief that has not been pleaded. I decline to grant general damages sought by the plaintiff in her submissions.

**Whether the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants are entitled to the reliefs sought in their counter-claim.**

84 The 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants have not proved their counter-claim against the plaintiff and the other defendants. They are therefore not entitled to any of the reliefs sought in their counter-claim which is dismissed.

**Whether the 7<sup>th</sup> defendant is entitled to the reliefs sought in its counter-claim.**

85 The 7<sup>th</sup> defendant has not proved its counter-claim against the plaintiff and the other defendants. The 7<sup>th</sup> defendant is therefore not entitled to any of the reliefs sought in its counter-claim which is dismissed.

**Who is liable for the costs of the suit?**

86 Cost is at the discretion of the court. As a general rule, costs follow the event unless the court for good reason orders otherwise. In the present case, the plaintiff has succeeded in her claim against the defendants. The plaintiff shall have the costs of the suit and the counter-claims.

**Conclusion:**

87 In conclusion I hereby enter judgment for the plaintiff against the defendants as follows;

1. I declare that all that parcel of land known as L.R No. 13873 situated at Karen Plains in Nairobi (the suit property) is wholly owned by the plaintiff and that the plaintiff holds the genuine title in respect thereof.



2. I declare that the titles held by the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants and the 7<sup>th</sup> defendant in respect of the suit property are fraudulent, null and void and the same are hereby cancelled.
3. I declare that the purported subdivision of the suit property by the 7<sup>th</sup> defendant is illegal, null and void and the same is hereby cancelled.
4. A permanent injunction is issued restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants by themselves, their servants, agents and/or assigns from trespassing on or interfering in any way with the suit property and the plaintiff's quiet possession and enjoyment of the same.
5. Kshs. 141,520/- together with interest at court rates from the date hereof until payment in full as against the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants being special damages for the loss suffered following the demolition of the plaintiff's site house.
6. The plaintiff shall have the costs of the suit and the counter-claims.

**DELIVERED AND DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF AUGUST 2022.**

**S. OKONG'O**

**JUDGE**

Judgement delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Wangui Shaw for the Plaintiff

Ms. Angawa h/b for Mr. Havi for the 1<sup>st</sup> Defendant

N/A for the 2<sup>nd</sup> Defendant

Mr. Kamau h/b for Mr. Motari for the 3<sup>rd</sup> Defendant

Mr. Ngugi for the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants

Mr. Ondabu and Mr. Odunga for the 7<sup>th</sup> Defendant

Ms. C. Nyokabi-Court Assistant

