Kotak v Tucha Adventures Limited & 4 others (Environment & Land Case 86 of 2019) [2024] KEELC 859 (KLR) (13 February 2024) (Judgment)

Neutral citation: [2024] KEELC 859 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 86 OF 2019

LL NAIKUNI, J

FEBRUARY 13, 2024

(FORMERLY HIGH COURT CIVIL NUMBER 2687 OF 1998)

BETWEEN

YATIN VINUBHAI KOTAK ..... PLAINTIFF

AND

TUCHA ADVENTURES LIMITED ..... 1ST DEFENDANT

COMMISSIONER FOR LANDS ..... 2ND DEFENDANT

ENOCK TUITOEK ..... 3RD DEFENDANT

ORBIT ENTERPRISES LIMITED ..... 4TH DEFENDANT

KIPKALYA KONES ..... 5TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the suit instituted by Yatin Vinubhai Kotak, the Plaintiff herein through the Amended Plaint dated 11th February, 2008 and filed in the High Court at Mombasa on 12th February, 2008. Initially, the suit was against the Tucha Adventures Limited and The Commissioner for Lands, Enock Tuitoek, Orbit Enterprises Limited and Kikalya Kones as the 1st, 2nd, 3rd, 4th and 5th Defendants herein respectively.

2. For information sake, it is instructive to note that this suit had been initially filed at the High Court at Nairobi in the year 1998 which is on quick arithmetic it has been lingering in the corridor of Justice for close to over twenty six (26) years (which Mr. Amoko Advocate occasionally never forgot to underscore with great humour that it was instituted before he was admitted to the Bar) and running without

mentioning the numerous Judicial officers who have ever presided over the rather protracted case altogether.

3. Upon service of the Amended Plaint to the Defendants, the 1st Defendant entered appearance on 14th December, 1998 and filed their statement of Defence and Counter - Claim dated 23rd December, 1998 whilst the 2nd Defendant filed a statement of Defence dated 6th February, 2001.

4. On 16th November, 2021, the Learned Counsel for the Plaintiff informed the Honourable Court that they had withdrawn the case against the 3rd, 4th and 5th Defendants on 20th May, 2019. This was done vide filing of a Notice of Withdrawal of the Suit dated 24th October, 2018 under the provision of Order 25 (2) of the Civil Procedure Rules, 2010. Going forward, the Honourable Court set down the case for hearing at noon on the same day arising from its age – having been filed in the year 1998.

5. The matter proceeded on by way of adducing viva voce evidence. The Plaintiff summoned three (3) witnesses - PW - 1 and PW - 2 who testified on 16th November, 2021, PW - 3 testifying before on 19th July, 2022 and PW – 2 was recalled to testify on 20th July, 2022. The Plaintiff marked the close of his case on 20th July, 2022. The 1st Defendant only summoned DW - 1 who testified on 20th July, 2022. The 2nd Defendant summoned two (2) witnesses - DW - 2 who testified on 22nd February, 2023 and DW – 3 who tender evidence on 23rd February, 2023 and DW – 2. On 21st June, 2023, the Defendants closed their cases and the Honourable Court gave directions for the filing of the written submissions and subsequently reserved the Judgment date.

II. The Plaintiff's case

6. From the filed pleadings, the brief facts of the case according to the Plaint were that vide the Letter of Allotment dated 25th September 1996, the Government of the Republic of Kenya through the Commissioner of Lands (the 2nd Defendant) offered him all that parcel of land known as Title No. Mombasa/Block XXVI/919 (then unsurveyed) (Hereinafter referred to as "The Suit Property"). The suit property is situated within Mombasa island with condition as stipulated attached thereof in the said Letter of Allotment. Upon being issued, the Plaintiff then accepted the offer of allotment. On 26th September 1996, he issued a Banker's cheque for a sum of Kenya Shillings Three Sixty Eight Thousand Nine Ten Hundred (Kshs. 368,910/-) payable to the Commissioner of Lands in respect of stand premium, rent, stamp duty and other out-goings as tabulated in the Letter of Allotment, which money was duly acknowledged by the Commissioner of Lands.Thus, the Plaintiff having met the terms and conditions of the offer in respect of the suit property, he was on 2nd September 1997 issued with a Lease of the property which he executed together with the Commissioner of Lands.On 4th September 1997, the Plaintiff was issued with the Certificate of Lease for the property for a term of 99 years from 1st September, 1996 which in essence, the Certificate effectively gave the Plaintiff the full title as the bona fide, absolute and registered proprietor of all that parcel of the suit land.

7. In a surprising turn of events, the Plaintiff came to learn that the same property had been given to a third party namely; the 1st Defendant herein who had thereafter been issued with a similar Certificate of Lease by the 2nd Defendant in an irregular and illegal allocation when knowing that the Plaintiff was the first registered title holder of the property. The Plaintiff then pleaded that this was irregular, wrongful and perpetrated by fraudulent means.

8. To back up his assertion, the Plaintiff relied on the following particulars of fraud or mistake of the 1st and 2nd Defendants herein as follows:-

    a. Allocating the 1st Defendant the suit property when already there was a prior commitment and/or registration.

b. By the admission of one Enock Tuitoek (the 3rd Defendant) that he erroneously acquired the property in question when there was a prior allocation and the allegation by the 5th Defendant that he sold the property to the Plaintiff whereas the Plaintiff was the first registered owner of the suit property.

c. By causing two titles to be issued in respect of the same property.

d. The 1st Defendant caused the property to be allocated to himself despite the prior allocation.

9. Upon the Plaintiff hearing of the presence of the second title issued to the 1st Defendant, he lodged inquiries with the Commissioner of Lands and was assured through the Commissioner's letters dated 11th and 12th December 1997 that all the records both in the Ministry of Lands and Settlement head office and in the District Registry Mombasa which indicated that the suit property belonged to him, the Plaintiff with no other third party.Resultantly, the Plaintiff proceeded to the suit premises in an attempt to fence it off and to chart out plans for its developments but was frustrated by the 1st Defendant through its directors and agents who threatened the Plaintiff and violently kept him away from the property claiming ownership of the same. Indeed, the 1st Defendant had gone ahead to fence off the suit premises and even pulled down an old house which was erected therein and further plans to start developing the plot if not restrained by this Honourable Court.The conduct of the 1st Defendant as set out in paragraphs 10 and 11 hereinabove of the Plaint were wrongful and it interfered with the Plaintiff's right title and interest in and to the suit property by reasons of which the Plaintiff prayed for an order declaring that the suit property belongs legally absolutely to the Plaintiff to the exclusion of the 1st Defendant. The Plaintiff was currently unable to carry out the developments that the Plaintiff had planned for the suit property.

10. Further to the aforesaid, the Plaintiff feared that the 1st Defendant would carry out their threats referred to in Paragraphs 10 and 11 hereinabove of the Plaint and such actions were likely to cause the Plaintiff irreparable harm and injury which could not adequately be compensated for in damages and by reason thereof the Plaintiff also prayed to this Honourable Court to grant restraining them until such time as this Honourable Court deems fit from interfering with the Plaintiff's use and quite enjoyment of the suit property and/or from trespassing thereon and or from doing anything or act adversely affecting the Plaintiff's title and interest in the suit premises and or from dealing with the suit property in any way whatsoever contrary to the Plaintiff's claim and interests thereon. The 3rd, 4th and 5th Defendants had also variously claimed ownership, acquisition and/or rights to the said suit property in various correspondences and the Plaintiff was reasonably apprehensive that the said Defendants may do acts that were inconsistent with the Plaintiff's lawful rights to the suit property. In the alternative, the said 3rd, 4th and 5th Defendants claim to had at some point had interest in or applied for the suit property which was a pertinent question to be determined in the proceedings herein. The 3rd, 4th and 5th Defendants had no right whatsoever to the suit property as the same legally belonged to the Plaintiff having been lawfully allotted as aforesaid. Despite of repeated demands notices having been issued, the 1st Defendant had persisted in its illegality and had prevented and marred the Plaintiff from entering the suit property.

11. The Plaintiff prayed for Judgment against the Defendants jointly and severally for:-

a. A declaration that the purported reallocation of the said plot number Mombasa/Block XXVI/919 situated in Mombasa Island to the 1st Defendant is illegal and therefore null and void.

b. An order of permanent injunction restraining the Defendants either by itself themselves, servants, employees, and/or agents from evicting, barring or continuing to evict or bar the Plaintiff from remaining in or occupying plot No. Mombasa/Block XXVI/919 situated in Mombasa island until the final determination of the suit or until further orders of the court.

c. An order of temporary injunction restraining the Defendants either by themselves, servants and/or agents from wasting, damaging, alienation, sale, removal or disposition of the plot No. Mombasa/Block XXVI/91 until determination of the suit or until further orders of the court.

d. An order of perpetual injunction restraining the Defendants either by themselves, their servants, employees, and/or agents from evicting, barring or continuing to bar, evict the Plaintiff from, remaining in or occupying plot No. Mombasa/Block XXVI/919 situated in Mombasa Island.

e. A declaration that the Plaintiff is a bona fide registered owner of the plot No. Mombasa/Block XXVI/919 situated in Mombasa Island.

f. A declaration that the registration of the 1st Defendant by the 2nd Defendant as the proprietor of the plot No. Mombasa/Block XXVI/919 situated in Mombasa was obtained, made or omitted by fraud or mistake.

g. In view of prayer (e) above the court do order rectification of the register by directing that the registration of the 1st defendant having been obtained made or omitted by fraud or mistake be and is hereby cancelled or amended.

h. Costs of this suit with interest thereon of court rates.

i. Such further or other relief as this Honourable Court may deem fit to grant.

On 16th November, 2021 the Plaintiff called his first witness who testified as follows:-

A. Examination in chief of PW - 1 by Mr. Omollo Advocate:-

12. PW – 1 was sworn and testified in the English language. He informed the Court that he was Francis Otieno Okunga, a Land Economist and Consultant in Land Management. He was shown his witness statement dated 12th July, 2012 and he confirmed that his signature was appended therein which he adopted as his evidence in chief in this case.

13. The witness was stood down. When called to the stand again on 20th July, 2022, the witness told the Court that he recorded his statement dated 12th July, 2012 and filed on 17th July, 2012. He also filed several documents and was in Court through a Power of Attorney donated to him by the 1st Defendant filed on 11th July, 2018, they were documents no. 7 to 37 marked as Plaintiff Exhibit "1 to 31".

B. Cross examination of PW - 1 by Mr. Amoko Advocates:-

14. When he referred to the 1st Defendant, the witness stated that he meant the Plaintiff and when he referred to the Appellant, he meant the 1st Defendant, and when referring to the Commissioner as the 2nd Respondent. He told the Court that he was fully conversant to the facts as deponed to the statement. The Plaintiff bought the land from Kipkalias Kones. The property was issued with a Letter of Allotment on 26th September, 1996, the sale was by way of written statement dated 13th November, 1996. The date of Letter Allotment was 26th September, 1996, which meant the land was being sold before the issuance of the Letter of Allotment.

15. With reference to the Amended Plaint, the witness told the Honorable Court that there was no reference to Honorable . Kipkalias Kones and Mr. Kotak from the sale agreement of the land of the suit land. The statement in the Amended Plaint was a contradiction. Before he sold land he had to have the land. He must have a claim to the land, this was not a fabrication. What was on the Amended Plaint was a mistake. He was familiar with the process of the issuance of the land. It was the Letter of allotment that would have to be issued. It had temporary land reference number.

16. According to the witness, the Plaintiff attempted to take the physical possession of the suit land in the year 1997. He did not know the month. It was Hon. Kones and the brother to Yatin. When they went to the land, he was not there as he had travelled to Nairobi but he was fully aware of the visit. Mr. Yatin told him what had transpired as he was not there. It was Mr. Kones pretending to sell the land to him. He saw the land in the year 1998, it had a gate and a demolished government house. He was able to see it from outside. He was not chased away, he did not see anyone there and was not familiar with the facts that Mr. Yatin was chased away. Some of the particular facts and events may not be known to him before the power of attorney was donated to him.

17. He stated that he was not there when Mr. Kotack approached Mr. Kones. It was in the office of Lengule's advocate. Mr. Kones was a Minister by then. The conversation took place in the month of September. He had been involved in this matter since the year 1996, it was Mr. Yatin to donate the Power of Attorney to him. It was an expression of trust. It was a very sensitive matter but his name did not appear in the year 1996 in any document. He was not aware of the problems that there was interference on the land.

18. According to him, "their" meant Mr. Kotak himself, Mr. Letangule Kones. In the year 1998, they took the Defendant to Court, the decree that was taken was overturned and hence it was over taken by events. He did not know the importance of that aspect by the time he was recording his statements. When he was referred to the ruling of Justice M. Mugo dated 29th April, 2005, PW – 1 stated that the had Judge this fact which was 7 years before he recorded his statement. When referred to Paragraph 8 of the Amended Plaint and if it was correct, the witness told the Court that the 1st Registered owner was not known to him. He was familiar with the facts of this case. On page 7, the witness stated that he could see it was a lease on the top right hand side it was dated 18th December, 1996. The lease document on page 12 was dated 20th December, 1996. Mr. Kotak was the registered owner by 1st September, 1997, the registration was on 2nd September, 1997 so it was Tucha who was the 1st one registered.

C. Re - examination of PW - 1 by Mr. Kongere Advocate:-

19. He told the Court that his relationship with the Plaintiff was that they were long term friends which went all the way to the early 1990s.

20. The Plaintiff called PW - 2 on 16th November, 2021.

D. Examination in Chief of PW - 2 by Mr. Omollo Advocate:-

21. PW – 2 was sworn and testified in the English Language. He identified himself as being Mr. Hashim Got Sat, a former Land Registrar in Mombasa. He recalled having made a witness statement dated 11th July, 2012 which he adopted as his evidence in chief. He stated that in his statement on paragraph 2 that the registration was in 1st Respondent it should read the Plaintiff. According to the record at the Land Registry and copy of the Green Card the same property was registered in the name of Yatin Vinu Bin Ubai Kotak for a term of 99 years from 1st September, 1996 at an annual rent of Kenya Shillings Seventeen Thousand (Kshs. 17,000/=) and the Lessor is the Government of Kenya.

22. When referred to the Plaintiff's list of documents, the witness stated that Plot No. Mombasa/Block had the Government of Kenya as the Lessor. This was a result of Lease dated 2nd September, 1997 to Yatin Bin Bhai Kotak. The green card made out a white card which was opened in the name of Yatin Bin Ubhai and a Certificate of Lease was issued to him on the 5th May, 1998. A restriction was placed against the title by the Chief Land Registrar with direction of no dealing until the Notice in the same annexure B4 dated 15th September, 1998. PW – 2 stated that the same restriction was removed by the Commissioner of Land through a letter dated 4th September, 1998. He was referred to the document on Pages 41 to 44 of the List of Plaintiff's documents and pages 30 to 33. He identified them as being the lease dated 2nd September, 1997 from the Government of Kenya to Yatin Vinubhai Kotak. The acreage being 0.0869 HA.

E. Cross examination of PW - 2 by Mr. Amoko Advocate:-

23. The witness confirmed to the Court that he prepared and signed the witness statement and at paragraph 2 on where he got the name. By virtue of the records, the 1st Respondent was a mistake. The document he had was the Court proceedings and the letter. From the title of the documents there was no reference to the 1st Respondent. The 2nd statement of Mr. Mwenda, the font was the same. He told the Court that he was the one who prepared the statement. There was a Letter of the Commissioner of Land dated 8th May, 1998, the subject Mombasa Island/ Block/ XXVI/ 969 by Ms. Judy Okungu.

24. According to the witness, this was a clear case of double allocation. He stated that it had been confirmed that an alternative land was identified. In the meantime, to register a restriction, the land was reserved for the Plaintiff. He saw the letter, in which he never explained why the restriction was placed on 8th May, 1998. It was the basis of filing the restriction. In his statement he had not referred to the fact that there was double allocation though it was mentioned in the correspondence. He wanted to be sincere and state the double allocation.

25. He told the Court that he became a Land Rregistrar in Mombasa in the year 1998. The registration of Tucha Adventures was done on 20th December, 1996 and Yatin Vinubhai was done on 4th September, 1997. According to the records, the restriction of Tucha was cancelled through several letters by the Commissioner of Lands and a decree of Court that was illegal. According to the witness, on 24th July, 2002 with reference to the Ruling in HCCC No. 2687/1998 by Justice Mugo on pages 9-10 the same was decided on 29th April, 2005 that the decree of 24th July, 2002 was set aside. There was a letter from the Commissioner of Land forwarding the decree. The decree by Justice Mugo was not extracted under the provision of Section 80 of *Land Registration Act*.

F. Cross examination of PW - 2 by Ms. Waswa Advocate:-

26. He told the Court that he was not the one who registered the lease dated 3rd September, 1997. The leases were registered by Mr. K. Githi, the Land Registrar. He did not know there were two titles for the same parcel of land but it came to his knowledge later on. He was writing the statement based on the complaint made. The title for Tucha Adventures Limited would be cancelled, declared irregular and/or illegal. There had been correspondences by Mr. Mohamed Mae to the effect of their property being interfered with. There was also a letter Messrs. Sachdeva and Company Advocates dated 18th October, 1997 which was a complaint lodged by the 1st Defendant. The complaint originated from the 1st Defendant and that was how they wrote to the Commissioner of Lands and the Chief Land Registrar. They inquired on how the double allocation for the same land was made.

27. All the leases came from the Commissioner of Lands Nairobi. The Land Registrar Mombasa was only a recipient of Leases from Nairobi. The Land Registrar received the Lease documents in triplicates and

he did the entry in the Land Register. It was booked in the presentation book and entries were made. But if the lease were irregular, then he would return it. When the lease for Yatin Vin Bhai Kotak was received, it was entered in the register but the Land Registrar realized that there was an error in that there existed another lease. The error was of double allocation. There were correspondences to that effect when it was discovered and all this was being done in order to correct the said error. As the Land Registrar Mombasa, he wrote a Letter to the Commissioner of Lands explaining the error.

28. According to the witness, the nature of the error was simply because the Lease for Yatin Vinubhai Kotak came later on than the one of Tucha Adventure Limited. (Court noted that the witness was not comfortable to give an answer on the nature of the error. He stated that, the Land Registrar would be in the best position to answer that query on the error of double allocation). He stated that there were several correspondence and the solution was arrived at for the cancellation of the title deed. He had not seen any title for Tucha or Yatin in order to commence the cancellation process. Hence, they were compelled summon the parties to surrender their titles for the cancellation and putting the cancellations in the Kenya Gazette; He was shown the green card. He had not seen that. The Cancellation was seen physically from the green and white card. The title for Tucha Adventures was never recalled. According to the record, the title to Tucha was also to be cancelled. Therefore, the restriction was placed by Mr. G.K. Githu.

29. The witness told the Court that the ruling by Lady Mugo was never extracted and hence served and registered. He was not aware of any registration of the decree. How to resolve such cases of double allocation one had to first confirm, liaise with the Commissioner, then they investigate it. Double allocation meant either:-

    a. 2 Letters of allocation were issued.

    b. Or PDP was prepared by different Physical Planners; and

    c. The survey conducted must have been done by different Land surveyors and

    d. Records at the Senior Principal Nairobi were not well captured.

30. According to the witness, there were two forms of allocation:-

    a. Government to lessee

    b. County Government – Planning committee. That was all.

31. On 19th July, 2022 the Plaintiff called its third witness PW - 3.

G. Examination in Chief of PW - 3 by Mr. Kongere Advocate:-

32. PW – 3 was sworn and testified in English language. He told the Court that he was Chief Inspector known as Joshua Kiplagat Rotich. He stated that he was in Court because he used to see Yatin VinuBhai Kotak who would be holding meetings with Kipkalias Kones at the Mayfair Hotel at around 6.30 pm. They would be talking of a land. In the year 1996, he saw Yatin, Kauchak and Kipkalias Kones being together. He witnessed them signing some documents which he later on discovered it was a sale agreement. He picked the sale agreement and placed it in the car. He recorded his statement on 17th July, 2012.

H. Cross examination of PW - 3 by Mr. Amoko Advocate:-

33. PW – 3 stated that he did not know where the land was situated. He was referred to paragraph 4 of his statement. He confirmed that he had no knowledge of the land. The same stated that Kones had land

at Mombasa. The witness knew that he had the land while driving his car. Kones told people about the land although he never referred to the land reference. He was the one who wrote the statements. He did not know how comes the other paragraphs never had numbers. He did not know where and what Hon. Kones was doing on the other days of November, 2012. They were together with Hon. Kipkalis Kones during this period. But he remembered that on 13th November, 2012, they would meet at the swimming pool on several occasions. When referred to page 5 of his statement, the witness stated that it was Kones who sold the land to Yatin Vinubhai Kotak. The witness testified that he could not remember a lot of the happenings of the year 2012.

I. Cross examination of PW - 3 by Ms. Waswa Advocate:-

34. PW – 3 told the Court that he was at a distance when they were signing the sale agreement. He only saw them do it and he kept it in the brief case.

35. There was no re - examination.

36. The Plaintiff marked the close of his case on 20th July, 2022.

III. The 1st Defendant's Case

37. The 1st Defendant entered appearance on 14th December, 1998. Subsequently, it filed a statement Defence and Counter - Claim dated 23rd December, 2023. In its Counter Claim, the 1st Defendant repeated the contents of Paragraphs 3, 4 and 5 in the statement of Defence.

38. The 1st Defendant averred that it was a stranger to the allegations contained in Paragraphs 4, 5, 6 and 7 of the Plaint. With reference to Paragraphs 8 and 9 of the Plaint, the 1st Defendant admitted that it had been issued with a Certificate of Lease in respect of Mombasa/Block XXVI/919 whereunder it is registered as the proprietor of the leasehold interest in the said plot for a term of 99 years from 1st October 1996 and was the registered as such proprietor at the Mombasa District Registry on 20th December, 1996. The 1st Defendant denied being guilty of any fraud in respect either of the issue of the said Certificate of Lease or of its (the First Defendant's) registration as such proprietor as aforesaid. Accordingly, the 1st Defendant averred that there was any mistake in relation to the issue of the said Certificate of Lease or with respect to its (the 1st Defendant's) registration as such proprietor as aforesaid.

39. On further reference to the contents made out under Paragraphs 8 and 9 of the Plaint, the 1st Defendant averred that the Certificate of Lease issued in its favour is registered under the provisions of the Registered *Land Act* (Cap. 300) and such registration being a first registration under the said Act and prior in point of time to the registration of the Certificate of Lease issued in favour of the Plaintiff, the 1st Defendant's title to Mombasa/Block XXVI/919 is absolute and indefeasible and could not be challenged even if (which is denied) there was any fraud or mistake as alleged or at all.

40. With reference to the contents made out under Paragraphs 10, 11, 12, 13, 14 and 15 of the Plaint, the 1st Defendant;

    a. Denied that the Plaintiff had any right title or interest in Mombasa/Block XXIV/919;

    b. Averred that as the registered owner of the said plot, it (the 1st Defendant) was entitled to fence the said plot, to pull down any buildings thereon and to develop the same to the exclusion of everyone else, including the Plaintiff; and

    c. Averredfurther that as such owner, it was entitled to resist any attempt by the Plaintiff to interfere with its possession and/or ownership of the said plot.

41. In the long ran, the 1st Defendant prayed for the following reliefs:-

    a. A declaration that it is the legally registered proprietor of the said plot and that its title thereto is absolute and indefeasible;

    b. An injunction restraining the Plaintiff, his servants and agents from interfering with the 1st Defendant's ownership and / or possession of the said plot;

    c. An order that the Plaintiff pays the costs and incidental to this Counter-claim.

42. On 20th July, 2022, the Honourable Court was informed that the 1st Defendant Witness had hearing difficulties and apprehension of issues explained to him unless it was through his wife. There being no objection, the 1st Defendant summoned Ms. Shamnia Issa Sohrab to assist the husband in translation of the proceedings. She informed Court that she was a housewife living in Kizingo Mombasa and she was translator stating that although the witness had an ear device but they were not so effective for the past 3 years. She was guided by Court and understood that her role was strictly to translate every word to the witness and not to be a witness to the case. She translated the same in Swahili to him. She effected her role with resilience and as guided.

J. Examination in Chief of DW - 1 by Mr. Amoko Advocate:-

43. DW – 1 was sworn and testified in Kiswahili language. He identified himself as being Mr. Mwinyi Mohamed Mae. He was born in the year 1946. He had recorded a witness statement on 18th February, 2012 filed in Court on the same day. He confirmed it bore his signature. He relied and adopted it as his evidence in support of the case. He had also filed a bundle of documents dated 16th February, 2011 and filed on 17th February, 2011 which he prayed for the same to be marked and produced as 1st Defendant Exhibits Numbers 1 to 7.

K. Cross examination of DW - 1 by Mr. Kongere Advocate:-

44. He confirmed that the case that brought him to Court was on land parcel no. Mombasa Island Block XXVI/919 which was indicated in his Letter of Allotment. He stated that it was not Tucha Adventures Limited that applied for the land. He was a director at the 1st Defendant's Company. He had evidence to proof that it was Tucha Adventures Limited that applied for the suit land. Unfortunately, he did not have it right there in Court. According to him, the company that applied for the land was trading in the names and style of Orbit Express Limited on 3rd October, 1996 as was indicated at pages 21 of the 2nd Defendant's bundle of documents. At page 20 of the documents was a letter dated 11th September, 1996 and at the bottom he could see the date was 18th October, 1996.

45. When referred to page 22, the witness stated that he could see its letter dated 23rd October, 1996 from Orbit Express Limited to the Commissioner of Lands. He had read it and understood it. They were applying for the plot to be given to Tucha Adventures Limited as authorized by Mr. Enock Tuitoek. He had seen it. It was written on it no objection and signed on 29th October, 1996. At page 21, the witness stated that he could see it was written vacant Government land. He knew the Advocates by the name of Messrs. Sachdeva Advocates. They had once represented Tucha Adventures Limited. At page 24 of the 1st Defendant's bundle of documents, the witness stated that he could see the letter written by Messrs. Sachdeva & Co. Advocates dated 9th April. 1998 and its contents. At page No. 1, the witness told the Court that it was a Letter of Allotment dated 24th October, 1996 to Tucha Adventures Limited. There was no house on the land from the Letter of Allotment. He had a house but he demolished it. He never paid anything to the Government.

46. The witness confirmed that from the letter he was meant to pay the government a sum of Kenya Shillings one hundred and Seven Thousand One Twenty Hundred (Kshs 107,120/-). He confirmed paying the figure stated in the letter. He told the court that at page 4 was a letter dated 25th October, 1996. He wrote the letter directed to the Commissioner of land. He signed it. On page 5 there was a copy of the Bankers Cheque dated 25th October, 1996 for Kenya Shillings one hundred and Seven Thousand One Twenty Hundred (Kshs 107,120/-) paid to the Commissioner of Lands. But he never had an official receipt there. He lived in Mombasa. The Letter of Allotment was dated 24th October, 1996. It was from the department of land Nairobi. The cheque was issued by Habib Bank Limited – Nkrumah Road, Mombasa Branch.

47. The witness told the court that at page 7, he stated that Tucha Adventures Limited was given the lease dated 18th December, 1996. He was referred to page 2 of the 2nd Defendant's bundle entitled "Instruction to prepare a new lease" to Mr. Yatin Vinubhai Kotak dated 21st August, 1997. He answer was that he never had such a document in his possession.

48. At page 22 of the 2nd Defendant's bundle of documents, the witness stated that it was a letter by Orbit Express Limited dated 23rd October, 1996. It was signed by Mr. Enock Tuitoek. He was referred to page 23 of the 1st Defendants Bundles. It was the letter dated 27th February, 1998 by Mr. Enock Tuitoek to Mr. Honorable Kipkalia Kones. He was shown a copy of the letter on page 24 of the 1st Defendant documents. It was a letter dated 9th April, 1998 by Messrs. Sachdeva & Co. Advocate to the Commissioner of Land. On page 25, it was a letter dated 14th April, 1998. He had not sued Mr. Enock Tuitoek but he had paid him. He went to the plot all the time. The Plot was rectangular in shape.

L. Cross examination of DW - 1 by Ms. Waswa Advocate:-

49. He told the court that he knew Mr. Enock Tuitoek. He met him at the offices of the law firm of Messrs. Sachdeva Advocate. He was a Land Agent who was selling a lot of land. The land was a government land and it had an old house on it. The government had decided to reduce their parcels of land as a means of revenue collection. They bought it at a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-). He started building on it. There was a borehole. He bought the land from Mr. Enock Tuitoek. There was a sale agreement with terms and conditions stipulated thereof. The sale was done through his advocates Messrs. Sachdeva Advocate after he gave the seller money in exchange of the title which he cited at pages 7 and 11 dated 20th December, 1996 given to him by Mr. Enock Tuitoek. Its Mr. Tuitoek who applied for the title deed and the only thing he did was to give them the final documents.

50. He stated that ordinarily, they would let the Land Agent to handle the whole transaction on their behalf. He is the one who processed the documents. DW -1 never physically went to Nairobi at all. He avoided it due to the cold whether conditions of Nairobi. If the Coast got cold, he would travel to the Middle East – Saudia Arabia. These were detailed legal processes. He never lodged a complaint against the person – Mr. Tuitoek. They only dealt with correspondences through the advocates. He never reported the matter to the police nor filed any suit. He had not registered any restriction, or caveat or caution at the Land Registry. He went to the people who had sold the land to him to complain to them for selling him a wrong land.

M. Re - examination by DW - 1 by Mr. Amoko Advocate:-

51. He was referred to page 15 of the bundles, the witness stated that the letter dated 18th December, 1997 by Messers. Sachdeva & Company Advocate showed that he had lodged a complaint to the District Land Registrar dated 13th February, 1998. This was evident from pages 17, 18 and 20 of the 1st Defendant documents. He was referred to page 28 of the 1st Defendant's bundles, he told the court that

the letter was to the Chief Land Registrar dated 8th May, 1998. He was taken through the full contents of the said letter and its import which indicated that the suit land was his land. He made reference to page 25 which was a letter dated 14th April, 1998 on the third paragraph by Messrs. Sachdeva & Company Advocates, there was an indication that they paid Mr. Enock Tuitoek for the purchase of the land and to enable him process the sale and the transfer of the suit land to Tucha Adventures Limited. The 1ST Defendant closed its case on 20th July, 2022.

IV. The 2nd Defendant's case

52. The 2nd Defendant filed a statement of Defence dated 6th February, 2001. It admitted that a Letter of Allotment dated 25th September, 1996 was offered through him to the Plaintiff for the suit land title No. Mombasa Island/Block XXVI/919 by then. In response to Paragraph 5 of the Plaint, the 2nd Defendant admitted that the Plaintiff accepted the offer of the allotment and acknowledged payment for the same for a sum of Kenya Shillings Three Sixty Eight Thousand Nine Hundred and Ten (Kshs. 368,910.00/=). As a consequence thereof a lease in favour of the Plaintiff was prepared and forwarded for registration at the Land Registrar, Mombasa. The 2nd Defendant never denied the issuance of Certificate of Lease for a period of 99 years from 1st September, 1996. The 2nd Defendant denied the contents of paragraph 8 together with all and singular particulars of fraud and/or mistake of the Defendant. The 2nd Defendant reiterated that as far as he was concerned the records showed that the suit property belonged to the Plaintiff herein. The 2nd Defendant was a stranger to the contents of made out under Paragraphs 10, 11, 12, 13, 14 and 15 of the Plaint.

53. The 2nd Defendant prayed for the suit before this Honourable Court to be dismissed with costs. On 22nd February, 2023 the 2nd Defendant called it's first witness DW - 2.

A. Examination in chief of DW - 2 by M/s. Waswa Advocate:-

54. DW – 2 was sworn and testified in the English language. She identified herself as M/s. Josephine Mnyazi Rama. She was the Land Registrar, Mombasa. She had filed a further list of documents on 4th August, 2022.

55. The witness proceeded with her testimony on 23rd February, 2023. She told the court that they filed a witness statement on 4th August, 2022 together with a bundle of documents which she adopted as her evidence in chief and in support of the case. The 2nd Defendant documents were produced as Exhibit Numbers 1 to 20. It was noted that item no. 6 was the same as item No. 17, they should be one and the same document. It was further pointed out that Item No. 3 had a typographical error, should have been ready in the year 1997 and not 1998. Without objection, the error was corrected thereof.

B. Cross examination of DW - 2 (the 2nd Defendant's witness) by Mr. Kongere Advocate:-

56. DW – 2 informed Court that she had the chance of going through the file. By 20th December, 1996, the owner of the suit land was Tucha Adventures Limited. The Plaintiff was a registered owner on 4th December, 1997. But before the registration, there would had been a Letter of Allotment for Yatin Vinubhai Kotak which was dated 25th September, 1996. She did not have a Letter of Allotment for Tucha Adventure Limited - the 1st Defendant herein.

C. Cross examination of DW – 2 (The 2nd Defendant's witness) by Mr. Amoko Advocate:-

57. She informed the Court that her testimony was based on records found at the Land Registry Mombasa. She joined the Government (Ministry of Lands) in February 2019. She was not involved in this matter. She was an Advocate of the High Court of Kenya. She confirmed that her witness statement was per

the records in the Land Registry. These were the records from the land registry at Mombasa. She was given part of the pleadings in this case. She never had those for the 1st Defendant. She never asked for the pleadings for the 1st Defendant. There were no records for Tucha Adventures Limited. She was referred to the documents by the 1st Defendant and in particular document no. 7. It was a letter dated 10th February, 1998 and particularly at paragraphs 2 and 3. She confirmed that she never referred to the said letter in her witness statement. She stated that the said letter talked of double registration/ allocation of the same parcel of land – the suit land. She never had any explanation for this. Likewise, she was referred to document No. 5 of the 1st Defendant's list. DW – 2 testified that it was a letter dated 12th April, 1999 which indicated that there was a double allocation of the suit land.

58. DW – 2 was further referred to the 1st Defendant list of documents dated 17th February, 2011 particularly document no. 1. She confirmed it was the Letter of Allotment for Tucha Adventures Limited dated 24th October, 1996. Likewise, she confirmed that it was missing from her witness statement. She stated that a complaint was lodged by Messrs. Sachdeva And Company Advocates on behalf of Tucha Adventures Ltd. She had the letter by Messrs. Sachdeva and Company Advocates dated 18th December, 1997. She informed Court that there was a response to that letter and complaint by Mr. KK. Githi, the then Land Registrar, Mombasa dated 10th February, 1998 but also she had not referred to it in her witness statement. DW – 2 was referred to document no. 20 from the 2nd Defendant's bundle of documents. The witness stated that it was a letter dated 8th May, 1998. (She read out the whole letter loudly). She stated that she also never referred to this letter in her witness statement. She pointed out at Paragraph 2 of the letter which stated that Tucha Adventures Limited was the first registration. According to her under the provision of the Registration of *Land Act* Cap. 300 (Now Repealed) provided under the provision of Sections 26 and 27 that the first registration to a parcel of land took precedence priority at all costs.

59. She admitted that she had not referred to the letters and matters of Tucha Adventures Limited at all in her witness statement. She was referred to document No. 6 of the 2nd Defendant's bundle of documents. It was a letter dated 11th September, 1997 a written to the Commissioner of Lands by Hon. Kipkalia Kones making a complaint on the double allocation of the suit plot to the 1st Defendant having sold it to the Plaintiff. The Chief Land Registrar dealt with the complaints. The Commissioner of Lands had no powers to deal with the complaint. She was further referred to a letter dated 4th September, 1998 by Wilson Gachanja, he said that:-

> " Refer to the letter – the Plot was allocated to Yatin as per the Letter of Allotment. The title therefore is the valid one. It is a case of double allocation. The title in favour of Tucha should be returned."

D. Cross examination of DW - 2 by Ms. Waswa Advocate:-

60. DW – 2 told Court that she got her documents from the Land Registry. It was the Commissioner of Land who had the allocating authority. The records at the Land Registry were for Yatin Vinubhai Kotak. Those were the active records they had. They never had any documents in relations to Tucha Adventures Limited. She carried the entire parcel and correspondence file from the Land Registry at Mombasa. Before she came to Mombasa, she had knowledge of the case. Hence her response was as comprehensive to the issues of this case. For the documents with the 1st Defendant may have been some of the documents which were forwarded to him by the Commissioner of Lands – vide a letter dated 26th July, 2002. She made reference to the said letter.

61. On 21st June, 2023 the 2nd Defendant called DW - 3 (2nd Defendant's DW – 3) who testified thus:-.

A. Examination in chief of DW - 3 (2nd Defendant's witness DW - 3) by Ms. Waswa Advocate:-

62. DW – 3 (the 2nd Defendant's – DW – 2) was sworn and testified in the English language. He was called Mr. Gordon Odeka Ochieng. He worked with the Ministry of Lands and Public Works/ Housing. He was currently the Director of Lands Administration attached and under the Ministry of Lands Public Works and Housing Development at Ardhi Housing Development house Nairobi. He had been at this Ministry and the headquarters since the year 1989. He had been there since the year 1989. He was in Court in relation to the suit property.

63. He told the Court that he knew the case was on the issuance of two (2) titles (double allocation) over the same property. He recorded the witness statement dated 19th November, 2018 which he wished to rely on and adopt as his evidence. He also stated that there was a list of 20 documents marked as 2nd Defendant Exhibits 21 to 42 dated 19th November, 2018. The issue in the suit was about the double allocation which ordinarily should never have arisen. Initially the land had been Government (Public) land and not available for allocation. The issue arose after the Letter of Allotment issued to the Plaintiff on 25th September, 1996, and the payments were made in the year 1996. From that time, the property then became private property hence it was available for allocation. However, due to the manual system which was used at the Ardhi Office, it issued a 2nd Letter of Allotment dated 24th October, 1996 to Tucha Adventures Limited. At his position, he was of the opinion that the 2nd Letter of Allotment for the 1sst Defendant should never have been issued as the same land had already been allocated to the Plaintiff. He confirmed that it was one and the same land. There was a month difference as to the time of allocation. The Plaintiff's lease registration was on 4th September, 1997 while that of 1st Defendant was done 20th December, 1996. This meant that the 1st Defendant moved first meaning the lease was registered first.

64. According to the witness immediately after issuance of the lease, the allottee of the lease was required to make the payment within 30 days from the date of allocation of the land un-surveyed, the Allottee was required to have the licenced survey. The land was surveyed and that was what led to the issuance of the title/ lease for plot no. MI/BLOCK XXVI/919. The two allocations to the Plaintiff and 1st Defendant were based on Part Development Plans (PDP) which were prepared by the Physical Planning Officer Mombasa. On the Plaintiff's allocation PDP was 1st November, 1995 approved by the Commissioner of Lands.

B. Cross examination of DW - 3 (2nd Defendant's DW - 2) by Mr. Kongere Advocate:-

65. He told the Court with reference to paragraph 11 (a) of the written statement that the shape of the of the plot allocated to 1st Defendant was "L" shaped. But what was surveyed was Rectangular in shape being no semblance at all. This was not possible for the same property. It's the surveyor surveyed different property.

C. Cross examination of DW - 3 (2nd Defendant's DW - 2) by Mr. Amoko Advocates:-

66. DW – 3 informed the court that he had been at the Ministry of Lands since the year 1989. He had never been involved in the allocation nor registration of the suit land. The registration of the leases was done from the Mombasa Offices. The land was not available to any person – private as the Letter of Allotment had been allocated to another person. Before the Government *land Act*, Cap. 280 was repealed, it could confer the interest of Land to an allottee. The Plot was one and the same and the Letter of Allotment was for the same parcel of land. Mr. Githii was the District Registrar of Titles at Mombasa.

67. He was referred to the letter dated 10th February, 1998. The witness stated that the same was an important letter to the Honourable Court but he had never referred to it while making his witness statement. He had knowledge of Ms. Okungu's letter dated 8th May, 1998 which was addressed to the Land Registrar from the Chief Land Registrar. He did not refer to the letter as it was not in his custody. It was from the Ministry of Land and Settlement. It came from the Chief Land Registrar. He was under the Directorate of Land Administration. In the year 1998 was when the Ministry of Land and Settlement was divided into Several directorates. These documents were not in his custody. Mr. Githii would only comment on the documents on registration and nothing else. The witness confirmed that what Githii had said was true. The lease was registered in favour of Tucha Adventure Limited. It was the 1st registration, which conferred precedence. He was referred to paragraph 3 of the said letter. The witness confirmed that it was for the 1st registration. He was aware of this but never referred to it in his statement.

68. On further reference to the letter of Ms. Okungu dated 8th May, 1998, the witness told the Court that he was representing the Commissioner of Lands in existence over the same parcel of land. From his knowledge, there were two (2) leases registered in the year 1997 by the Minister of Lands. He never knew Mr. Kipkalias Kones nor did he know who he was. He was referred to page 20 of the Bundle of documents by the 2nd Defendant. The witness stated that he did not have the letter dated 20th July, 2002. He was once again referred to the letter dated 8th May, 1998, whereby Ms. Okungu directed on a restriction to be put on the second title so that no dealing were registered while an allotment was being identified.

69. He stated that he was authorized to remove the restriction by Ms. Okungu though he never had the said document authorising him to do so here in Court. It was a high Court decree dated 24th July, 2022. DW – 3 stated that Ms. Okungu had stated that they needed to get an alternative land for the Plaintiff. Tucha Adventure Limited was to get compensation of the money he had spent. He was referred to the ruling by Justice M.G. Mugo dated 29th April, 2005, at page 6, the decree was not arrived based on conspiracy. On page 8 of the Ruling, it indicated that the decree was unlawful. On Page 9 indicated that the consent had no effect and page 10 indicated that he could not confirm the steps taken to be in compliance with the court order.

70. He told the Court that although he was aware that the Court order had to be obeyed and adhered with the same order was never served upon him. He denied the allegations that he had conspired to deprive the 1st Defendant of the land. He also refuted the allegation that they had refused to implement the court order and that they were acting on the strength of the powerful Minister of Lands, Mr. Kipkalias Kones. He stated that the matter of the ruling was revolving around the consent order but not to the documents of the lands. The misbehavior of a public officer ought to have been acted on. He was not aware whether this had been corrected.p

D. Re - examination of DW - 3 by Ms. Waswa Advocate:-

71. DW – 3 confirmed that he was in Court to explain the issues pertaining to the suit land. There were two leases processed and registered accordingly. The Land Registrar was supposed to register them. The remedy left out for the 1st Defendant was to seek for a refund of the finances they had spend on this transaction. But the 1st Defendant had not done that. On being referred to dated 8th May, 2018, the witness told the Court that it had been submitted to Court and hence there was no intention to conceal any information.

72. On 21st June, 2023, the 2nd Defendant closed their case after its witness testified.

V. Submissions

73. On 21st June, 2023 upon the close of the case by the Plaintiff, 1st and 2nd Defendants, the Honourable Court directed that the suit through the Amended Plaint dated 11th February, 2008 and filed on 12th February, 2008 by the Plaintiff and the Counter – Claim dated 23rd December, 1998 be canvassed by way of written submissions with a set out time frame accordingly. On 27th July, 2023 pursuant to the Honourable Court confirming compliance of these directions and it reserved a Judgment date on notice.

74. At this juncture, the Honourable court wishes to sincerely express its utmost gratitude to all the Learned Counsels – Mr. Billy Kongere for the Plaintiff, Mr. Walter Amoko for the 1st Defendant and M/s. Winnie Waswa for the 2nd Defendant in the manner in which they professionally conducted this rather complex and protracted case with robust resilience, devotion and dedication to the cause of Justice and their clients. The Court never took this for granted.

A. The written submissions of the Plaintiff

75. The Plaintiff through the Law firm of Messrs. Muriu, Mungai & Company LLP filed their written submissions dated the 10th July, 2023. Mr. Kongere Advocate commenced their submissions by stating that this suit, aptly and hilariously described by Mr. Amoko Advocate for the 1st Defendant as "having hit puberty" right before his own eyes, was now, thankfully, on the homestretch. The Learned Counsel informed the Honourable Court that the suit concerned the Suit Property. Both the Plaintiff and the 1st Defendant assert exclusive legal rights, title and interest to ownership over the same suit property.

76. The Learned Counsel summarized the Plaintiff's case as follows; the Plaint dated 1st December 1998, was amended through an Amended Plaint dated 11th February 2008. The gist and substance of case by the Plaintiff was that he was allocated the Suit Property on 26th September 1996 and took all the requisite steps to get the Suit Property registered in his name leading to a Certificate of Lease issued on 4th September 1997. However, it was after the registration that he learnt that the 1st Defendant also held a lease over the same Suit Property. The Plaintiff vehemently challenged the Lease title granted to the 1st Defendant herein. He considered it to be the result of an illegal and fraudulent process thus null and void.The Plaintiff called three (3) witnesses to support his case and who all tender their evidence in Court accordingly. PW - 1 was Mr. Hashim Got Sat who testified on 16th November 2021. He was a former Land Registrar at the Mombasa land registry. He adopted his witness statement dated 11th July 2012. He provided Court with such detailed testimony over the matter. His testimony revolved around the process of registering the two (2) leases received from the Commissioner of Lands.

77. PW - 2 was Inspector Joshua Rotich. He testified on 19th July 2022. His testimony was that he was the driver to Hon. Kipkalya Kones who was the first allottee to the suit plot and then sold it to the Plaintiff herein. He recalled on several occasion seeing the Plaintiff with Hon. Kones. He believed they were, on those occasions discussing the sale of Hon. Kones' interest in the Suit Property to the Plaintiff. Finally, it was PW - 3 was Mr. Francis Otieno Okunga who testified on 20th July, 2022. He adopted his witness statement dated 12th July, 2012. He also produced the documents in the List of Documents dated 10th July 2018 as Plaintiff Exhibit Numbers 1 to 28 (starting at No. 7 to 38 as listed). An objection to the production of documents No. 12, 22, 23 & 24 in that List of Documents was upheld. He held a Power of Attorney from the Plaintiff. He testified of how the Suit Property was initially allocated to Hon. Kones by the Government of Kenya, through the offices of the Commissioner of Lands. Subsequently, It was transferred to the Plaintiff by Hon. Kones. A Letter of Allotment dated 25th September 1996 was, at Hon. Kones' request, issued to the Plaintiff. The Plaintiff paid a sum of Kenya Shillings Three

Sixty Nine Thousand Nine Hundred and Ten (Kshs. 368,910.00/=) it was required to; there was the survey of the Suit Property; obtained a lease and caused the lease to be registered on 4th September 1997. When he and the Plaintiff visited the Suit Property sometimes in the year 1998, they found the 1st Defendant demolishing the existing structure on the Suit Property. That is what led to the institution of the present suit.

78. The Learned Counsel further summarized the 1st Defendant's case as follows. That the 1st Defendant resisted the suit vide a Statement of Defence and Counterclaim dated 23rd December 1998. On 20th July, 2022, the Director of 1st Defendant, Mr. Mohamed Mae Munye, testified as DW - 1. He adopted his witness statement dated 12th February 2012, and produced the documents in the List of Documents dated 16th February 2011 as 1st Defendant's Exhibit Numbers 1 to 7. The gist of his testimony was that the 1st Defendant was allotted the Suit Property vide a Letter of Allotment dated 24th October 1996. It surveyed the Suit Property, got a lease prepared by the 2nd Defendant and presented the lease for registration. The lease was registered on 18th December 1996. Having been so registered, the 1st Defendant acquired an indefeasible title over the Suit Property. At any rate, the 1st Defendant's title was superior to the Plaintiff's, whose lease was registered on 4th September 1997, long after the 1st Defendant's registration.

79. Further, the Learned Counsel summarized the 2nd Defendant's case. He stated that the 2nd Defendant filed a Statement of Defence dated 6th February 2001. It called Ms. Josephine Rama, a Senior Registrar of Titles at Mombasa land registry, as DW-2. Her testimony was taken on 23rd February, 2023. She produced as 2nd Defendant Exhibit Numbers 1 to 20 the documents in the List of Documents dated 1st August 2022. The gist of her testimony was that the land registry in Mombasa had registered two (2) titles over the same property, possibly because ofdouble allocation. The lease in favor of the 1st Defendant was registered on 18th December 1996. The lease in favor of the Plaintiff was registered on 4th September 1997.When this error was brought to their attention, the land registry liaised with the 2nd Defendant who ultimately determined that from records in its possession, the Plaintiff's allotment was issued first, thus he was the lawful owner. Thus, her testimony the suit land was legally registered in the names of the Plaintiff.

80. DW - 3 was Mr. Gordon Ochieng', a Senior Assistant Director Land Administration at the Ministry of Lands testified on 21st June 2023. He reiterated the sequence of the issuance of the Letters of Allotment to the Plaintiff and the 1st Defendant. He confirmed that according to their records, it was the Plaintiff who was entitled to the Suit Property. The Learned Counsel stated that they had not gone into the evidence adduced from cross examination of any of the witnesses. The Learned Counsel intimated that they would be getting to that part of the evidence as was relevant, when addressing the issues; which they next identified.

81. The Learned Counsel relied on the following two (2) broad issues for determination:-

82. Firstly, on whether the Plaintiff held the only legal title to the suit land. The Learned Counsel informed the Honourable Court that they would show that the Plaintiff not only held a legal and valid title over the Suit Property but also that the 1st Defendant's alleged title is legally infirm. They had two (2) broad grounds for so concluding. On the ground of the Plaintiff's allocation coming first, the Learned Counsel submitted that they understood the law to be that when there was a challenge to a proprietor's title, then waving the title was not sufficient. One must go to the root of the title and show that it stood legal scrutiny. That was the exercise he undertook to take the Court through shortly. For now, however, they accepted that both the Plaintiff and the 1st Defendant held Letters of Allotment.

83. With that assumption, it was indisputable that the Letter of Allotment issued to the Plaintiff was on 25th September 1996. The Letter of Allotment to the 1st Defendant was issued on 24th October 2016. Speaking plainly, the Letter of Allotment to the Plaintiff came first in time while that of the 1st Defendant followed later on. He held that the case law abound that any subsequent allotment, without a cancellation of the first allotment, could not give rise to a valid title. He sampled some of the case law. As far as the year 1983 in the case of:- "M'Ikiara M'Mukanya & another – Versus - Gilbert Kabere M'Mbijiwe [1983] eKLR", Chesoni Ag. JA (as he then was) stated:-

> " The plot they were granted was not available for allocation since 1967 when it was granted to the Respondent. The Council had no Plot No 58 at Nkubu Market to allocate and it could not allocate what it did not have.....The alleged allocation to the Appellants is of no effect in law."

84. More recently, Ohungo J. of the ELC had held in the case of:- "David Njuguna Mwangi – Versus - Peter Maina Ngatia [2019] eKLR" that:-

> " Even if we were to assume that the two letters of allocation ultimately refer to one and the same plot, the Plaintiff would have a better title to the plot since his allocation was first in time. The plot having been allocated to him, it would not be available for allocation to the Defendant."

85. Oundo J., he too of the ELC, thought at much in "Kamau James Njendu – Versus - Serah Wanjiru & another [2018] eKLR". The Learned Counsel further added the holding by Gacheru J., also of the ELC, in "Salome Wangari Wamunyu – Versus - Irene Jane Njambi & 2 other [2021] eKLR".

86. The Learned Counsel further went ahead to argue that if the court was invited to ignore Ohungo, Oundo and Gacheru JJ. whose views were not binding, there was the Court of Appeal in the case of "Philemon L.Wambia – Versus - Gaitano Lusitsa Mukofu & 2 others [2019] eKLR" agreeing entirely with those views thus:-

> " In the instant case, the second letter of allotment to the Appellant did not attach in rem to any land since there was no parcel upon which the allotment could attach. The first allotment to Mr. Joseph Muturi Muturania effectively made the suit property unavailable for allotment to the appellant the more when the first allottee had fulfilled the terms and conditions of the allotment."

87. Therefore, according to the Learned Counsel, there was consistent body of case law, both by this court and the Court of Appeal, that once the allotment was made to the Plaintiff on 25th September 1996, there was nothing left for the 2nd Defendant to allot to the 1st Defendant as he purported to on 24th October 1996. It followed that the allotment to the 1st Defendant was a nullity. It did not matter how lawful and bona fide the subsequent steps may be. Out of nothing, comes nothing, and a nullity begot a nullity. But were the subsequent steps by the 1st Defendant in fact, lawful? Certainly not; and the Learned Counsel undertook to demonstrate that aspect under the second ground for upholding the Plaintiff's title.

88. Secondly, on the issue of whether the Lease title held by the 1st Defendant was obtained illegally and fraudulently, the Learned Counsel submitted that during the course of the trial, the Learned Counsel for the 1st Defendant made heavy weather of Hon. Kipkalya Kones' support of the Plaintiff's case. He saw this, and invited the witnesses to agree with him, that Hon. Kones' influence over the 2nd Defendant

was what led to the 2nd Defendant's support of the Plaintiff's case. The Learned Counsel further went to state that if that was an attempt at impeaching the Plaintiff's title on account of fraud or collusion, it fell way short. As stated in the case of:- "Philemon L. Wambia (Supra) states:-

> " .....it is not enough to simply infer fraud from the facts. In this matter, the Appellant has invited us to infer fraud from the fact that the 1st Respondent was working at the land office. Allegations of fraud cannot be proved by inference."

89. The Learned Counsel argued that they were also unable to see any problem in the 2nd Defendant looking at the documents in its possession and taking a view, a reasonable and lawful one, that it was the Plaintiff who must prevail. That could not be evidence of fraud, as the 1st Defendant seemed to insinuate during the cross – examination of the Plaintiff's witnesses. If anything, and on the contrary, from the evidence here, showed that it was the 1st Defendant's title that was obtained illegally and fraudulently. The Learned Counsel pointed out several facts.

90. First, Mr. Mae confirmed that the application that led to the allotment to the 1st Defendant was done by a legal entity trading in the names and style of Orbit Chemicals Limited (see pg. 21 of 2nd Defendant's first bundle of documents). It was stated that Orbit Chemicals Limited applied for allocation of "a vacant Government land". However, Mr. Sachdeva Advocate, writing on behalf of the 1st Defendant, confirmed that the 2nd Defendant ".....has removed the existing structures....." (see page 24 of 1st Defendant's bundle of documents). Contrast that with the allotment to the Plaintiff which confirmed that there were existing structures for which the Plaintiff was required to pay the then handsome sum of Kenya Shillings Two Hundred and Sixty Six Thousand (Kshs. 266,000.00/=) as compensation for the house; a figure which the 1st Defendant, they noted, was never required to pay.

91. Thus, the Learned Counsel posed the query - Why would the 2nd Defendant be removing existing structures on a "vacant Government land"? It could only mean that the 1st Defendant unlawfully imposed itself on a parcel of land that was quite different from that spoken of in the Letter of Allotment that it held. Second, the suit property seem to be distinct and different in shape and perhaps sizes. From the Letter of Allotment to the Plaintiff, it is referred to what was "a rectangular plot" (see pg. 3 of 2nd Defendant's first bundle of documents). On the other hand, the Letter of Allotment to the 2nd Defendant was referred to as "an "L - shaped plot" (see pg. 17 of 2nd Defendant's first bundle of documents). However, the 2nd Defendant now claimed that the plot was s not "an L - shaped plot" but "a rectangular plot. They remained uneducated on how the Suit Property metamorphosized from "L-shaped" to rectangular.

92. Third, the letter of allotment to the 2nd Defendant required it to pay Kenya Shillings One Hundred and Seven One Hundred and Twenty (Kshs.107,120.00/=) to the 2nd Defendant. Apart from presenting a letter forwarding a cheque whose receipt could not be established on the face of it, the 2nd Defendant presented no evidence that it complied with that condition. Nor did they see any evidence that the 1st Defendant paid any compensation for the house that it confirmed it demolished. Payment of those sums was a fact so peculiarly within the 1st Defendant's knowledge that it was, by the provision of Section 112 of the *Evidence Act* Cap. 80, required to prove that fact. As it did not present any evidence in that regard, the conclusion must be that the rightful sums owed to the government were not paid. It has been held in some cases, such as "Kizito – Versus - Kizito Kanonya & 7 Ors [2019] UGSC 28", that depriving the government revenue which it is otherwise entitled to, is evidence of fraud. That is what the 1st Defendant did here.

93. Fourthly, the Letter of Allotment by the 1st Defendant was issued in Nairobi on 24th October 1996. By 25th October 1996, the 2nd Defendant had obtained a banker's cheque in Mombasa for the exact

amount that the Letter of Allotment required him to pay. How peculiarly efficient, at a time of typing with typewriters and cheques clearing after several days. Still on peculiar efficiency, the process of getting the Plaintiff's title commenced with a Letter of Allotment issued on 25th September 1996 and concluded with a lease registered on 4th September 1997. That is some 12 months. The 1st Defendant, on the other hand, commenced on 24th October 1996 and had a lease registered on 18th December 1996; barely a month and a half.

94. According to the Learned Counsel, it was not unkind to say the speed at which the 1st Defendant processed everything reeks of fraud. Okong'o J. in "Alice Jane Njoki Chege – Versus - Rachel Wanjiku Chege & 2 others [2019] eKLR" finding fraud, thought that:-

> "…….the speed with which the whole transaction was conducted should have raised eye brows."

95. The Learned Counsel submitted that it must raise eyebrows here; and rightly so. It was unusual that the same offices that were taking 12 months to process the Plaintiff's title, were eleven-times efficient only when it came to the 1st Defendant's title. Fifthly, Mr. Mae admitted under cross-examination by Ms. Waswa Advocate for the 2nd Defendant that the process was done on the 1st Defendant's behalf by Mr. Enock Tuitoek. Mr. Tuitoek authored a letter dated 27th February 1998 (pg. 23 of the 1st Defendant's bundle of documents) saying this:-

> "This is to confirm that I erroneously acquired the above-mentioned property which was originally allocated to yourself.'
>
> I therefore hereby agree to surrender and return the property and its document of title to the Commissioner of Lands."

96. The Learned Counsel submitted that they had it in the clearest and unequivocal language. The person who did everything that gave rise to the Lease title for the 1st Defendant confessing his sins. How then could the 1st Defendant, who demanded for and obtained title from those sins, be the innocent person it claims to be?Sixthly, the documents on record showed that there had to be instructions within the 2nd Defendant for a lease to be prepared after a letter of allotment was issued. They saw instructions to prepare a lease in so far as the lease to the Plaintiff was concerned (see pg. 7 of 2nd Defendant's first bundle of documents). When Mr. Mae was asked under cross-examination whether there were similar instructions to prepare the 1st Defendant's lease, he was unable to refer to any such instructions. In sum, the Learned Counsel submitted that they saw an acquisition process that was so fraudulent that the instructions required to be issued were never issued, but a lease was nonetheless prepared and registered. These shortcuts could only be evidence of fraud.

97. By fraud, he had in mind the definition h found in the case of: "Kizito – Versus - Kizito (supra)" thus:-

> "Fraud includes all acts, commissions, and concealments which include a breach of legal duty, trust confidence…….fraud in all cases implies a willful act on the part anyone, whereby another is sought to be deprived, by illegal or inequitable means of what he is entitled to."

98. The facts that they had pointed to above, taken singularly and jointly, leave not doubt in any reasonable person's mind that the 1st Defendant's title cannot stand. The 1st Defendant had made much of the first registration and indefeasibility of title. The Learned Counsel stated that the Supreme Court, recently

in the case of:- "Dina Management Limited – Versus - County Government of Mombasa & 5 others [2023] KESC 30 (KLR)", declared that;

> "Indeed, the title or lease is an end product of a process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The first allocation having been irregularly obtained, H.E. Daniel Arap Moi had no valid legal interest..."

99. Likewise from the same case of:- "Dina Management (supra)", the title under challenge was registered under Cap. 281, while this is under Cap 300. That first registration under Cap 281 did not perturb the Supreme Court one bit. The Learned Counsel argued that they saw no reason why it should perturb this court under Cap. 300 when the Supreme Court has set the yardstick on illegally acquired properties.Having shown, so far, that the Plaintiff's allotment was first in time thus vitiating any subsequent allotment, including that to the 1st Defendant; and that the 1st Defendant in fact obtained its title through illegality and fraud, it followed that the Lease title for the Plaintiff was the only legal title over the Suit Property, that resoundingly answers the first issue.

100. Regarding the second limb of the Learned Counsel's argument, on whether the Plaintiff was entitled to the reliefs he sought, the Learned Counsel submitted that the Plaintiff sought in brief, a declaration that he was the lawful and absolute owner of the Suit Property; that the 1st Defendant's registration was obtained by fraud or mistake and was therefore null and void; a rectification of the register to expunge the 1st Defendant's registration; and a permanent injunction to restrain the 1st Defendant from remaining on or interfering with the Plaintiff's use of the Suit Property.

101. According to the Learned Counsel, it seemed to them that if the first issue was answered in the manner proposed to them, then the reliefs that the Plaintiff seeking for prayers (a), (b), (cc),(d), (e) & (f) must follow as of course. And if those reliefs were granted, the reliefs sought in the Counter - Claim must by the 1st Defendant should be rejected.Prayer (g) is on costs. They followed the event, although in cases of innocent double allocations, the courts have tended to order the innocent parties to bear their own costs. Here however, it is not a case of innocent double allocation. Rather, it was a case of double allocation conceived, orchestrated and implemented by the 1st Defendant. He must and should be condemned to bear the Plaintiff's costs.

102. In conclusion, the Learned Counsel submitted that they set out to answer two broad issues. The way in which he answered them, applying the law to the facts, should lead to the irresistible conclusion that the Plaintiff's suit was merited. They invited the court to find that the Plaintiff's suit succeeded with costs, while the 1st Defendant's Counter - Claim must fail with costs.

B. The Written submissions of the 1st Defendant

103. The 1st Defendant through the Law firm of Messrs. ANL Law Advocates filed their written submissions dated 26th July, 2023. Mr. Amoko Advocate poetically commenced their submissions by stating thatwas a sadly familiar tale for which politicians were deservedly at the receiving end of savage barbs. Things went badly awry, when they meddle with the faithful discharge of the duties of civil servants, and obsequious civil servants, oblivious of the law and their duties as well as the rights of innocent third parties, rush to please them.

104. The Learned Counsel averred that the double allocation took place in respect to the suit land. Thanks to an administrative faux paux- missing Kalamazo binders - both the 1st Defendant and the Plaintiff were registered as its proprietors. As soon as this came to the offices' attention, the Chief Land Registrar, initially Mr. Onyango and then Mrs. Okungu, took time to investigate it. Acting lawfully,

fairly and pragmatically, Mrs. Okungu directed that (a) as prescribed by law first registration should be respected (in Mr. Ochieng's words in his moments of honesty, "paramount") so the Lease Title for the 1st Defendant was upheld but (b) the Plaintiff would not be left in a lurch as alternative parcel of land would be identified and allotted to him. Thus, a lawful and fair resolution of the matter sensitive to the rights and interests of both parties, was in the works.

105. According to the Learned Counsel, that was not to be. The Hon. Kiplaya Kones intervened, protesting to the Commissioner of Lands – the 2nd Defendant herein, whose toadying teams then quickly swung into action to ensure the cancellation of the Lease title for the 1st Defendant. As soon as this was done, and there were scales now tilted in his favour, the Plaintiff launched these proceedings nominally against two Defendants but to all intents, the 2nd Defendant, the Commissioner, was his comrade-in-arms, with whom he was working hand in glove (as has been held conspiratorially so) at the expense of the 1st Defendant. That was how the matter had come to be here for the past 25 years. Mrs. Okungu, then the Registrar of Titles, identified the proper resolution of this matter 25 years ago. As dictated by the provision of Section 141 of the Registered *Land Act*, Cap 300 (repealed), first registration, in that case that of the 1st Defendant, was sacrosanct and could not be impeached. Even though it had been dragged out of them, as they fought hard for the Plaintiff, all the officials, from the Ministry of Land, however grudgingly, accepted that was correct. The Learned Counsel submitted that they really needed not go further than that but "ex abundanti cautella, for him to start with facts as established from parsing the evidence before the Court.

106. On the forensic analysis, the Learned Counsel stated that the Court received oral testimony from four witnesses on behalf of the Plaintiff, one on behalf of the 1st Defendant and two on behalf of the 2nd Defendant as well as mostly, overlapping documentary evidence from all three parties. In evaluating their oral testimony, they would respectfully invite the Honourable Court to pay heed to Goff LJ's (as he then was) invaluable guidance that: "It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence ....reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth." "The Ocean Frost [1985] I LLLR 1,57".

107. The first objective fact was there was a double allocation over the suit land. The land that was allotted to the Plaintiff and the 1st Defendant were the same. This much was confirmed by all the contemporaneous documents- see for example - Mr. K. K. Githii's Letter of 10th February 1998 which sets out precisely what went wrong and was categorical that this was a case of "double allocation." It was never before the subject of any controversy until November 2018when all over sudden it occurred to Mr. Gordon Ochieng who has been actively batting the Plaintiffs wicket, the 1st Defendant's allotment was for a different, adjacent plot, (See Paragraphs 8 and 9 of his Witness Statement dated 19th November 2018). No explanation was forthcoming as why it took him two decades to record in writing this alleged fact. Thankfully though to the evident shock of the Learned Counsel, in occasional moments of candour, Mr. Ochieng was categorical that the land was the same before being led back to the agreed script by the Counsel for the Plaintiff.

108. The Learned Counsel urged the Honourable Court to reject the post boc conveniently minted claim, that 1st Defendant had been allotted a different parcel of land which is not only not supported by them. This was all contradicted by all, repeat, all contemporaneous records. Faithful to Goff LJ's useful guidance, in these and other respects, the motives of both witnesses spell doom to their respective testimonies. Ever eager to assist the Plaintiff, in his oral testimony, Mr. Otieno, who confessed his was not legally qualified, gratuitously opined, that the Letter of Allotment to the 1st Defendant was invalid

because, having already been allocated to the Plaintiff, the land was not available for allotment because it had been alienated. This should be rejected out of hand:-

a. Not for the first time, Mr. Otieno contradicted himself for if, the allocation to the 1st Defendant was for a different parcel of land, how could it have been the subject of an earlier allotment to the 1st Defendant. As Sir Walter Scott taught us centuries ago, of what a wicked web it was conceived when we first practice to deceive.

b. Further, once again how did this killer point escape everyone's attention for the past 25 years until Mr. Ochieng' came to testify? There was no such claim in contemporaneous records nor in his Witness Statement.

c. More importantly, the Court of Appeal has authoritatively held that as it was merely an offer, a Letter of Allotment did not and could not confer any legal interest/right until and when it was accepted, its conditions were fulfilled, and a title was issued upon registration-see "Wreck Motor Enterprises – Versus - Commissioner of Lands & 3 others [1997]eKLR":

> In our view, the endorsement or the appending of bis signature by H.E. the President on the applications to the Commissioner of Lands for the suit plot or for that matter any other unalienated Government Land is not sufficient to grant title over any land to anyone. H.E. the President only approves the application for consideration by the Commissioner of Lands for allocation of any such property. It does not amount to the applicants obtaining title to such lands. Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held. See Dr. Joseph N. K. Arap Ng'ok – Versus - Justice Moijo ole Keiwua &4 Others, Civil Application No. NAI.60of1997 (unreported).

109. In his witness statement, which unlike those of the Plaintiffs witnesses, was based on personal knowledge and duly supported by documents (not eavesdropping on alleged conversations in the back of cars), Mr. Mohamed Mae, the Plaintiffs director sets out, what followed once the 1st Defendant received the letter of allocation:-

a. He accepted the allocation on behalf of the 1st Defendant and paid the sums required of it. In his submissions, the Plaintiff complained that there was undue haste on the part of the 1st Defendant which was indicative of fraud. With respect, the offer was to be accepted and paid for within 30 days of the date of the post mark. There was nothing improper, let alone fraudulent, about acting within the time stipulated in a letter of allotment. What smacked of impropriety was whether the Plaintiff actually complied with the terms of its Letter of Allotment as far as time was concerned. Even though Mr. Okunga claimed it made the payments, no evidence had been produced to verify this in particular whether the Plaintiff complied with the thirty-day requirement for acceptance and payment.

b. A 99-year lease commencing 1st October 1996 was duly prepared and signed between the Government of Kenya and the 1st Defendant.

c. On 20th December 1996, the lease was registered, and the 1st Defendant was issued with a Certificate of Lease.

d. Later in December 1997, he discovered that on 7th September 1997, another lease over the Property was registered in favour of the Plaintiff.

e. The 1st Defendant's erstwhile advocates protested to the then District Land Registrar as to this state of affairs.

110. According to the Learned Counsel, Mr. Githii's response to this on 10th February 1998, to which, as it did not assist the Plaintiff, neither of Mr. Hashim Got Sat nor either of the 2nd Defendant's witnesses refer, was a model of a non-partisan, conscientious public servant, did when seeking to address a situation of where due to an administrative cock-up, and through no fault of their own, two innocent parties who had both been registered as proprietor of the Property. He first explained how the dual registration came to took place. The 1st Defendant's lease was registered on 20th December 1996. Due to the shortage of Kalamazo binder, The Plaintiff's lease unknowingly was registered on 4th September 1997,unaware of the 1st Defendant's earlier registration. The matter had been referred to the Commissioner for guidance. Mr. Githii concluded "I am treating this as a case of double allocation and sincerely apologize to the parties for any inconvience caused to the parties concerned."

111. The response from the Chief Land's Registrar as per Mr. Onyango's letter of 17th February 1998 was asking for time to look into the matters raised with a promise to communicate the action taken. Eventually, his successor in her letter of 8th May 1998 provided the guidance sought by Mr. Githii:

> " ...It is clear this is a mater of double allocation. It has been decided that an alternative plot be found for the second allottee Mr. Yatin Vinubhai Kotak. Please therefore put a restriction on the second title so that so dealings are registered while an alternative is being identified. The Title in favour of Tucha Adventures Limited will remain valid because it was registered first..."

112. Note the objective balanced approach, taking time to investigate, properly asking and answering the right questions-what happened- there was a double allocation? where did things go wrong due to absence of Kalamazo cards, double registration ensued-with the 1st Defendant's registration happening prior to the Plaintiffs? what did the law provide-first registration was unimpeachable; fairness-the Plaintiff should not be short-changed- they should get him another parcel of land. This was yet another model of non-partisan, conscientious public official working to correct bona fide error by the Land's registry and also do right for two innocent parties who had both been registered as proprietor of the Property.

113. It now transpired that there was a parallel process on under the aegis the Commissioner. While as confirmed by Ms. Rama there was no statutory basis for this process, it hadmore important) than the law, slavishly kowtowing to the demands of a cabinet minister. Once Hon. Kones sent his letter of 11th September 1997 requesting that the other "transaction be reversed, and that the title document issued in favour of Tucha Adventure Limited be cancelled It would appear as far as the Commissioner was concerned, the 1st Defendant's fate was sealed. The Commissioner and his officials immediately went about getting its title cancelled. Unlike Ms. Rama who, however reluctantly, accepted Ms. Okung'u was exercising statutory powers donated to Chief Land Registrar and had given sound reasons for doing so, there was an attempt by Mr. Otieno to discredit Ms. Okung'u that she had no business giving those directions. The position of the Chief Land Registrar was established by sub-section 7(1) of the RLA tasked with responsibility of administering the land registries in accordance with the act. Land Registrars were appointed under sub-section 7(2). By sub-section 7(4), it was for the Chief Land Registrar to determine ("authorize") what powers and duties to confer on such land registrars, subject to a proviso that "no such authorization shall be deemed to divest the Chief Land Registrar of any of bis powers or duties, and be may, if he thinks fit, exercise and perform all bis powers or duties notwithstanding any such authorization." A blunder-dual registration of the Property-had

been committed by the Mombasa Land Registry and needed correction. This was well within Mrs. Okungu's wheelhouse as she had the responsibility for the land registries.

114. The Learned Counsel averred that they did not have the full picture of the steps they undertook to get this done, as while there was Mr. Githii's reaction to the commands he received from Mr. Ochieng's, inexplicably, the latter had not disclosed what those ukases were. There was a legal rule that where a party never put in evidence that would have been expected of him failed to do so, it is presumed that the evidence would have been against him-see the provision of Section 112 of the *Evidence Act* as well as for example "Serraco Limited – Versus - Attorney-General [2014]eKLR". Even with the 2nd Defendant's niggardly disclosure of the limited correspondence only, it is clear from his letters, that Mr. Githii, had been instructed to cancel the 1st Defendant's lease over the Property. By his letter of 10th December 1997 (page 11 of the 2nd Defendant's 2nd Bundle of documents), S.M. Kagwi on the Commissioner's behalf wrote to Registrar of Titles Mombasa that the Property belonged to the Plaintiff and asked who the registered owner of the plot was. There was an unsigned letter at page 14 in 2nd Defendant's bundle of documents' dated 16th December 1997 in Mr. Githii's name that according to his records the Property belonged to the Plaintiff. They then had the Commissioner's letter of 4th September 1998. Making the best we can of its contents, Mr. Gachanja delivered on Hon. Kones' demanded thus:

> " We refer to the Chief Land Registrar's letter refer no. MSA/A/24/VOL.II/41 dated 8th May 1998 in regard to the above title.
>
> The plot, was allocated to Yatin Vinubhai Kotake as per the letter of the allotment held by this office.
>
> The title is therefore the valid one as far as we are concerned. This is a clear case of double allocation, and the chief land registrar has been believed on the matter.
>
> The title in favor of Tucha Adventures Ltd should be returned to this office for further directions."
>
> Despite the admission that there was a clear case of double allocation, the Commissioner relied on the allocation to the Plaintiff so as to uphold the validity of his title, while even though it also had an allotment, that of the 1st Defendant was left hanging "be returned to this office for further directions"

115. In his letter of 26th July 2002, Mr. Githii confirmed that as directed, the caveat on the Plaintiffs title was removed on 15th September,1998. It would appear, though, that the title in favour of the 1st Defendant was not returned to the Commissioner as directed. The contrast between this process and that of Mrs. Okungu was stark. The Commissioner's letter was the execution of a predetermined outcome, with no effort, at establishing what happened. By any means and at all costs- uphold the Plaintiffs title and cancel the 1st Defendant's. No reasons need be given for this outcome-not even a feeble attempt to explain, let alone justify, this outcome. Despite recognition that there was a double allocation, no concern, however, trivial, as to the fate of the 1st Defendant, not a word. It was not even 'favoured' with the courtesy of a notification of this decision. Consistent with such disregard of the 1st Defendant, when challenged on this asymmetrical treatment, Mr. Otieno said the 1st Defendant would be entitled to a refund of the money it paid upon application- never mind it had never been informed of this nor given any reasons why the Commissioner set about cancelling its title. The adjective callous does quite describe this partisan highhandedness by the Commissioner. While it is overused at times, this is impunity.

116. The Learned Counsel submitted that the Commissioner had no statutory basis for his actions. The RLA granted him no powers to do what he did, or rather orchestrated. Pressed, neither Ms. Rama nor Mr. Otieno could identify the said powers. To her credit, towards the end of her testimony, at cross, the previously defensive Ms. Rama frankly accepted that, unlike the Chief Land Registrar, the Commissioner lacked the legal authority for his actions.

117. At this, it was important to note that could only be, at its most delicate, be described as skulduggery on part of the Plaintiff and the Commissioner. On 17th July 2002 when this matter came up before Mbito j, without any prior notice to the 1st Defendant, they entered into a consent by which the latter conceded to the suit. Notwithstanding this, the headstrong Plaintiff and the Commissioner extracted a decree which purported to uphold the Plaintiffs title and extinguish the 1st Defendant's. In her ruling on 29th April 2005, Mugo J accurately chastised these actions thus,

> " It is clear from the proceedings of 17th July 2002, the pleadings and the said Ruling that by allowing the Plaintiff and the 2nd Defendant to record the consent of 17th July 2002,the court did not anticipate that the said two parties would thereafter conspire together and proceed in a manner so prejudicial to the 1st Defendant as in now clearly apparent. Firstly, the prayers in the Plaint cannot be granted on the consent of the 2nd Defendant particularly when the 1st Defendant has not been heard on its defence and counter claim. The facts of the case clearly show that it has an arguable defence to the action as well as a reasonable cause of action in the counterclaim which must be given a chance."

118. The Learned Counsel submitted that armed with the purported decree, Mr. Otieno ordered Mr. Githi to cancel the 1st Defendant's title as though it were an order which emanated from this Honourable Court when in actual fact it was illegal concoction born on a conspiracy (see paragraphs 2.12 above). By his letter of 26th July 2002, Mr. Githii reported back that the deeds had been done and forwarded all the records relating to the 1st Defendant's title to the Commissioner for his perusal/destruction. Mugo J correctly noted "the speedy manner in which the Plaintiff and the 2nd Defendant moved to enforce the said consent order much to the horror and shock of the Honourable Judge before wbom the same was recorded."

119. Allowing the 1st Defendant's application to set aside the purported decree, Mugo J was scathing as to the Plaintiffs and the Commissioner's joint conduct and justifiably so:-

> " No Judgement was recorded against the 1st Defendant as to support the purported declarations that the allocation (referred to in the decree as a reallocation)" is illegal and therefore null and void" or that the Plaintiff, as against the 1st Defendant "is the bona fide owner" of the suit premises. In my considered opinion, order 3 of the decree is not an order al all in so far, as it states that among other things, the registration of the 1st Defendant by the 2nd Defendant as the proprietor of the disputed plot was omitted by fraud or mistake. Moreover the record shows that the 2nd Defendant did not admit the allegation of fraud.
>
> "Armed with this consent judgment, the applicant for reasons which I cannot comprehend made out a decree affecting the Respondents (applicant herein) title and now seeks the aforesaid orders as the 2nd Defendant bas apparently for reasons not yet clear cancelled the Respondent's title to the suit premises while it was not party to the consent order....."

Her Ladyship held and found that the terms of the decree went beyond the terms of the consent as recorded:

> "Finding that indeed the purported decree is at great variance with the consent judgment entered by the Plaintiff and the 2nd Defendant on 17th July 2002 and that the steps taken by the consenting parties upon reliance on the same are without basis or sanction of this Court. The sane are greatly prejudicial to the 1st Defendant and cannot be allowed to maintain and are hereby declared illegal, null and void. I order that the purported decree issued on 24th July 2002 be set aside and that the 2nd Defendant take steps to put the warring parties back to their status quo ante, pending the bearing and determination of the dispute and the final determination of who the bona fide owner of Mombasa/Block/XXVI/919 is...."

120. There was no appeal, let alone a successful one, against Mugo J's findings/holdings and orders. They are binding. Despite this (note how often such qualifiers are required in respect to the Commissioner's conduct, or rather misconduct), the records at the Mombasa Land Registry as confirmed by Mr. Gat and Ms. Rama still show that pursuant to the purported decree, the Plaintiff is the registered proprietor of the Property and the 1" Defendant's title has been cancelled. Confronted as to why despite Mugo J's holding that the purported decree was illegal, null and void, thus of no legal effect, the records still reflect reliance on it, Messrs. Gat's and Otieno's fallback was that they had not been served with the order. This was as non-responsive as it is evasive.

a. Firstly, the question was not service but the continued reliance on a decree that had been declared illegal, null and void ab initio. It was wholly unacceptable after this finding, for public officials to testify before this Honourable affirming on oath, inter alia, on the basis of the decree that the Plaintiff was the registered proprietor of the Property. The Honourable Court should not countenance this as it was a direct assault to the rule of law, an elemental part of which as aptly explained by Nolan LJ is the "submission of the executive to orders of the court fundamental to the rule of "Ian'-M – Versus - Home Office [1992] 1 QB 270". The Supreme Court has been categorical on this "It is, therefore, evident that not only do contemnors demean the integrity and authority of courts, but they also deride the rule of law. This must not be allowed to happen." "Republic – Versus - Ahmad Abdulfathi Mohammed another SC Criminal Application No 2 of 2018; [2018] eKLR".

b. And remember the Commissioner was represented by the Attorney-General, the principal legal adviser to the Government. By Article 156(6) of our Constitution, the Attorney-General "shall promote, protect and uphold the rale of law ..." It could not be right that the A-G whether as part of a conspiracy or not, in an effort to bolster a private party's case against another private party is filing witness statements relying on a decree held to be illegal, null and void.

c. In that connection on service, there used to be a misunderstanding, which apparently still persists that contempt proceedings were not maintainable unless the alleged contemnor had been personally served. In "Shimmers Plaza Limited – Versus - National Bank of Kenya Limited [2015] eKLR", the Court of Appeal clarified that such personal service is not required where the alleged contemnor was represented by counsel who was present when the decision was read, and orders rendered. A fortiori, for reasons the Counsel had given above, this holds with greater force when the party was a member of the Executive such as the Commissioner and Counsel

was Attorney General Kyalo for the Attorney General was present when Mugo J delivered her ruling.

d. Mr. Otieno copped to being the official who had been instructing the Attorney General in these proceedings including the entering into the consent and extracting the purported decree. With greatest respect, his casual shrug-of-the-shoulder, attitude when Mugo J's finding of grave misconduct by the Commissioner was drawn to his attention, is shocking. He did not seem to have regarded it as a big deal. Mr. Otieno is unrepentant. This attitude displays not just a disregard of the duties of a public officer, but a wanton disrespect of the decisions of this Honourable Court.

e. Mr. Okunga's reliance, on behalf of the Plaintiff in his Witness Statement on decree and subsequent actions of the servile official at the Ardhi House, was equally mistaken.

121. All in all, the unabashedly parochial, imperious conduct exhibited by the Commissioner was sanctionable and should be sanctioned. The Learned Counsel submitted that they expected better of their public officials. Both the 1st Defendant as well as this Honourable Court were entitled to better from the Commissioner. It was a sure guarantee for entrenchment of partisan maladministration in favour of the politically connected who throw their weight about, if this is tolerated. Some brief comments as to the Plaintiffs witnesses none of whose testimony undermined the analysis set out above. They also had precious little to commend them. With respect, their evidence was of little, if any probative, value for a variety of reasons. Whether singly or collectively, their evidence viewed by "reference to the objective facts and documents, to the witnesses' motives and to the overall probabilities" fails. These testimonies need not detain the Honourable Court for long:-

a. PW - 1, testified as to the current status of records at the Mombasa Land's Registry, as, by his lights, ordered in the purported decree. As his entire case at to the Plaintiff being the current proprietor of the land derived from the purported decree which is illegal, null and void it is, with respect, of zero value. The records relating to 1st Defendant's title had been forwarded to the Commissioner for perusal/destruction in July 2002 so of course were not available at the Mombasa Land Registry as of the date of his perusal of the Register.

b. PW – 2, Inspector Rotich, the late Hon. Kone's driver whose evidence, claiming perfect recollection of conversations between his boss and an Asian man he could barely describe over the purchase of land that despite specific reference to in his Witness Statement, it was evident at cross he had no knowledge of. It also emerged at cross that he had little familiarity with his ostensible Witness Statement displaying, at cross, near complete, if not complete, ignorance as to its contents.

c. Both the evidence of PW - 2 and PW - 3 never supported the case pleaded in the Amended Plaint on which the Plaintiff set his stalls. There was no claim in the Amended Claim that the Plaintiff purchased the Property from the late Hon. Kones. To the contrary, he expressly disclaimed that-with one of his particulars of fraud as per paragraph 8(b)is that the allegation by the 5th Plaintiff [i.e. Hon. Kones] that he sold the property to the Plaintiff whereas the Plaintiff was the first registered owner." Just to put beyond any doubt, at paragraphs 14A, 14B and 14C the Plaintiff accuses Hon. Kones as one of the people who have laid claim to the property without having any right to do so. How the Plaintiff purchased the Property from a person who by his own pleading had no right to the property is a mystery we need not plumb. It is sufficient to note that Inspector Rotich and Mr. Okunga's evidence undercut the Plaintiff's pleaded case. Even if credited with any truth(they should not), their respective

testimonies since they do not support the Plaintiffs pleaded case as per the Amended Plaint, his suit is for dismissal with costs.

d. Finally, all this evidence was wholly irrelevant to issues this Honourable Court had to resolve that turn in the dual registration of the Property in both the Plaintiff and the 1st Defendant's name, with the latter's first in time. While Hon. Kones' intermediation (of which none of these witnesses spoke to), expose the motivations (a relevant issue as Lord Goff advised when determining truth) for the Commissioner's as well as Mr. Otieno's actions, what transpired between the Plaintiff and him prior to such registration is of no legal relevance in these proceedings.

e. At this stage he urged to correct the Plaintiffs testimony. Mr. Okunga never testified that the Plaintiff paid a sum of Kenya Shillings Three Hundred and Sixty Eight Thousand Nine Hundred and Ten (Kshs. 368,910/=) it was required to. He most certainly did not produce evidence supporting such payment.

122. The Learned Counsel submitted that the 1st Defendant was registered as proprietor of the Property under the RLA on 20th December 1996. It was a first registration in terms of Section 14(d) for, that was the date on which the Property first came on to the land register. By the provision of Sections 27, 28 and 143 of the RLA provide:-

> " 27. Subject to this Act-
>
> (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
>
> (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest/described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
>
> 28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-
>
> (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
>
> (b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:
>
> Provided that nothing in this section shall be taken to relieve a proprietor from any duly or obligation to which he is subject as a trustee."
>
> [....]
>
> 143.

(1) Subject to subsection (2), the court may order rectification court. Of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake."(emphasis added)

123. The Learned Counsel submitted that faithfulto the terms of these provisions, the Courts had consistently rejected, in whatever garb presented and whichever grounds invoked, challenges to first registration under the RLA as clear by two decisions of the Court of Appeal:

a. "Joseph Marisin – Versus- Joseph Kibilat S. Bargalliet NKR Civil Appeal No 306 of 1997 as quoted in Chacha – Versus - Mwita Manini (2002) eKLR", after quoting section 143 (1), their Lordships held:

> " Quite clearly this section envisages that the little by way of a first registration is indefeasible even if obtained by fraud. This must be of necessity be so because the Land Adjudication Committee goes into all claims of ownership of the particular land prior to issuance of the first registration title. That is the law and a court of law cannot interpret the law otherwise than what it clearly lays down."
>
> There were no exceptions to this.

b. In the case of:- "Muriuki Marigi – Versus - Ricbard Marigi Muriuki and 2 Others[1997] eKLR", the Court of Appeal succinctly summarized the correct legal position thus:-

> " We earlier set out the provisions of Sections 27 and 28 of the Registered *Land Act* which in effect state that the rights of a registered proprietor of land registered under the Act are absolute and indefeasible and are only subject to rights and encumbrances noted on the register or overriding interest which are set out in section 30 of the Act." Their Lordship approved and applied the famous pair of cases that constitute the locus classicus "Obiero – Versus - Opiyo & otbers [1972] EA 227" and "Esiroyo – Versus - Esiroyo Another [1973]EA 388".

124. The Learned Counsel submitted that the Plaintiff in his submissions, now rests claim to the Property on the basis that its allocation came first. That is not his pleaded case. There is no reliance in his pleadings as first allocation conferring superior interest. As per paragraph 8 of the Amended Plaint, the Plaintiff contended that the Certificate of Lease by the second Defendant in an irregular and unlawful when knowing that the Plaintiff was the first registered title bolder of the property. "Parties are bound by their pleadings. One of the cardinal principles underlying our adversarial system of litigation for parties to bring the issues to be determined by the Court through their pleadings, the evidence they present as well as the submissions they make- "It is trite law, and the provisions of Order XIV of the Civil Procedure Rules are clear, that issues in a suit generally flow from the pleadings, and unless amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of Order XX Rule 4 of the aforesaid Rules, may only pronounce judgment of the issues arising from the pleadings or such issue as the parties may have framed for the Court's determination."- "Galaxy Paints Co Ltd – Versus - Falcon Guards [2000] 2 E.A. 385". It is improper to use submissions to build an entirely different case to one pleaded.

125. According to the Learned Counsel these apply with greater force to the ostensible fraud relied in the Amended Plaint is not, save for one element, the ones sought to be developed in the Plaintiffs

submissions. At paragraph 8 of the Amended Plaint, the particulars of fraud given comprise. In his submissions, the fraud sought to be relied on are whether or not there was an existing structure in the Property--paragraphs 33 to 35; the rectangular plot allocation as against the L-Shaped one in the 1st Defendant's title-see paragraph 35; want of payment-paragraph 37;l ack of compensation to Government of Kenya for the existing structure- paragraph 38; expedition-paragraphs 41 to 43; the 1st Defendant's responsibility for Mr. Tuitoek's confessed sins-paragraphs 44 to 45 and finally-Mr. Mae's inability show from the 2nd Defendants records instructions for the preparation of the 1st Defendant's lease. A seemingly veritable bill of dastardly conduct, not a single one of which has been pleaded. By order 2, rule 4(1)of the CPR, any fraud relied on must be specifically pleaded. As the Court of Appeal held in The Court of Appeal in "Vijay Morjaria -Versus - Nansingh, Madhusingb Darbar ~ another [2000]eKLR" :

> "It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts". Thus, the Honourable Court was precluded from considering them.

126. There was a further problem with the contents of Paragraphs 33 to 45 of the Plaintiffs submissions. Save for the part of "the rectangular plot" allocation as against "the L-Shaped one, these matters are not the subject of testimony by any of the Plaintiffs witnesses. Even on this shape of the plot, while Mr. Okunga mentions, it was not the extent of detail, alleged factual detail (that the Plaintiff had proposed to lead through the evidence of a surveyor who was not called, the Plaintiffs seeks to sneak in via submissions) set out in the submissions. In effect the Plaintiff was impermissibly using submissions to lead evidence to contest primary facts. This should not be allowed. Had these matters been pleaded, the 1st Defendant would have had an opportunity to plead its response to them, all the parties would had led relevant evidence supporting their respective positions which would then had been subjected to cross-examination.

127. Even assuming, arguendo, if the Learned Counsel was mistaken, (which he was not), and these matters are open for determination, they assist the Plaintiff naught. Firstly, as they had already shown on the basis of the clear terms of the RLA, in particular, the provision of Section 143(1) (which the Plaintiff never referred to) as well as binding authority from the Court of Appeal, as it was a first registration in favour of the 1st Defendant under the RLA, it cannot be challenged. This Honourable Court has no power to order its rectification either as sought by the Plaintiff or at all. In his submissions, the Plaintiff sought to rely on the decision of the Supreme Court in perturb "Dina Management Limited (Supra)" as to the scope of indefeasibility of title under sections 23 and 24 of the Registration of Titles Act ("the RTA"), Cap. 281. He claimed that first registration did not perturb the Supreme Court one bit. We see no reason why it should perturb this court under Section Cap. 300 when the Supreme Court has set the yardstick on illegally acquired property." Overlooking that apparent malapropism in the curious use of the word perturb a deep disturbance of mind, which hope neither this Honourable Court nor the Supreme was afflicted with), with respect, the Plaintiff misread and misapplied the Supreme Court Judgment in the case of:- "Dina Management Limited (Supra)". In the case of "Dina", the Supreme Court dismissed an appeal against the dismissal by the lower Courts, not a constitutional petition alleging violation of Article 40 of *the Constitution* by a 4th transferee. Holding that the Courts should not countenance the grabbing of public land, the Court held that the protection afforded by Section 24 did extend as there was no valid title to be transferred-see Paragraphs 108 to 111 of the Judgment. Statutes with different provisions cannot be interpreted in the same way. The non-reviewability of

first registration under section 143(1), of the RLA is not equivalent of a claim of the indefeasibility of tile under section 24 of the RTA by a bona fide purchaser value. In Dina Management Limited, the Supreme Court did not, nor indeed could it have purported to overrule section 143(1) of the RLA as well as the binding authorities applying its terms. This issue was not before them.

128. Employing the style of defection by accusing the party of doing what you are guilty of, the Plaintiff from its submissions, invites this Honourable Court to find fraud against the 1st Defendant on the improper basis. The 1st Defendant has not alleged any fraud against the Plaintiff. It is that Plaintiff, relying on unpleaded fraud, to paraphrase the Court of Appeal in "Philemon L. Wambua – Versus - Gaitano Lusitsa and 2 others" who has failed to lead specific evidence distinctly alleging, tendering and proving such fraud in Court.

129. The Learned Counsel submitted that while they were anxious not to extend these already prolix submissions, out of abundance of caution, a word or two about the authorities relied on by the Plaintiff in support of unpleaded case based on prior allotment as well as fraud, which for reasons given above, are inquiries this Honourable Court was precluded from undertaking in these proceedings. Lord Steyn famously remarked that in law context is everything. The quotations relied by the Plaintiff have been taken out of the context and certainly do not support the sweeping propositions contended for by the Plaintiff. For example none of the cases relied on by the Plaintiff involved a successful challenge to first registration under RLA on the basis of prior allotment. In fact, the only case cited by the Plaintiff which involved the RLA was decided on the basis of the sanctity of first registration. They did not propose to examine the cases the Plaintiff relied. Some illustrative examples would do.

a. The sheet anchor of the proposition that prior allocation trumps a later is the decision of the Court of Appeal in "M'Ikiara M. Mukanya & another – Versus - Gilbert Kabere M'Mbijiwe". The holding there that effect of allocation had been blindly followed without an appreciation of its context. That context was that the allocation upheld there was under the Trust Lands Act under which title was conferred on the basis of an allotment by the Commissioner of Lands as an agent from the relevel local authority- see the detailed discussion and analysis undertaken by Chesoni Ag JA at pages 7 to 9 before concluding that the Respondent had been granted a leasehold interest based on a reading of sections 37 and 39 of the Trust *Land Act* and the exhibits before the Court. It does to speak to the letters of allotment granted to the Plaintiff and 2nd Defendants. Also recall crucial that the Appellants who were challenging the allotment, neither spoke of nor exhibited in their evidence any Letter of Allotment granting them the plot, which the respondent exhibited." That is what was held, nothing to do with prior nor subsequent allotment. Under the Trust Lands Act, title was conferred by allotment. The Respondent who had one won. The Appellant who did not have lost. This was statute-specific and fact-specific finding not generalizable across the whole landscape to all other land acts. With respect, all subsequent decisions relying on this decision without identifying its context as the special regime of the Trust Lands Act, were wrongly decided. As they were all first instance decisions, they are not binding to this Honourable Court.

b. The Learned Counsel turned to "Kamau James Njendu – Versus - Sarah Wanjiku & another" which was land under the RLA. While there was reference to cases speaking to prior allocation as cited in the Plaintiffs favour, the basis of the decision was prior registration (See paragraphs 29 to 32 of the typescript of the Judgment).

c. The Plaintiff also cites the decision of the Court of Appeal in "Philemon L Wambna – Versus - Gaitano Lusitsa & 2 others". The citation of the Plaintiff was partial. He overlooked the facts that the Court of Appeal accepted as a correct statement of the law by Kimondo J from a legal standpoint, a Letter of Allotment was not title to property. It is a transient and [is] often a

right or offer to take property. "The 1st Respondent succeeded by virtue of being the registered owner of the suit land with vested rights. The position is reaffirmed in the persuasive case of Ahmed Ibrahim Suleiman and Another -Versus - Noor Khamisi Surur (2013)eKLR where it was stated that "the plaintiff having been registered as proprietor and having been issued with a certificate of lease over title is entitled to the protection of the law." It is registration that trumps.

d. As a final illustration of the Plaintiffs penchant for misusing authorities took its reliance on decision of the Ugandan Supreme Court in "Kizito – Versus - Kanonya" to contend that since the 1st Defendant paid less than the Plaintiff as per their respective letters of allotment without compensating the Government for the dwelling, this constituted fraud because the Exchequer was cheated of revenue. The actual holding in that case was that the deliberate false insertion in the sale agreement by the purchaser of the wrong purchase price significantly lower than what was actually paid to pay lower tax than as due constituted fraud on part of the purchaser-see page 52. It would be churlish to say more.

130. In disposition, the Learned Counsel submitted that as the Plaintiff never claimed, nor indeed, could he credibly do so, any overriding interest in respect to the property, and it mounting a challenge against a first registration that was not within the limited jurisdiction of this Honourable Court under Section 143(1) of the RLA. It was a suit for dismissal with costs while, as its title is unimpeachable, the 1st Defendant's Counter - Claim should be allowed with costs.

C. The Written Submissions by the 2nd Defendant

131. On 26th July, 2023 the Learned Counsels for the 2nd Defendant being the State Law offices of the Honourable Attorney General, Offices at Mombasa filed their written Submissions dated even date. M/s. Winnie Waswa the Senior Litigation Counsel commenced her submissions by providing the Honourable Court with a brief background of the case. She stated that before this Court was the Amended Plaint dated 11th February, 2008. She held that the Plaintiffs sought for the following orders:-

a) a declaration that the purported reallocation of the said plot number Mombasa/Block XXVI/919 situated in Mombasa island to the 1st Defendant is illegal and therefore null and void;

b) an order of permanent injunction restraining the Defendants either by themselves, servants, employees, and/or agents from evicting, barring or continuing to evict or bar the Plaintiff from remaining in or occupying plot No. Mombasa/Block XXVI/919 situated in Mombasa Island until the final determination of the suit or until further orders of the court;

c) An order of temporary injunction restraining the Defendant either by themselves, servants and/or agents from wasting, damaging, alienation, sale, removal or disposition of the plot No. Mombasa/Block XXVI/919 situated in Mombasa Island until the final determination of the suit or until further orders of the court;

d) an order of perpetual injunction restraining the Defendants either by themselves, servants, employees, and/or agents from evicting, barring or continuing to evict or bar the Plaintiff from remaining in or occupying plot No. Mombasa/Block XXV1/919 situated in Mombasa Island;

e) A declaration that the Plaintiff is the bonafide registered owner of the plot No. Mombasa/ Block XXVI/919 situated in Mombasa Island;

d) A declaration that the registration of the 1st Defendant by the 2nd Defendant as the proprietor of the Plot No. Mombasa/Block XXVI/919 situated in Mombasa was obtained, made or omitted by fraud or mistake;

g) In view of prayer (f) above, the court do order rectification of the register by directing that the registration of the 1st Defendant having been obtained made or omitted by fraud or mistake be and is hereby cancelled or amended;

h) Costs of this suit with interest thereon of court rates;

i) Such further or other relief as this Honorable Court may deem fit to grant.

132. In response thereto, the Learned Counsel informed Court that the 2nd Defendant filed its Statement of Defense dated 6th February, 2001 in which it acknowledged that indeed there was double allocation over the suit property Mombasa Block XXVI/919 pitting the Plaintiff's title against the 1st Defendant's. The 2nd Defendant further filed List of documents, list of Witnesses and witness Statement on 19th November, 2018 when the matter was still in Nairobi. 2nd Defendant's Further list of Documents and witness statement were filed on 4th August, 2022.

133. According to her, the matter then proceeded on various dated whereby the 2nd Defendant's first witness - Ms Josephine Rama , the Land Registrar, from the Land Registry, Mombasa testified on 23rd February, 2023. The witness confirmed that indeed there existed two Leases at their Land Registry over the same suit property. One of it was in favor of the Plaintiff which was registered on 4th September,1998 for a period of 99 years from 1st September, 1996, while the other one was registered on 20th December,1996 in favour of the 1st Defendant for a period of 99 years from 1st October, 1996. She clearly indicated how queries were raised as to how the two parallel Leases came to exist and the Allocating department; Commissioner of Lands through several correspondences among them the letter dated 4th September, 1998 confirmed that the suit property was allocated to the Plaintiff and the title is valid.

134. She further stated that the Commissioner of Lands directed that the Title by the 1st Defendant should be returned back to Lands office. It was proper to note that the Land Registrar only registers Leases forwarded from the allocating office; Commissioner of Lands and hence would not establish or explain if there were errors in allocation.

135. The 2nd Defendant's 2nd witness was Mr. Gordon Ochieng DW - 3; He testified on 21st June, 2023 whereby he clarified on the issues of Allocation of leases. Firstly, DW - 3 informed Court that the Allocation of the suit property to the Plaintiff was on 25th September, 1996 and that for the 1st Defendant was on 24th October, 1996. Hence, this meant that the land once allocated to the Plaintiff was therefore not available for allocation to any other person including the 1st Defendant. DW - 3 also went a head to clarify how the portion allocated to the 1st Defendant was "L" shaped but what they Surveyed was rectangular in shape bringing out some error on the part of the parcel held by the 1st Defendant. This facts could be spotted out on the PDPs attached to the Letter of Allotments. The PDP attached to the Plaintiff's letter of Allotment showed the Structure Planning was undertaken on 21st November, 1995 while that attached to 1st Defendant's Letter of Allotment was done 4th of July, 1996. This showed the 1st Defendant's came way later after the land was already Allocated to the Plaintiff.

136. During the hearing, DW - 1 could not clearly state how exactly he came to be in possession of the suit property. As much as the Letter of Allotment indicated that they were the Allottee, his testimony said otherwise. He stated that the same was allocated to one Enock Tuitock. It then Mr. Tuitock who sold it to Tucha Adventures Limited. However, the DW – 1 was never able to produce any poof of the

transaction from the sale such as a Sale Agreement or Transfer documents between them. Indeed, he stated that had never been to Nairobi due to the cold weather and that everything was done by Enock and the Advocate. None of them were brought in as witnesses to this case.

137. Further, the Learned Counsel stated that DW - 1 could not confirm that indeed payments were made as a condition contained in the Letter of Allotment given to them. No receipt of payment was produced in this matter. From the testimony, DW - 1 never knew how much the Allocation came about yet the same allocation was alleged to be done to them.

138. As a result, the Learned Counsel held that it raised numerous issues on how exactly the allocation of the land was done to the 1st Defendant. Likewise, the procedure followed in between to obtaining of the Lease over the suit property ahead of the Plaintiff was questionable. Much evidence was already on record and hence they would rely on it.

139. The Learned Counsel submitted that the present suit pertained the legal and lawful title to the suit land. Both the Plaintiff and the 1st Defendant assert their proprietary rights over the suit property. The Plaintiff averred that they came into possession of the suit property pursuant to the Letter of Allotment dated 25th September, 1996. As dictated by the terms of the allotment, the Plaintiff stated that they paid a sum of Kenya Shillings Three Sixty Eight Thousand Nine Ten Hundred (Kshs. 368,910.00/=) had the suit property surveyed and ultimately obtained a lease that was duly registered on the 4th September, 1997. On the contrary, the 1st Defendant contended that it acquired its legal title over the suit property vide the Letter of Allotment dated 24th October, 1996. It consequently had the suit property surveyed, obtained a lease which was then registered on the 18th December, 1996.

140. The Plaintiff alleged that when they visited the suit property back in the year 1998, they found the 1st Defendant demolishing the existing structures on the said land, prompting the Plaintiff to institute the present suit in defense of their proprietary rights.

141. According to the Learned Counsel, the main issue for the determination by the Honourable Court was whether the Plaintiff had the superior title to the suit property. She asserted that this was a case of erroneous double allocation over the same subject property, with both the Plaintiff and 1st Defendant having legal title over the suit property. To buttress on her point, she relied on the Supreme Court's case of "Dina Management Limited – Versus - County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) where the Apex Court, while affirming the decision of the Court of Appeal in "Munyu Maina – Versus - Hiram Gathiha Maina Civil Appeal No. 239 of 2009 [2013]eKLR guided thus:-

> "Where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. It is the instrument that is in challenge and therefore the registered proprietor must go beyond the instrument and prove the legality of the title and show that the acquisition was legal, formal and free from any encumbrance including interests which would not be noted in the register."

142. Additionally, she submitted that where the proprietorship to the suit property was under challenge, the Court was bound to re - visit the historical background the land by "going to the root of the title". According to her, it was uncontested that both the Plaintiff and 1st Defendant were beneficiaries of the land allocation process, with the former having allegedly acquired the suit property pursuant to the Letter of Allotment dated 25th September, 1996, while the latter having been allocated the same vide the Letter of Allotment dated 24th October, 1996. The Learned Counsel held that the purported allocation of the suit property was effected under the previous land dispensation, particularly the Government

Lands Act, Cap. 280 (now repealed). Notably, the provision of Section 2 of this Act identified the land subject of allocation, in the following words:-

> 'Unalienated land was defined as Government land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment.(Emphasis is Mine)'

143. With regard to the procedure of allocation of public land under the previous land regime, the Supreme Court in "the Dina Management Limited (Supra) while cementing the position of this Court sitting at Malindi in the case of "Nelson Kazungu Chai & 9 others – Versus - Pwani University College [2017] eKLR observed that:-

> ".....It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for Lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease

144. To this end, the Learned Counsel stated that the apex court in this heavily relied authority in "the Dina Management Limited (Supra) v where it further cautioned that:-

> " As we have established above, before allocation of the un-alienated Government Land, there ought to have been processes to be followed prior. Further, we cannot, on the basis of indefeasibility of title, sanction irregularities and illegalities in the allocation of public land. It is not enough for a party to state that they have a lease or title to the property"
>
> "Indeed, the title or lease is an end product ofa process. If the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible."

145. The Counsel opined that having considered the pleadings before this Court in totality, it was apparent that this due procedure was followed in the allocation of land to the Plaintiff. A Letter of Allotment was issued to the Plaintiff on the 25th September,1996 which was subsequently accepted by the said recipient who then made the requisite payment. Consequently, a lease in favor of the Plaintiff was prepared and forwarded for registration on 3rd September, 1997. Based on the provisions of Section 2 of the repealed Government *Land Act*, the import of the Letter of Allotment issued to the Plaintiff was that the suit property, subject of the letter, became alienated land from the date thereof. It then follows that the purported reallocation of the suit property to the 1st Defendant was therefore null and void as at that point in time, the suit property was no longer unalienated public land as the allotter (the Commissioner of Lands) had intended for the same to be allocated to the Plaintiff.

146. In the spirit of the guidance of the apex court in the Dina Management Limited case, she submitted that the Certificate of Lease issued to the 1st Defendant, albeit on an earlier date was a product of a flawed and unlawful process. Therefore, the same was bad in law, null and void. The suit property as it was currently and as per DW - 2 was currently in the name of the Plaintiff.

147. In conclusion, the Learned Counsel urged Court to find the suit land belonged to the Plaintiff based on the Letters of Allotment - the procedure used and the timings to allocate them. She referred Court to the indemnity clause therein, which stipulates that:-

> 'The Government shall not accept any liability whatsoever in the event of prior commitment or otherwise'

148. Further, she submitted that there was no cause of action brought against the 2nd Defendant. Additionally, none of the reliefs sought from the Amended Plaint nor Counter – Claim were against the 2nd Defendant. In the long run, the Learned Counsel prayed that the suit against the 2nd Defendant be dismissed with costs.

D. The further written submissions of the Plaintiff

149. The Plaintiff further through the firm of Messrs. Muriu, Mungai & Company filed written submissions in support of his submissions dated 10th July, 2023 dated 27th July, 2023. He commenced the submission stating that the 1st Defendant responded vide his submissions dated 26th July 2023. From the 1st Defendant's submissions, some mischaracterization of the pleadings, the evidence and the law arise. The Plaintiff puts them straight in these further submissions. First, it is argued that the Plaintiff's witness, Mr. Francis Otieno Okungu, neither testified nor presented evidence that the Plaintiff complied with the conditions in the letter of allotment dated 26th September 1996.In point of fact, the Mr. Otieno specifically stated so at par. 2 of his witness statement dated 12th July 2012. The evidence in support of that statement is found at page 35 of the Plaintiff's Bundle of Documents dated 10th July 2018.

150. Second, it was said the fact that the property allocated to the 1st Defendant was "L-shaped" and not rectangular only came to the parties' realization in 2023 when Mr. Ochieng' testified.In point of fact, at pg. 9 of the Plaintiff's Bundle of Documents, Mr. Okungu specifically states, on 12th July 2012, that the allocation to the 1st Defendant "was L shaped and did not have any structure on it".

151. Thirdly the Learned Counsel submitted it was said the Plaintiff never pleaded fraud in the allocation of the property. Paragraph 8 of the Plaint lists as some of the particulars of fraud, the following;

> Allocating the 1st Defendant the suit property when already there was a prior commitment and/or registration.
>
> By the admission of Enock Tuitoek that he erroneously acquired the property in question when there was a prior allocation...
>
> The 1st Defendant caused the property to be allocated to himself despite the prior allocation.

152. According to the Learned Counsel, fraud in the allocation process was therefore distinctively pleaded. What the Plaintiff did in his submissions was to cluster and summarize the fraud and point the court to the pieces of evidence in support of the pleaded case of fraud. They did not understand the statement of principle in "Vijay Morjaria – Versus - Nansingh Madhusingh Darbar & another [2000] eKLR" to require the Plaintiff to particularize in the Plaint, the evidence that he was going to rely on to prove the allegation of fraud.At any rate, it would be an abdication of judicial duty if the court were to ignore the evidence of fraud when parties led evidence and were extensively examined on those facts. It is, in

the Learned Counsel view that, the kind of scenario which the Court of Appeal in "Aliaza – Versus - Saul [2022]KECA 583(KLR)", had in mind when it said;

> " I take the view, on the authority of the decisions in Odd Jobs v Mubia [1970] EA 476 and, among other decisions...that though unpleaded, the issue of a constructive or implied trust was left for the determination of the trial court."

153. Fourth, it is submitted that section 143 of Cap 300, now repealed, shields even the most fraudulent of registrations, provided it is a first registration. The cases of "Muriuki Marigi – Versus - Richard Marigi Muriuki & 2Others [1997] eKLR" and "Chacha – Versus - Mwita Manini [2002] eKLR" are cited in support. Foremost, "Muriuki Marigi (supra)" did not deal with section 143 of Cap 300. "Chacha – Versus - Mwita (supra)" which did, cited from an unreported decision of the Court of Appeal. The Court of Appeal had explained the protection to first registration to be because;

> " ...the Land Adjudication Committee goes into all claims of ownership of the particular land prior to issuance of the first registration title."

154. According to the Learned Counsel it was obvious that those are not the circumstances obtaining here. Here, the Land Adjudication Committee never got involved. This was unalienated public land which the Commissioner of Lands was alienating in exercise of his powers under the Government *Land Act* Cap 280. The Learned Counsel invited the Honourable Court to appreciate the provision of Section 143 of Cap 300 with that legislative intent in mind. The provision of Section 143 of Cap 300 however would not apply to a case such as this where a fraudster seeks to deprive the party to whom the land was lawfully allotted. Although the 1st Defendant submitted that considerations in one statute cannot be imported to another statute, they could not agree. They had already seen the Supreme Court refer to the rule of law when dealing with titles issued under Cap 281 repealed. There is also the brief but particularly illuminating concurring Judgment by Kiage JA in "Aliaza – Versus - Saul (supra)" when dealing with Cap 302. The good judge says;

> " It is time, I think, that this Court spoke in unmistakable terms that it would not, in this day and age, rubber-stamp fraud and dishonesty by holding as null and void agreements freely entered into by sellers of agricultural land, and which have been fully acted upon by the parties thereto, when those sellers, often impelled by no higher motives than greed and impunity, seek umbrage under the *Land Control Act*..."

155. Mumbi Ngugi JA, delivering the leading Judgment, rendered herself thus:-

> Happily for us today, we have been empowered to render justice and fairness, and to rule in accordance with good conscience, by nothing less than the Supreme Law of the land, which renders any legislation inconsistent with *the Constitution* null and void. Under the new constitutional dispensation and in light of the provisions of section 7 of the Sixth Schedule to *the Constitution*, the *Land Control Act* must be read in a manner that does not give succour to a party, such as the respondent, who wishes to renege on his contractual obligations in order to steal a match on the purchaser.

156. The Learned Counsel agreed that whatever views the courts took in 1997, must now certainly be tinkered with the realities of the current constitutional dispensation. Were the courts to countenance the view advanced by the 1st Defendant, then they would be inviting fraudsters to divest honest men and women of their lawfully acquired property by simply beating them to the finish line that is registration.

157. In conclusion the Learned Counsel reiterated their earlier submissions and invited the court to find that the Plaintiff's suit succeeds with costs, while the Counter – Claim by the 1st Defendant must fail with costs.

VI. Analysis and Determination

158. I have considered and reviewed the Pleadings filed by the Parties herein, essentially the Amended Plaint dated 11th February, 2008, the statement of Defence and Counter - Claim by the 1st Defendant dated 23rd December, 1998 and the 2nd Defendant' statement of Defence dated 6th February, 2001 respectively. Further, I have taken into account the documentary evidence tendered and produced by the Plaintiff, as well as the oral testimonies adduced before the Honourable Court and having similarly evaluated the written submissions, the myriad of authorities cited, the provision of *the Constitution* of Kenya 2010 and the Statures.

159. In order for the Honourable Court to arrive at an informed, reasonable, fair and Equitable decision, the Subject matter has been crystalised into the following five (5) salient and germane issues for its determination. These are:-

a. Whether Plot No. Mombasa/ Block XXVI/919 within Mombasa was dully allocated to the Plaintiff and if so whether the said plot was thereafter available for re - allocation to the 1st Defendant or any other person.

b. Whether the transfer and re – allocation of the suit property in the name of the 1st Defendant was lawful or otherwise.

c. Whether the 1st Defendant's Counter - Claim is sustainable.

d. Whether the Plaintiff and the 1st Defendants were entitled to the reliefs sought at the foot of the Plaint.

e. Who bears the costs of the suit by the Plaintiff and the Counter claim by the 1st Defendant.

Issue No. a.) Whether Plot No. Mombasa/ Block XXVI/919 within Mombasa was dully allocated to the Plaintiff and if so whether the said plot was thereafter available for re - allocation to the 1st Defendant or any other person.

160. Under this Sub – heading, the Honourable Court has been able to decipher the main substratum of this rather protracted suit initiated by the Plaintiff. Ideally, the case is one on ascertaining the absolute and legal registered ownership of the suit land between the Plaintiff and the 1st Defendant herein. Land in Kenya is a very sensitive and emotive issue. It is a source of livelihood. *The Constitution* of Kenya, 2010 categories land into three – Public, Private and Community land. It is instructive to note that the suit land was initially registered under the Government of Kenya, hence it was public land. The Honourable feels obligated to explain the process of the conversion of the public land to private land. This is where the land has been made available for private allocation. For this to allocation to happen it involves a detailed due process consisting of documentations and correspondences from different Government offices to be pursued as was provided for under the provisions of Sections 3, 7, 9 and 12 of then Government *Land Act*, Cap. 280 (Repealed). The provision of Section 3 of GLA provided that the powers to alienate unalienated Government land was vested in the President of the Republic

of Kenya only except in certain cases where such powers had been delegated to the Commissioner of Lands. Section 3 of GLA provides:-

> " The President, in addition to, but without limiting, any other right, power or authority vested in him under this Act, May:- subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated Government Land.....". These instances include Grants for religious, charitable, educational or sport purposes; Town planning exchanges on recommendation of the Town Planning Authority; Sale of Small remnants of land acquired for town planning purposes and left over after satisfaction of such need; use of local authorities for municipal or district purposes; Extension of existing townships leases; temporary occupation of farm lands on grazing licenses; Sale of farms and Plots which have been offered for sale and remain unsold.

161. The provision of Section 3 of the Government *Land Act* Cap 280 (now Repealed), the power to alienate un - alienated Government land was vested in the President of the Republic of Kenya only except in certain cases where such power had been delegated to the Commissioner of Lands. However, Section 3 should be read in conjunction with Section 7. The import of this proviso is clear beyond peradventure. It is that the making of Grants or dispositions in or over unalienated Government Land was the exclusive preserve of the President and in so doing he acted personally, unless he expressed delegated the power to so do to the Commissioners of lands. Those instances included religious, charitable, educational or sports purposes, exchanges, sale of small remnants of land acquired for town planning purposes, use of local authorities for Municipal or district purpose, extension of existing township leases, temporary occupation of farm lands on grazing licences, sale of farms and plots which had been offered for sale and remained unsold and so forth. If any parcel of land was available for alienation, then the Commissioner of Lands was obliged to dispose them in the prescribed manner as required under the provision of Sections 9 and 12 of the Government *Land Act* would be by public auction.

162. The law for disposal of un-alienated town plots was so elaborate so as to prevent the Commissioner of Lands or the President of the Republic from allocating town plots to their cronies and friends at the detriment of the public. Therefore, based on the above legal position, and the Court fully concurs with the Counsel for the Plaintiff that the 3rd Defendant could not have issued the Grant to the 1st Defendant under the provision of Section 7 of the GLA provides that:-

> " The Commissioner may, subject to any general or special directions from the President, execute for and, on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act.
>
> Provided that that "nothing contained in the section shall be deemed to authorize the Commissioner to exercise, any of the powers conferred upon the President by Sections 3, 12, 20 and 128 among other Sections".
>
> Indeed, the interpretation of Sections 3, 7, 9, 12 and 13 of the GLA vis-à-vis the powers of the Commissioners of Lands were given adequate consideration in a plethora of cases which the Honourable Court wishes to cite herein. These are the cases of:- The Town Council of Ol - Kalau – Versus- Ng'ang'a General Hardware, Nbi. Civil Appeal No. 269 of 1977, Champakalal Ramn Shal – Versus- The Attorney General & Another, Mombasa HCCC No. 145 of 1997, Insurance Company of Easy Africa –Versus- The Attorney General & Another Mombasa HCCC No. 135 of 1998 eKLR (2001). James Joram Nyaga

& Another – Versus- the Hon Attorney General & Another Nairobi High Court Misc. Civil Application No. 1732 of 2004 eKLR (2007), Milan Kumarn Shah & 2 Others – Versus- City Council of Nairobi Civil Suit No. 1024 of 2005 (OS) Nbi. HCCC 3063 of 1996 Paul Nderitu Ndungu & 20 Others –Versus- Pashito Holdings, Dr. Syedna Mohammed Burhannudin Swaleh & two others – Versus - Benja Properties Limited; Nbi. HCCC No. 73 of 2000, Shiva Mombasa Limited – Versus - Kenya Revenue Authority & Another Mombasa HCCC No. 171 of 2004, eKLR and Kenya Anti Corruption Commission – Versus - James Raymond Njenga & Another Eldoret HCCC No. 61 of 2008 eKLR (2010). In all the above cited cases, and fully concur with the submission by the Learned Counsel for the 1st Defendant, the holding by Courts were that the legal mandate and powers by the then Commissioner of Lands on unalienated Government land were limited. The Courts held inter alia:-

> "Under the provision of Section 9 of GLA suit premise was not available for alienation and the procedures laid under the provision of Sections 12 and 13 of GLA were not complied with in the process of alienating it.

163. By the same token, the title is indefeasible and sacrosanct if the process of allocation of the land was to be done in accordance with the law. The Commissioner of Lands had a duty to cater for public rights while performing his duties. The provision of Section 3 of GLA set out special powers of the President. They were delegated to the Commissioner of Lands in certain defined cases. The provision of Section 3 of GLA was to be read with the provision of Section 7 of the Act. Sections 3, 12, 20 and 128 of Act limits the power of the Commissioner of Land to executing leases or conveyances on behalf of the President and the proviso specifically limits the power to alienate un - alienated land to the President. The Commissioner had no powers to alienate land that which had already been reserved for another purpose or already reserved. The concept of indefeasibility of title should not un-discriminately be allowed to camouflage unlawful activities towards the acquisition of such title in the process courting disorder and encouraging land grabbing.

164. In summary, it requires such land to be gazette, surveyed and a Part Development Plan (PDP) to be prepared by the Director of Survey; and send to the Commissioner of Land who prepares and issues the Letter of Allotment to be send over to the Land Registrar for the registration and issuance of Leases to the Land. From the very onset, I have taken cognisance that hardly did the any of the parties herein adhere with these stringent procedural requirements to acquire Government land. It is extremely unfortunate.

165. Nonetheless, taking that the parcel of suit land was registered under the Registration of *Land Act*, Cap. 300 (Now Repealed) there would be need to consider applying the provisions of the current laws – the *Land Registration Act*, No. 3 of 2012 as I shall decipher herein below. In that case, the relevant provisions would be Sections 27, 28 and 143 of the RLA to wit:-.

> Section 27(a) "Subject to this Act(a) the registration of a person as the proprietor of land shall be vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto"
>
> Section 28 of the Act provides that:-
>
> > "The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by

the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever..."

Section 143 (1) of the Act provides thus:

"Subject to Sub Section (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration has been obtained, made or omitted by fraud or mistake

(2) The register shall not be rectified so as to affect the title of a particular who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default"

166. However, considering that the Act has now been repealed, and based on the saving Clause under Section 107 of the *Land Registration Act*, No. 3 of 2012, the applicable law is the Lands Registration Act, No. 3 of 2012 and the relevant provisions being Sections 24, 25 and 26 (1) of the LRA , No. 3 of 2012 and the *Land Act*, No. 6 of 2012. This Legal position finds grounding in the provisions Section 23 (3) (c) of the *Interpretation and General Provisions Act*, Cap. 2 which provides.

" Where a written law repeals in whole or in part another written law, then unless a contrary intention appears the repeal shall not affect a right, privilege, obligation or liability acquired, accrued or incurred under a written law so repealed"

This legal position was upheld in the cases of "Samwuel Kamau Macharia & Another – Versus – Kenya Commercial Bank Limited & 2 Others (2012) eKLR and Tukero Ole Kina & Another – Versus – Tahir Sheikh Said (also known as TSS) & 5 Others (2015) eKLR" .

166. To advance on this legal preposition, the efficacy, legitimacy and legality of the rights of the legal land proprietor is created through registration. The Certificate of Title and in this case Lease is deemed to be the "prima facie" evidence of the stated registration. The Certificate of Lease held by the land owner is protected under the Provisions of Law- Sections 25 (1) and 26 (1) of "The *Land Registration Act*" No. 3 of 2012 provides as follows:-

" The right of a proprietor whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto free from all other interest and claims whatsoever....."

This fact is strengthened by the following decisions - "ELC (Nku) No. 272 of 2015 (OS) – Masek Ole Timukoi & 3 others –Versus- Kenya Grain Growers Ltd & 2 others and "ELC (Chuka) No. 110 of 2017 – M'Mbaoni M'Thaara – Versus- James Mbaka. And in Civil Appeal 60 of 1992 – 'Dr. Joseph M. K. Arap Ngok –Versus- Justice Moijo Ole Keiwua' where courts has held that:-

'It is trite law that land property can only come into existence after issuance of a Letter of Allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to Provisions in the Act under the property is held.'

167. The provisions of Section 26 (1) of the *Land Registration Act* verbatim provides:-

> "(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or (b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original."
>
> In the case of "Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR - clearly spells out the purpose of above provisions of Section 26 (1) (b) is to protect the real title holders from being deprived of their title by subsequent transactions. However, where the Certificate of Title or in this case the Grant is doubtful suspect or obtained by fraud or forgery un-procedurally, illegally or corrupt means or by mistake or omission as envisaged under the above Provision of Section 26 (1) of *Land Registration Act*, the Provisions of Section 80 (1) & (2) of *Land Registration Act* for the cancellation and rectification of the title comes to play – "Peter Njoroge Nganga – Versus - Kenya Reinsurance Corporal Limited & Others" ELC (Kjd) No. 204 of 2017."
>
> Additionally, in the Court of Appeal case of "Munyu Maina – Versus- Hiram Gathiha Maina (2013) eKLR where court held:-
>
> > "When a registered property root of title is under challenge it is not sufficient to damage the instrument of title as a 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 the acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register" and Huber L. Martin & 2 others –Versus - Margaret J. Kamau & 5 Others (2016) eKLR comes to play here as in the case of the instant case.

168. From the evidence tendered and/or availed to the Honorable Court, the Court is caused to make a determination as whether this was a case of "double allocation and/or registration between the Plaintiff and the 1st Defendant herein or "Illegal allocation" of the suit land. The Court is being called upon to effectively apply the Solomonic Wisdom as founded in the Scripture on the bibilical story from 1 Kings 3 Verses 16 to 28 of the two Harlots who were both claiming parentage the same life child ending with the words: "and all Israel heard of the Judgement which the King had rendered, and they stood in awe of the King, because they perceived that the wisdom of God was in him, to render justice".

169. It is evident and apparent that the suit property was allocated to the Plaintiff all that piece of land known as Title No. Mombasa/Block XXVI/919 by the 2nd Defendant through Letter of Allotment

letter dated 25th September, 1996, the Plaintiff then accepted the offer of allotment and on 26th September 1996, he issued a Banker's cheque for Kenya Shillings Three Sixty Eight Thousand Nine Hundred and Ten (Kshs. 368,910/-) payable to the Commissioner of Lands in respect of stand premium, rent, stamp duty and other out-goings as tabulated in the letter of allotment, which money was duly acknowledged by the Commissioner of Lands. The Plaintiff having met the terms of offer in respect of the suit property, he was on 2nd September 1997 issued with a lease of the property which he executed together with the Commissioner of Lands. On 4th September 1997, the Plaintiff was issued with the Certificate of Lease for the property for a term of 99 years from 1st September, 1996 which Certificate effectively gave the Plaintiff the indefeasible title, rights and interest as the bona fide and registered proprietor of all that piece of land as vested in him by law pursuant to the provision of Sections 24, 25 and 26 of the *Land Registration Act*, No. 3 of 2012. On the other hand, the 1st Defendant also claimed to have made the payment and attached a letter forwarding a bankers cheque. Apart from that, there is no evidence on the acknowledgement of the cash in form of an official receipt issued at least it was never produced in Court as part of their evidence.

170. In support of the contention that once an allottee has compiled with the terms of the Letter of Allotment, the land becomes unavailable for re-allocation, it is imperative to take cognizance of the decision in the case of "Republic – Versus - City Council of Nairobi & 3 Others (2014) eKLR" where it was held as hereunder;

> "Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled."

171. Other than the foregoing, it is also worthy to note that where an allottee has complied with the terms of the Letter of allotment and the allotting authority has proceeded to and executed a transfer instrument, in this case, a Deed of assignment, which was executed in favor of the 1st allottee and which was thereafter transferred in favor of the vendors and ultimately transferred in favor of the Plaintiff, with the approval of the city council of Mombasa, now defunct, the beneficiary of such allotment, acquires a legitimate title and the same become private property, which cannot be impugned with compliance with due process of the law.

172. If any case law was required to buttress the foregoing trite position, then one need not look far and wide, but suffice it, to refer to the decision in the case of "Benja Properties Limited – Versus - Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR", where the Court of Appeal stated as hereunder:

> " The legal effect of the registrations made in 1907 and 1911 was to convert the suit property at that time from un-alienated government land to alienated government land with the consequence that the suit land became private property and moved out of the ambit and confines of the GLA. This made the suit property unavailable for subsequent allotment and alienation by the Commissioner of Lands or the President of Kenya.
>
> The appellant's title to the suit property was thus anchored on land that was not unalienated government land. We concur with the trial judge's finding that "the suit land having been owned privately was not GLA land, and was not available for alienation. Its alienation was illegal and void ab initio."

173. In the humble view of this Honourable Court, the suit property having been allocated to the Plaintiff, - Yatin Vinubhai Kotak, who then accepted the offer of allotment and on 26th September 1996, he issued a Banker's cheque for Kenya Shillings Kenya Shillings Three Sixty Eight Thousand Nine Hundred and Ten (Kshs. 368,910/-) payable to the Commissioner of Lands in respect of stand premium, rent, stamp duty and other out-goings as tabulated in the letter of allotment, which money was duly acknowledged by the Commissioner of Lands. The Plaintiff having met the terms of offer in respect of the suit property, he was on 2nd September 1997 issued with a lease of the property which he executed together with the commissioner of Lands. On 4th September 1997, the Plaintiff was issued with the Certificate of Lease for the property for a term of 99 years from 1st September, 1996 which Certificate effectively gave the Plaintiff the full title as the bona fide and registered proprietor of all that piece of land. The same could not have been allocated to and in favour of the 1st Defendant. The 2nd Defendant in their statement of defense and through their witness Gordon Odeka Ochieng, the current Director of Land Administration confirmed that he knew the case was on the issuance of two (2) titles over the same property. He recorded the witness statement dated 19th November, 2018 which he wished to rely on as his evidence. He also stated that there was a list of 20 documents marked as 2nd Defendant Exhibits Numbers 21 to 42 dated 19th November, 2018. The issue in the suit was about the double allocation which ordinarily should never had arisen. The issue arose after the letter of allotment was issued to the Plaintiff on 25th September, 1996, payments were made in 1996. At the time the property became private property hence it was not available for allocation but as elaborately explained by the Director of Land Administration – DW – 3 - due to the manual system the Ardhi Office which issued a 2nd Letter of Allotment to Tucha Adventures Limited dated 24th October, 1996, in his position it was his opinion the Letter of Allotment should never have been issued as the same land had already been allocated to the Plaintiff. DW – 3 confirmed that it was one and the same land. There was a month difference as to the time of allocation. The Plaintiff lease registration was on 4th September, 1997 while that of 1st Defendant was done 20th December, 1996. This means the 1st Defendant moved first meaning the lease was registered first.

174. Consequently, and in the premises, I find and hold that the purported Letter of Allotment issued to the 1st Defendant dated 24th October, 1996 and the subsequent lease dated 20th December, 1996 were invalid, null and void.

175. For avoidance of doubt, this Honourable Court begs to point out that this was not a case of double allocation (Emphasis is Mine) as envisaged by the 1st Defendant but one of illegal allocation (Emphasis is Mine), in as so far as the suit property was not available for allocation and/or alienation, at the time when the it was purportedly allocated or re-allocated the same on 24th October, 1996.

Issue No. b.) Whether the transfer and re – allocation of the suit property in the name of the 1st Defendant was lawful or otherwise.

176. Under this sub- title this Honourable Court will examine if the reallocation to the 1st Defendant was lawful or otherwise. While dealing with the first issue, I have found and held that the suit property had long been allocated and/or alienated by the Mombasa City Council as it was then to and in favour of the Plaintiff who dully complied with the terms of the Letter of Allotment, culminating to a point where the Plaintiff had a certificate of lease dated 4th September, 1997.

177. Nevertheless, the point herein however relates to whether the transfer of the suit property in favor of the 1st Defendant was lawful or otherwise. In this regard, to be able to authenticate the illegality or otherwise of the transfer, one needs to authenticate whether the terms Letter of Allotment which was issued to the 1st Defendant were complied with.

178. First and foremost, it was incumbent upon the 1st Defendant to place before the Honourable Court evidence of the letter of acceptance and payments of the stipulated on the face of the letter of allotment and essentially to establish that the same were made within the prescribed 30 days. However, the totality of the bundle of documents, that were filed before the court by the 1st Defendant, no Evidence and/ or Document, namely, the letter of acceptance and Revenue receipt denoting payments were ever attached and/ or availed.

179. In the absence of acceptance and/or payments of the monies stipulated on the face of the purported letter of allotment, it is my finding and holding that the letter of allotment, even if same had not been illegally issued, same would have long lapsed. Simply put, if the terms of a letter of allotment are not complied with within the statutory timelines, same lapses automatically and hence ceases to exist in the eyes of the Law.

180. In support of the foregoing holding, it is sufficient to take cognizance of the decision in the case of "H.H. Dr. Syedna Mohammed Burhannuddin Saheb & 2 Others - Versus - Benja Properties Limited & 2 Others [2007] eKLR", where the Honourable Court, Visram Judge, held as hereunder;

> " In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant's argument, that the expired letter, when acted upon, had been "revived" through conduct. The letter had expired. It was dead. There was nothing to "revive".

181. Other than the foregoing the Plaintiff had complied with the terms of the allotment letter dated 25th September, 1996 and had proved that he had made payment through the Banker's cheque for Kenya Shillings Three Sixty Eight Thousand Nine Ten Hundred (Kshs. 368,910/-) payable to the Commissioner of Lands in respect of stand premium, rent, stamp duty and other out-goings as tabulated in the letter of allotment, which money was duly acknowledged by the Commissioner of Lands.

182. Notwithstanding the foregoing, it is also worthy to note that the purported Letter of Allotment dated 24th October, 1996 was issued to Tucha Adventures Limited which begs the question was the person assigned that land the same as the 1st Defendant in this claim. With reference to the contents made out under Paragraphs 8 and 9 of the Plaint, the 1st Defendant admitted that it had been issued with a Certificate of Lease in respect of Mombasa/Block XXVI/919 whereunder it is registered as the proprietor of the leasehold interest in the said plot for a term of 99 years from 1st October 1996 and was the registered as such proprietor at the Mombasa District Registry on 20th December, 1996. The 1st Defendant denied being guilty of any fraud in respect either of the issue of the said Certificate of Lease or of its (the 1st Defendant's) registration as such proprietor as aforesaid; accordingly the 1st Defendant averred that there was any mistake in relation to the issue of the said Certificate of Lease or with respect to its (the 1st Defendant's) registration as such proprietor as aforesaid. With further reference to the contents made out under Paragraphs 8 and 9 of the Plaint, the 1st Defendant averred that the Certificate of Lease issued in its favour is registered under the provisions of the Registered *Land Act* (Cap. 300) and such registration being a first registration under the said Act and prior in point of time to the registration of the Certificate of Lease issued in favour of the Plaintiff, the 1st Defendant's title to MOMBASA/BLOCK XXVI/919 is absolute and indefeasible and cannot be challenged even if (which is denied) there was any fraud or mistake as alleged or at all.

183. The 1st Defendant's witness 1, the director at the 1st Defendant company confirmed to this Honourable Court that it was not the 1st Defendant that applied for the land. The company that applied for the

land was Orbit Express Ltd accepted on 3rd October, 1996 indicated at pages 21 of the 2nd Defendant's bundle of documents. At page 20 of the documents was a letter dated 11th September, 1996 and at the bottom he could see the date was 18th October, 1996. When referred to page 22, the witness stated that he could see its letter dated 23rd October, 1996 from Orbit Express Limited to the Commissioner of Lands. He had read it and understood it, they were applying for the plot to be given to Tucha Adventures Ltd authorized by Enock Tuitoek. He had seen it was written on it no objection and signed on 29th October, 1996. At page 21, the witness stated that he could see it was written vacant government land. He knew the Advocates by the name of Messrs. Sachdeva Advocates, they had once represented Tucha Adventures Limited. At page 24 of the 1st Defendant's bundle of documents, the witness stated that he could see the letter written by Messrs. Sachdeva & Co. Advocates dated 9th April. 1998 and its contents. At page No. 1, the witness told the Court that it was a Letter of Allotment dated 24th October, 1996 to Tucha Adventures Limited. There was no house from the letter of allotment. He had a house but he demolished it. He never paid anything to the Government. Clearly something is a miss as to how a company that did not comply with the terms of the letter of allotment ended up with a Certificate of lease indicating that they had complied with the terms as prescribed.

184. In my humble view, the registration of the suit property to and in favor of the 1st Defendant was predicated and/or premised on the illegal and unlawful documents and hence same was plagued with illegalities, to the extent that the entire process, was illegal, un-procedural and void ab initio. Such a transaction, does not only defeat common sense, but raises serious question about adherence to and observance of the law by persons working at the office of the 2nd Defendant. Certainly, it cannot be said that the errors evidence on the instruments that were acted upon by the 2nd Defendant could not have been noted. DW - 1 who is the director of the 1st Defendant testified under oath as earlier indicated in this Judgment that he did not make any payments as to regards of the said payments of Kenya Shillings One and Seven Thousand One Hundred and Twenty (Kshs. 107,120/=) which as per his testimony was in the Letter of Allotment but again confirmed that he paid the same stating that he had a bankers cheque dated 25th October, 1996 for the amount stated in the Letter of Allotment but he had no official receipt in Court. He stated that ordinarily, they would let the land agent to proceed the documents. He never went Nairobi at all. These were detailed legal processes. He never lodged a complaint against the person. They only dealt with correspondences through the advocates. He never reported the matter to the police nor filed any suit. He had not registered any restriction, or caveat or caution at the Land Registry. He went to the people who had sold the land to him to complain to them for selling him a wrong land. As per the evidence of DW – 3, his only remedy was left from claiming a refund from the people who allegedly sold him a non – existent parcel of land.

185. Nevertheless, it is my humble view that this is yet another case where the provisions of Section 26 (1) (b) of the *Land Registration Act*, 2012 would suffice. For clarity the said provisions are reproduced as hereunder;

> (b) where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.

186. I am aware, that the 1st Defendant may very well contend that same was never party or privy to the fraud or illegality that culminated into the issuance of the illegal Letter of Allotment that premised the unlawful lease instrument, but it must be noted that the provisions of Section 26 (1) b (supra), are more concerned with circumstance in which the title was acquired than to the knowledge of the Parties thereto.

187. Consequently, if it is proven that there was illegality or corrupt practice, as is the case herein, then the title, which arose from the said vitiated process, must be nullified. In support of the foregoing

observation, this Honourable Court relies on the holding in the decision in the case of "Embakasi Properties Limited & Anor. – Versus - Commissioner of Land & Another [2019] eKLR" in which this Court of Appeal expressed itself as follows:

> " Although it has been held time without end that the certificate of title is: "... conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof", it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party.
>
> See Section 23 of the repealed Registration of Titles Act. Section 26 of the *Land Registration Act*, 2012 though not as emphatic as Section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired "illegally, unprocedurally or through a corrupt scheme"

Issue No. c.) Whether the 1st Defendant's Counter - Claim is sustainable.

188. Under this Sub – title, the Honorable Court the will now assess the Counter – Claim by the 1st Defendant. As stated, the 1st Defendant repeated the contents of paragraph 3, 4 and 5 in the statement of defence and prayed for the following:-

a. A declaration that it is the legally registered proprietor of the said plot and that its title thereto is absolute and indefeasible;

b. An injunction restraining the Plaintiff, his servants and agents from interfering with the 1st Defendant's ownership and / or possession of the said plot;

c. An order that the Plaintiff pays the costs and incidental to this Counter-claim.

189. The 1st Defendant averred that it is a stranger to the allegations contained in paragraphs 4, 5, 6 and 7 of the Plaint. With reference to Paragraphs 8 and 9 of the Plaint, the 1st Defendant admitted that it had been issued with a Certificate of Lease in respect of Mombasa/Block XXVI/919 whereunder it is registered as the proprietor of the leasehold interest in the said plot for a term of 99 years from 1st October 1996 and was the registered as such proprietor at the Mombasa District Registry on 20th December, 1996. The 1st Defendant denied being guilty of any fraud in respect either of the issue of the said Certificate of Lease or of its (the First Defendant's)registration as such proprietor as aforesaid; accordingly the 1st Defendant averred that there was any mistake in relation to the issue of the said Certificate of Lease or with respect to its (the 1st Defendant's) registration as such proprietor as aforesaid.

190. It is trite that a court shall be guided by the parties pleadings, and in this case the Defendants Counter Claim and the Plaintiffs Defence to the Counter Claim. This was stated in the case "Associated Electrical Industries Limited – Versus - William Otieno HCCC No. 421 of 1998". As earlier indicated in this judgement this Honourable Court has concluded that the Plaintiff was the 1st Allottee and that the 1st Defendant had no proof of the revenue and municipal receipts that he had complied with the terms of the Letter of Allotment issued the second time therefore the said letter of allotment and the certificate of lease issued thereafter was null and void. By virtue of these findings the Counter claim by the 1st Defendant fails.

Issue No. d.) Whether the Plaintiff is entitled to the reliefs sought at the foot of the Plaint.

191. Based on the findings and holdings in terms of issues number 1 and 2 herein above, it must become obvious that the transfer, registration and ultimate Issuance of the certificate of lease in favor of the 1st Defendant, over and in respect of the suit property was riddled, with illegalities, un-procedurality and hence same was null and void.

192. In any event, it is worth repeating that the lessor, who purportedly prepared the lease instrument in favor of the 1st Defendant was non-existent and therefore incapable of generating a legal instrument, in the first instance or at all.

193. In the premises, it is my humble position, that the Plaintiff herein has laid and/or established before the court a clear-cut case for the grant of the orders sought at the foot of the Plaint beforehand. Consequently, I would answer the third issue in the affirmative.

Issue No. e.) Who bears the costs of the suit by the Plaintiff and the Counter claim by the 1st Defendant

194. It is now well established that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation.

The Black Law Dictionary defines cost to means:-

> " the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other"

195. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the *Civil Procedure Act* provides as follows;-

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

196. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book "The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

197. Additionally, the provision provides for 'costs of and incidental to all suit or application' which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book Judicial Hints on Civil Procedure, 2nd Edition, 2005 at 95 notes that the words 'the event' means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.

198. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. This position has been upheld in the cases of Supreme Court "Jasbir Rai Singh – Versus – Tarchalans Singh – (2014)eKLR; RoseMary Wairimu Munene – Versus – Ihururu Dairy farmers Co - operatives Society (2016) eKLR" and "Morgan Air Cargo Limited – Versus - Everest Enterprises Limited [2014] eKLR" the court noted that;

> " The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''Cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."

199. In this case, as this Honourable Court has opined above, the Plaintiff has proved his claim against the Defendants as per the amended plaint dated 11th February, 2008 and the 1st Defendant's counter claim dated 23rd December, 1998 has failed to prove its claims to this Honourable Court, consequence of this is that the Plaintiff shall have the costs of both the Plaint and the Counter claim to be paid by the 1st and 2nd Defendants jointly.

VII. Conclusion and disposition

200. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has established his case against the Defendants herein. Thus, the Court proceeds to make the following specific orders:-

a. That Judgement be and is hereby entered in favour of the Plaintiff in its entirety.

b. That a declaration be and is hereby that the reallocation of the said plot number Mombasa/ Block XXVI/919 situated in Mombasa Island to the 1st Defendant is illegal and therefore null and void.

c. That an order of permanent injunction be and is hereby issued restraining the Defendants either by itself themselves, servants, employees, and/or agents from evicting, barring or continuing to evict or bar the Plaintiff from remaining in or occupying plot No. Mombasa/ Block XXVI/919 situated in Mombasa island until the final determination of the suit or until further orders of the court.

d. That an order of perpetual injunction be and is hereby issued restraining the 1stDefendants either by themselves, their servants, employees, and/or agents from evicting, barring or continuing to bar, evict the Plaintiff from, remaining in or occupying plot No. Mombasa/ Block XXVI/919 situated in Mombasa Island.

e. That a declaration be and is hereby issued that the Plaintiff is a bona fide registered owner of the plot No. Mombasa/Block XXVI/919 situated in Mombasa Island.

f. That a declaration be and is hereby issued that the registration of the 1st Defendant by the 2nd Defendant as the proprietor of the plot No. Mombasa/Block XXVI/919 situated in Mombasa was obtained, made or omitted by fraud or mistake.

g. That in view of prayer (e) above this Honourable court do hereby issue an order of rectification of the register by directing that the registration of the 1st Defendant having been obtained made and omitted by fraud and mistake be and is hereby cancelled.

h. That prayer 3 in the Plaint on the temporary injunction as been overtaken by events as it is an interlocutory remedy to the preservation of the suit property.

i. That the costs of the Amended Plaint dated 11th February, 2008 and Counter Claim dated 23rd December, 1998 are awarded to the Plaintiff to be paid by the 1st and 2nd Defendants jointly and severally.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICRO – SOFT TEAMS VIRTUALLY MEANS SIGNED AND DATED AT MOMBASA THIS 13TH DAY OF FEBRUARY 2024.

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HON. JUSTICE MR. L.L NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of:-

a. M/s. Yumna – the Court Assistant.

b. Mr. Billy Kongere Advocate for the Plaintiff.

c. M/s. Wangechi Advocate holding brief for Mr. Amoko Advocate for the 1st Defendant.

d. M/s. Winnie Waswa Advocate for the 2nd Defendant.