



Sigma Developments Limited v Registrar of Titles, Mombasa & 5 others (Environment & Land Case 79 of 2016) [2024] KEELC 1457 (KLR) (5 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 79 OF 2016**

**LL NAIKUNI, J
MARCH 5, 2024**

BETWEEN

SIGMA DEVELOPMENTS LIMITED PLAINTIFF

AND

REGISTRAR OF TITLES, MOMBASA 1ST DEFENDANT

REGIONAL SURVEYOR, MOMBASA 2ND DEFENDANT

DIRECTOR OF SURVEY 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

NDERITU WACHIRA MURIUKI 5TH DEFENDANT

BRITANA OILS LIMITED 6TH DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court regards the suit instituted by Sigma Developments Limited, the Plaintiff herein through a Plaint dated 14th April, 2016 and filed on 20th April, 2016. The suit was against the Registrar of Titles Mombasa, Regional Surveyor Mombasa, Director of Survey, the Attorney General, Nderitu Wachira Muriuki and Britana Oils Limited the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants herein.
2. Upon service of the Plaint and Summons to Enter Appearance dated 21st April, 2016, the Defendants entered appearance and the 1st to 4th Defendants filed their Statement of Defence dated 28th April, 2017 and the 5th Defendant filed their Statement of Defence and Counter - Claim dated 13th October, 2021 on 27th October, 2021. The 6th Defendant never filed its defence. Subsequently, the suit was withdrawn



- against the 6th Defendant herein under the provision of Order 25 Rules 1 and 2 of the Civil Procedure, 2010 thereof.
3. On 24th July, 2017 the Honourable Court reserved a hearing date on 14th March, 2018. On 14th March, 2018 the Honourable Court took out the reservation for the hearing to pave way for the hearing of an application. On 14th October, 2020 the Honourable Court reserved a hearing dated on 15th March, 2021. On 8th December, 2021, the matter was reserved for its first hearing on the 8th January, 2022.
 4. With regard to the descriptive of the parties herein, the Plaintiff is described in the plaint as a limited liability company duly incorporated in Kenya in accordance with the Companies Act (Cap.486) Laws of Kenya (now repealed). The 1st Defendant is the Registrar of Titles in charge of Mombasa County appointed under the provision of Section 12 of the Land Registration Act, 2012. The 2nd Defendant is described as the officer in charge of regional survey in the County of Mombasa appointed under the provision of Section 3 of the Survey Act, Cap. 299 Laws of Kenya. The 3rd Defendant is described as the officer in charge of national surveys appointed under the provision of Section 3 of the Survey Act, Cap. 299 Laws of Kenya. The 4th Defendant is described as the Chief Legal Adviser to the Government of Kenya pursuant to the provision of Article 156 of the Constitution of Kenya, 2010 and is sued on behalf of the offices of the 1st, 2nd and 3rd Defendants herein. The 5th Defendant is described as an adult of sound mind and understanding. Finally, the 6th Defendant is a limited liability company duly incorporated in Kenya in accordance with the Companies Act (Cap. 486) Laws of Kenya (now repealed).
 5. This matter proceeded for hearing by way of adducing “viva voce” evidence with the Plaintiff’s witness PW - 1 testifying in Court on 8th January, 2022, 19th January, 2022, 10th and 11th May, 2022; PW - 2 testifying on 10th and 11th May, 2022 and the Plaintiff closed its case. On the other hand, on 11th May, 2022, the 1st Defendant called in a witness who testified as DW - 1 and further cross examined on 12th May, 2022; DW - 2 and DW - 3 testified on 12th May, 2022. The 1st and 4th Defendant’s witness was the Land Registrar who testified on 24th October, 2022 after which DW - 4 tendered his testimony on the same day. The Defendants called DW - 5 on 22nd February, 2023 while DW - 6 testified on 23rd February, 2023 and proceeded with his testimony on 22nd June, 2023. After which both the Plaintiff and the Defendants closed their cases.
 6. It is instructive to state that from the very onset, the Honourable Court found the case involving voluminous and bulky documents and issues raised in matter being rather complex, convoluted and intriguing. Further to this, the Honourable Court wishes to point out the existence of a Judgement by this Court in Civil case Environment & Land Court Case Number (Mombasa) Case No. 116 of 2011: Ndiritu Wachira Muriuki – Versus - The Hon. Attorney General & Britana Oils Limited” which was over the same subject matter delivered on 27th November, 2015. By my sister Lady Justice Anne Omollo (then Presiding Judge at the ELC Mombasa). (Hereinafter referred to as “ELC Case No. 116 of 2011). Notably, all the parties and the Court in this matter during its proceedings and submissions have extensively deliberated and made reference to the “Obiter dictum” and “Ratio decidendi” of the same case. Principally, taking that the said decision has to date never been appealed against, set – aside nor reviewed, this Honourable Court guided by the Doctrine of “Stare decisis” has not taken the route of re – inventing the wheel but instead overly utilised it as a life precedent. Hence, the said decision will definitely bear dire consequences and implications to the orders arrived at in this Judgement.

II. The Plaintiff’s case

7. The brief facts of the case as per the filed Plaint are that at all material to this suit, the Plaintiff was and still is the registered owner of all that piece of land known as L.R. No.16123 measuring 0.06924 hectares and situate in the North of Kilifi Town in Kilifi County (Hereinafter also referred to as “The



Suit Property') pursuant to a Grant of Lease issued to the Plaintiff by the Government of Kenya for a term of ninety-nine (99) years from the 1st day of March 1992. The suit property is delineated on Land Survey Number 161887.

8. Before registration in the Plaintiff's name, the suit property was unregistered but the interest, title and rights thereto vested on one Mr. Macdonald Makaka as the beneficial owner thereof by virtue of a Letter of Allotment Reference 54188/IV/4 and dated 11th March 1992 issued to the said Mr. Makaka by the then Commissioner of Lands (office now abolished). Sometime in the month of April 1992, the said Mr. Makaka agreed to transfer his interest, rights and title over the suit property to the Plaintiff for a consideration of a sum of Kenya Shillings Nine Hundred Thousand (Kshs. 900,000.00/=). The parties duly executed a Transfer on 9th April 1992 under which it was agreed that the Grant/Lease in respect of the suit property would be issued directly to the Plaintiff. Hence, when the land was registered, the Grant was issued directly in favour of the Plaintiff.
9. The Plaintiff averred that the Grant issued in its name was a first and indefeasible registration. Upon being registered as the proprietor of the suit property, the Plaintiff had been diligently paying the land rates and rent due to the property to the Town Council of Kilifi and subsequently to the County Government of Kilifi. In order to secure the suit property, the Plaintiff resolved to construct a perimeter wall around it. The Plaintiff applied for and was granted consent for the construction of the said wall by the National Environment Management Authority (NEMA) on 31st December 2009.
10. In order to ascertain the boundaries of the suit property for purposes of constructing the perimeter wall, the Plaintiff applied for an inspection by a surveyor which inspection was done by the Kilifi District Surveyor and Beacon Certificate issued on 12th November 2010. The District Surveyor duly certified the beacons placed on the suit property as defining its boundaries. On 1st December 2015, Mr. Ashok Doshi, one of the directors of the Plaintiff company, was shocked to read a news report at page 20 of that day's edition of "the Daily Nation" newspaper local edition titled "State to pay trader for issuing two land titles". The report related to a court decision concerning a beach plot located in Kilifi Town which was reported to have two parallel title deeds. The report indicated that one Ndiritu Muriuki (the 5th Defendant herein) had purchased the subject property from Britania Oil Limited (the 6th Defendant herein) at a sum of Kenya Shillings Twelve Million (Kshs. 12, 000, 000.00/=) but was shocked to see the plot being developed by Mr. Ashok Doshi.
11. Following the said newspaper report, upon conducting investigation, it emerged that the decision in issue was in the civil case of "ELC (Mombasa) Case No. 116 of 2011. The Judgement in this civil case indicated that there existed two parallel Certificates of Title in respect of the suit property to wit; L.R No.16123 registered in the name of the Plaintiff and L.R No. 10172 now registered in the name of the 5th Defendant. Further, it emerged from the said Judgment in the civil case ELC Case No. 116 of 2011 that L.R No. 10172 was originally registered in the name of the 6th Defendant before it was sold and transferred to the 5th Defendant for a consideration of a sum of Kenya Shillings Twelve Million (Kshs. 12,000,000.00).
12. The Certificate of Title for the parcel known as land Reference numbers 10172 was issued to the 6th Defendant on 26th June 2009, over seventeen (17) years after the Plaintiff's Title over the same parcel of land was issued on 22nd April 1992. The Plaintiff followed the due process in obtaining its title to the suit property, which title was a first and indefeasible registration. The 2nd and 3rd Defendants were in charge of the survey process leading to the issuance of the second title deed while the 1st Defendant presided over its registration. By processing and issuing a second title deed in favour of the 6th Defendant and in respect of the same property, 17 years after the Plaintiff's title deed was issued, the 1st, 2nd and 3rd Defendants breached the constitutional and statutory mandate bestowed upon them as the official



- custodians and guarantors of land documents and titles in Kenya. They acted illegally and in bad faith. The 5th Defendant who is the holder of the parallel Certificate of Title realized that his title was not genuine and accordingly sought refund of the purchase price from the 6th Defendant and the order for refund was duly granted in ELC Case No. 116 of 2011. The 5th Defendant therefore has no interest whatsoever on the suit property. The Defendants breached their statutory obligations and colluded amongst themselves in order to defraud the Plaintiff of its legally registered property by issuing a parallel title deed in the name of the 6th Defendant which was subsequently transferred to the 5th Defendant.
13. To this effect, the Plaintiff pleaded and relied on the following particulars of beach and collusion by the Defendants:
- i. Deliberately opening a parallel file in respect of the suit property
 - ii. Conducting a parallel survey process of the suit property.
 - iii. Acting in breach of the law in issuing a second title in respect of the same property while the first title in the name of the Plaintiff was still intact and valid.
 - iv. Failing to guarantee the sanctity of the Plaintiff's title as mandated by *the Constitution* and statute more specifically the provision of Section 23 of the then applicable statute being The Registration of Titles Act (now repealed) and Sections 25 (1) and 26 (1) of the *Land Registration Act*, No. 3 of 2012.
 - v. Assigning two different numbers in respect of the same property.
14. According to the Plaintiff, the value of the suit property had since risen exponentially and the existence of the parallel title was a major impediment to the Plaintiffs enjoyment and peaceful possession of the same. The Plaintiff prayed that the parallel title issued in the name of the 6th Defendant and later transferred to the 5th Defendant be declared null and void abinitio and cancelled and the parallel file in respect of the same be closed and withdrawn from the Land Registry forthwith. Despite demand notice being served, the Defendants have failed to respond.
15. The Plaintiff responded to the statement of defence by the 1st to 4th Defendants through a Reply to Defence dated 4th June, 2018 where it averred:-
- a. The Plaintiff joined issues with the 1st, 2nd, 3rd and 4th Defendants in their Statement of Defence (hereinafter simply called "the Defence") save where the same consisted of an express admission.
 - b. The Plaintiff reiterated the contents of the Plaintiff in its entirety.
 - c. In response to the averments made out under Paragraph 3 of the Defence, the Plaintiff reiterated the contents of Paragraphs 8 and 9 of the Plaintiff.
 - d. In response to the contents of Paragraph 4 of the Defence, the Plaintiff reiterated the contents of Paragraphs 10, 11 and 12 of the Plaintiff.
 - e. In response to the contents of Paragraph 5 of the Defence, the Plaintiff reiterated the contents of paragraphs 13, 14 and 15 of the Plaintiff.
 - f. In response to averred under Paragraph 7 of the Defence, the Plaintiff reiterated the contents of Paragraphs 19 and 20 of the Plaintiff.
 - g. In response to Paragraph 8 of the Defence, the Plaintiff reiterated the contents of Paragraph 21 of the Plaintiff.



- h. In response to Paragraph 9 of the Defence, the Plaintiff reiterated the contents of Paragraph 23 of the Plaintiff.
 - i. In response to Paragraph 10 of the Defence, the Plaintiff reiterated the contents of Paragraph 24 of the Plaintiff.
 - j. The Plaintiff stated that the Defence was a sham as it consisted of mere denials and does not raise any triable issue.
16. The Plaintiffs prayed that the 1st, 2nd, 3rd and 4th Defendants' Statement of Defence be struck out with costs and Judgment be entered for the Plaintiff as prayed in the Plaintiff.
17. Additionally, the Plaintiff also responded to the 5th Defendant's Amended Defence and made a Defence to the Counter – Claim by the 5th Defendant dated 12th March, 2021 and another reply dated 5th November, 2021 where the following were their averments:-
18. In the response dated 12th March, 2021 where they averred that:-
- a. The Plaintiff joined issue with the 5th Defendant in his Statement of Amended Defence and Counterclaim dated 9th May 2018 and filed on 11th May 2018, 12th March 2021 (hereinafter referred to as “the Amended Defence”) save where the same consisted of an express admission.
 - b. The Plaintiff reiterated the contents of the Plaintiff in its entirety.
 - c. In response to the averments made out under Paragraph 3 of the Amended Defence, the Plaintiff reiterated the contents of Paragraphs 8, 9, 10, 11 and 12 of the Plaintiff.
 - d. In response to the contents of Paragraph 4 of the Amended Defence, the Plaintiff averred that L.R. No. 10172 which was registered in the name of the 6th Defendant and subsequently allegedly purchased by the 5th Defendant· never existed physically on the ground as the said parcel number physically related to the Plaintiff's property L.R. No.16123 which was the subject of this suit.
 - e. The Plaintiff denied that its title and the land survey number were non - existent as alleged at Paragraph 5 of the Amended Defence and put the 5th Defendant to strict proof thereof. The Plaintiff reiterated the fact that its title was issued prior to the one issued to the 6th Defendant which the 5th Defendant is laying claim and which was obtained by fraud as pleaded in the Plaintiff.
 - f. The Plaintiff denied the contents of Paragraph 6 of the Amended Defence and puts the 5th Defendant to strict proof thereof. The Plaintiff reiterated the contents of the Plaintiff and more specifically that Mr. MacDonald Makaka had proprietary interest which he transferred to the Plaintiff as pleaded at the contents of Paragraphs 9 and 10 of the Plaintiff.
 - g. In response to the averments made under Paragraph 7 of the Amended Defence, the Plaintiff reiterated the contents of Paragraph 10 of the Plaintiff. The 5th Defendant was not a party to the agreement between the Plaintiff and Mr. Makaka and hence could not deny purchase of the suit property from the latter.
 - h. In response to the assertions made under Paragraph 8 of the Amended Defence, the Plaintiff pleaded “Res ipsa loquitur. The fact that the title held by the Plaintiff was the first to be issued and hence indefeasible was plain and spoke for itself.



- i. In response to paragraph 9 of the Amended Defence, the Plaintiff reiterated that it paid land rates and rents and relied on the receipts evidencing payment of the same as contained at Pages 56 to 176 of the Plaintiff's Bundle of Documents filed herein.
- j. The Plaintiff denied the allegations of trespass and land grabbing at made out under the contents of Paragraph 10 of the Amended Defence and put the 5th Defendant to strict proof thereof. The Plaintiff averred that the 6th Defendant's title which the 5th Defendant laid claim on was issued way after the Plaintiff's title had been issued and the 6th Defendant's title was obtained by fraud and could not confer any legal title upon the 5th Defendant to warrant his claim of trespass against the Plaintiff who is the bona fide owner of the suit property.
- k. In response to paragraph 11 of the Amended Defence, the Plaintiff reiterated the contents of Paragraph 14 of the Plaintiff and shall rely on the Beacon Certificate at page 176 of the Plaintiff's Bundle of Documents filed herewith.
- l. The contents of paragraph 12 of the Amended Defence were not clear. The same were drafted as prayers and not averments. Nevertheless in response to the same, the Plaintiff denied that a Letter of Allotment had no transferable proprietary rights which could be transferred. The Plaintiff averred that a Letter of Allotment could confer proprietary rights which were transferrable through an informal transfer.
- m. The Plaintiff denied the contents of paragraphs 12, 13 and 14 of the Amended Defence and put the 5th Defendant to strict proof thereof. In response thereto, the Plaintiff averred that the 5th Defendant knew or ought to have known that the 6th Defendant had no legal and valid title capable of being transferred to the 5th Defendant.
- n. The 5th Defendant claimed and was awarded refund of a sum of Kenya Shillings Twelve Million (Kshs. 12, 000, 000.00/=) in the Civil case ELC No. 116 of 2011 being the purchase price he had paid to the 6th Defendant. Thus, the 5th Defendant had no claim at all regarding over the suit property.
- o. Since the 5th Defendant had already been awarded refund of his purchase price by a court of law, he had no claim at all over the suit property and his averments at paragraphs 15 and 16 paragraphs 16 and 17 of the Amended Defence are baseless.
- p. In response to Paragraph 18 of the Amended Defence, the Plaintiff reiterated the contents of Paragraphs 20 and 22 of the Plaintiff.
- q. In response to Paragraph 19 of the Amended Defence, the Plaintiff reiterated the contents of Paragraphs 22, 23 and 26 of the Plaintiff.
- r. The Plaintiff denied the contents of Paragraph 20 of the Amended defence.
- s. The Plaintiff denied the contents of Paragraphs 20 and 21 of the Amended Defence more specifically the particulars of fraud at items (i) to (v) (1) to (ix) thereof. The Plaintiff reiterated the validity of its title as pealed in the Plaintiff.
- t. The Plaintiff denied the contents of Paragraphs 21, 22 and 23 of the Amended Defence. The Plaintiff reiterated the contents of the Plaintiff and this Reply to Defence in their entirety.
- u. The Plaintiff pleaded that the 5th Defendant had no defence at all to the Plaintiff's case because the 5th Defendant's interest was limited to the purchase price which he paid to the 6th Defendant and which in any event he had been awarded.



- v. The 5th Defendant had no interest in the suit property was demonstrated by the fact that he only sought refund of his purchase price in the Civil case - ELC No. 116 of 2011 and was ordered to surrender his title. The 5th Defendant's interest was limited to refund of the purchase price and since he had been awarded the same by a court of law, he could not plead any interest in the suit property.
19. The Plaintiff's Defence to the Counter Claim by the 5th Defendant was that:
- a. The Plaintiff denied the allegations of Paragraph 24 of the Amended Defence in entirety. The Plaintiff denied that its acquisition of the land was tainted with illegality, fraudulent and a nullity in law.
 - b. The Plaintiff denied the allegations at Paragraph 25 of the Amended Defence and Counter - Claim and pleaded that the 5th Defendant's interest over LR. No. 10172 was extinguished by the Judgment delivered on 27th November 2015 in the civil case - ELC Case No. 116 of 2011 in which the 5th Defendant was awarded refund of the full purchase price he paid for the said property and was ordered to surrender his title back to the 6th Defendant herein.
 - c. The Plaintiff admitted the contents of Paragraph 26 of the Amended Defence to the extent that one parcel of land could not have two duly registered Deed Plans and title deeds and added that the same was the reason the Plaintiff sought the nullification of the title deed issued in favour of the 6th Defendant. Further, the Plaintiff denied the allegations that the Plaintiff's parcel of land had no records from the Director of Survey and that the Plaintiff had a title which was obliterated. The Plaintiff put the 5th Defendant to the denied contents of paragraph 26 of the Amended Defence.
 - d. The Plaintiff denied the particulars of fraud as pleaded at paragraph 26 (a) - (d) of the Amended Defence.
 - e. The Plaintiff averred that the 5th Defendant's Counterclaim was bad in law and could not be granted for the reasons stated herein and for further reasons that:
 - i. The 5th Defendant's rights and interest over the suit property were extinguished by the Judgment delivered on 27th November 2015 in ELC Case No.116 of 2011 in which the 5th Defendant was awarded refund of the full purchase price he paid for the said property and was ordered to surrender his title back to the 6th Defendant herein.
 - ii. The 5th Defendant's claim over the suit property was "Res Judicata" having been determined in ELC Case No. 116 of 2011.
 - iii. The prayer in the Counterclaim seeking the cancellation of the Certificate of title for L.R. No. 16123 held by the Plaintiff was statute barred by limitation because the said title was issued way back on 14th April 1992.
 - f. The Plaintiff prayed that the 5th Defendant's Amended Defence be struck out and/or dismissed with costs and Judgment be entered for the Plaintiff as prayed in the Plaintiff.
20. In the response dated 5th November, 2021 where they averred that:-
- a. The Plaintiff joined issue with the 5th Defendant in his Amended Defence and Counter - Claim dated 13th October 2021 save where the same consisted of an express admission.
 - b. The Plaintiff reiterated the contents of the Plaintiff in its entirety.



- c. In response to the 5th Defendant's Amended Defence and Counterclaim dated 13th October 2021, the Plaintiff reiterated and relied entirely on its Reply to the 5th Defendant's Amended Defence and Defence to Counterclaim dated 12th March 2021 and filed on 15th March 2021 with nothing useful to add.
21. The Counsel for the Plaintiff Mr. Oluga made a brief opening statement stating that there were two parallel rival title for the suit property bearing different numbers – 1st title in favour of the Plaintiff Land Reference No. 16/23 and the second one for 5th Defendant Land Reference No. 10172. The Learned Counsel told the court that they would demonstrate that the title for the 5th Defendant was secured un-procedurally and shall call a survey. The 5th Defendant had no more interest the interest having been determined in E.L.C. No. 116 of 2011.
22. In the long run, the Plaintiff sought for Judgment against the 1st, 2nd, 3rd, 4th, 5th and 6th Defendants jointly and severally for:-
- a. A declaration that the Certificate of Title registered as No. C.R. 22493/1 on 22nd April 1992 in favour of the Plaintiff is the valid document of title in respect of land parcel Number L.R.No.16123 measuring 0.06924 hectares and situate in North of Kilifi Town in Kilifi County.
 - b. A declaration that the Certificate of Title for L.R No. 10172 registered as No. C.R.45738 on 26th June 2009 in favour of Britana Oils Limited is null and void for having been issued irregularly and against the law.
 - c. A declaration that any development, sale, transfer or transaction carried out on the suit property on account of the Certificate of Title for L.R No. 10172 registered as No. C.R. 45738, including but not limited to the sale and transfer to the 5th Defendant herein, is null and void.
 - d. An order be and is hereby issued directed at the 1st Defendant to recall and cancel Certificate of Title for L.R No.10172 registered as No. C.R.45738 on 26th June 2009 in favour of Britana Oils Limited and to remove from the Land Registry any documents and/or files relating to the said L.R No. 10172.
 - e. An order of permanent injunction to restrain the Defendants either by themselves or through their servants, employees or assigns or any other person acting on their behalf or capacity, from registering, selling, transferring or in any other manner dealing with the suit property L.R. No. 16123.
 - f. In the alternative and without prejudice to (i),(ii),(iii) (iv)and (v) above, an order that the Plaintiff be paid compensation by the Defendants jointly and severally at the prevailing market value of the suit property as at the date of judgment.
 - g. General Damages.
 - h. Costs of this suit.
 - i. Any other and further relief this court may deem just to grant.
23. On 8th January, 2022, the hearing for the Plaintiff commenced whereby he summoned one witness – the PW - 1. He testified as follows:-



A. Examination in Chief of PW - 1 by Mr. Oluga Advocate

24. PW – 1 was sworn and affirmed. His name is Mr. Ashok Labhashanker Doshi. He was a holder of the Kenyan national identity card. He was a director in the Plaintiff company. He resided in Kizingo and was a business man. He was in court with regard to a property he had acquired. He stated to the court that he had signed a witness statement dated 12th March, 2021 and filed on 15th March, 2021 which made reference to another dated 14th April, 2016 and filed on 20th April, 2016 which he adopted and relied on for his evidence.
25. There was an objection of the statement referred to due to the names in the witness statement. PW - 1 told the Court that he was there to replace Mr. Amit. In the year 2015, he contracted cancer and he traveled to London. He stayed there for 11 months to undergo Chemotherapy. The 1st Statement was signed by Mr. Amit who is his second born son and a Director of the Company. He could not come to testify as the witness. He was the one with full history of the matter. The son was also a director in the company but was not involved in the day to day affairs of the Company. When he got back from London, he took over from Mr. Amit. The objection was dismissed and the witness was allowed to proceed. Mr. Ashok stated that he bought the property from Mr. Makaka who sold it to them on 9th April, 1992 through an informal transfer. He was given the title directly. Mr. Makaka had a Letter of Allotment. He saw the parallel title was in the newspaper – paragraph 15 of the Plaintiff – “Daily Nation” newspaper of 1st December, 2015. It was after that that he filed the case. He had knowledge of the same from the Judgment copy in the Judgment they were to be compensated. The property in dispute in this matter was No. 10172. He was referred to Paragraph 13 of the Judgment as stated by the Land Registrar that there were two title deeds for the same property. The property was registered in the names of Nderitu Wachira Muriuki and who later on sold it to Britana Oils Limited.
26. PW-1 was referred to copy of the title deed found in Plaintiff’s bundle of documents and marked as Plaintiff Exhibit No. 10. It was the title for the 6th Defendant and which was transferred to the 5th Defendants on 26th July, 2009 who was the current owner. Page 54 – Deed Plan was Number 136419. The survey report dated 22nd November, 2021 Page 11 of the Supplementary Affidavit of the Plaintiff. The Deed Plan No. 161887. On page 37 – the Land Reference No. 10174 and Deed Plan No. 136415 and stated that they used it to secure a title.
27. He told the court that he objected to the Counter Claim on the grounds that the 5th Defendant wanted his title deed cancelled, stating that his title deed was fraudulently obtained. Further, he referred to the Judgment of Civil Case No. 116 of 2011 Paragraph 24, Page 8 whereby the Court ordered that the 5th Defendant herein (Nderitu Wachira Muiruri) was paid his money in full he ought to have surrendered his title back to the 6th Defendant herein (Britania Oils Limited) as it would be wrong for him to receive both the money and also keep the title in his name. He made reference to the year 2008, when they developed the property and built the boundary wall.
28. He recalled that when he was in London, the family of Nderitu Wachira Muiruri – the 5th Defendant confronted the guards and wanted to shoot them. They reported the matter to the police. The 5th Defendant does not have possession to the land. He had never occupied it. He showed the Court the Original Certificate of Title Deed which was registered in the names of the Plaintiff.

B. Cross examination of PW - 1 by M/s Kiti Advocate

29. PW – 1 informed Court that he acquired the property on 14th April, 1992. He confirmed that its first on Letter of Allotment was on 11th March, 1992 and their informal transfer. The 1st Part Development Plan (PDP) they were issued with was signed on 12th March, 1992. The Letter of allotment was issued



to Mr. Makaka and then to them. They made the payment to the Ministry of Lands, by a bankers cheque for a sum of Kenya Shillings Fifty Six Thousand Three Hundred and Seventy Hundred (Kshs. 56,370/-) and a receipt was issued bearing number C278227 dated 1st April, 1992. It was through these documents that enable him acquire the title through their lawyer.

C. Cross Examination of PW - 1 by Mr. Kariu Advocate.

30. PW – 1 informed Court that he had in his possession the original Certificate of Title Deed which he produced. He indicated being very knowledgeable on the suit land but he always used an Advocate for advise and guidance whatsoever. He confirmed having acquired the title from a Letter of Allotment from which had been issued to Mr. Makaka. The Letter of Allotment was for a surveyed land. It was not situated within Mtondia which was un - surveyed but later on got surveyed. He had several properties which were situated within the Mtondia and Bofa Beach. However, he knew for a fact that the area Bofa Beach was derived from the Mtondia area as it was under Mtondia MAP. From the map there were two names, that of Mtondia and Bofa. He was referred to his further List of documents.
31. He told the court that the documents for the 5th Defendant showed Bofa beach. The sale agreement for the suit land from Mr. Makaka was prepared and duly executed before his lawyers. Unfortunately, he admitted not having produced it in Court. The property was a consideration of a sum of Kenya Shillings Two Million Three Hundred Thousand (Kshs. 2,300,000/=) paid through their Advocates for onward transmissions to the Advocates for Mr. Makaka. They also paid a sum of Kenya Shillings Nine Hundred Thousand (Kshs. 900,000/=) for purposes of Stamp Duty payable to the Government of Kenya.
32. The witness told the court that his Letter of Allotment was a copy. He stated that it was blurred and not clear. PW – 1 confirmed that the said Letter of Allotment never had the Part Development Plan (PDP) attached on it. He refuted it not being true that the it was the Letter of Allotment that guided him to proceed to take possession and/or to go to the ground. Instead, he stated that he was directed to the ground by one of the Legal Assistants from the Law firm of Messrs. Malik Advocates. He was not aware that these plots had been surveyed in the year 1959. He had never met the 5th Defendant. He never knew anyone by the name of Simon Kagai alias Crocodile. He had no idea whether the Letter of Allotment was a licence to own land. He stated that their title was No. 22493/1. The number had been issued and fixed at the Ministry of Lands and was registered on 22nd April, 1992 in his name. He had bought the land on 9th April, 1992 and the Deed Plan was issued on 7th April, 1992. The title for the 5th Defendant was attached at page 9 for title issued on 3rd November, 1998 which deed plan for the 5th Defendant came earlier but it was through fraud.
33. He told the Court that once a Deed Plan was prepared there were some documents which were also done but it was an issue of the survey of Kenya. He reiterated that his Deed Plan was prepared by a Private Land Surveyor trading in the names and style of Mr. E.W. V. Kiguru. He would be coming to testify in due course. The title was procured by the Government, through the Ministry of Lands. His application was done on 22nd April, 1992 and title was issued and registered on 14th April, 1992. The title was prepared and sent to Mombasa. The witness told the court that there was a covering letter dated 15th April, 1992 to that effect. He did not know why his advocates would be applying for a title on 22nd April, 1992. The Registrar of Titles was to cause the registration of the title. His advocate must have done it.
34. The witness told the Honourable Court that Sigma Development Ltd was headed by himself, his wife and Ashok groups. By the year 1990 Mr. Makaka was never a Director in the Plaintiff company. However, from the contents of a letter dated 27th March, 1992 (Page 41) he posed as a Director of their



Company. Messrs Malik & Company Advocates were Mr. Makaka's Advocate. He was not aware that the 5th Defendant occupied the land in the year 1999. He never had actual occupation of the suit land. His testimony was that he only knew of the land from the newspapers. He had never talked to the 5th Defendant. He was not aware that the 5th Defendant had bought the land from Britania oils Limited. He had knowledge of the civil case ELC NO. 116 of 2011 and the subsequent Judgment in that case. At page 12, paragraph 24, he had filed this case arising from the Judgment by this Court. From the said Judgement, the 5th ought to surrender his title to the 2nd Defendant to enable the 2nd Defendant refund the money he had paid for the purchase of the land.

35. The witness told the court that from the documents by the 5th Defendants, he was aware that the 5th Defendant had bought the land. It was wrong that there was a finding that there was no Deed Plan as stated at Page 5 of the Judgment. The findings of the Director of Survey were not captured in the Judgment. On page 8 of the Judgement was on the Surveyor's plan while on page 7, he had the Deed Plan. The Regional surveyor testified that records relating to the Deed Plan of the year 1992 never existed at the land registry. The surveyor was the only one who could provide an answer to that query (See page 9 paragraph 16). In the period of December, PW – 1 travelled out of town. He never collected the title. It was delivered to his office by the legal assistant from his Advocates' offices.

D. Re- examination by PW – 1 Mr. Oluga – Advocate

36. PW – 1 was referred to Page 13 of the Plaintiff's documents. He confirmed that the application was made on 22nd April, 1992 yet the title deed was issued on 14th April, 1992 by the Ministry of Land. At Page 13 the date of the instrument was 14th April, 1992. It was a form entitled application for registration. It was the same date as that on Grant. The Grant was prepared at Nairobi. It was forwarded to Mombasa. On page 34 was a letter dated 15th April, 1992 on when it was received. The Land Registrar prepared (registered) it on 22nd April, 1992.
37. The witness confirmed that on page 38 there was a stamp. It was registered in Mombasa on 22nd April, 1992. He was not the one who prepared the form. He was asked of Mtondia. It was the whole area while Bofa was a sub - set of the area. That was why his Letter of Allotment on page 48 was described as UN Residential Plot MTONDIA/KILIFI – issued on 11th March, 1992 (the original documents left on Court file by witness but to be returned Plaintiff Exhibit marked as No. 6 and 9).
38. On the issue of directorship. PW – 1 told the court that Mr. Makaka was neither a director nor was he a shareholder of Sigma Company. At page 41 from the letter dated 27th March, 1992 where Mr. Makaka referred the Company as being his company was a mistake. On being referred to the Judgment in the Civil case ELC No. 116 of 2011 on pages 5 to page 12. From the Deed Plan of 1992, it never specified that the plot belonged to the witness – paragraph 16 was not a court finding. The 5th Defendant was paid money and he was asked to surrender the title. Sigma Development Ltd had not been the one stopping the 5th Defendant from executing the Decree of the Judgment delivered on 27th November, 2015. He told the Court that he had been in occupation of the suit land from the year 1992. The official search had been done but it never indicated the actual date. However, the Land Registrar was to appear and testify on this aspects. That was all.
39. On the same day, the Plaintiff called its second witness who testified as follows:-

E. Examination in Chief of PW - 2 by Mr. Oluga Advocate

40. PW – 1 was sworn and testified in the English language. His name is Mr. Edward Marengi Kiguru, a holder of the Kenya national identity card. He was born in the year 1949. He was Licensed Land Surveyor. He traded in the names and style of Edward Kiguru Surveyors. He held a Bachelors Degree in



Survey in Geographic from the University of Nairobi in the year 1973. Thereafter, he got employed by the Government – the Survey of Kenya. He worked there for many years and at different places within the Republic of Kenya including Mombasa where he retired as the Provincial Coast Land Surveyor. He was recognized by the Institute of Surveyor in the year 1986. He was a qualified Land Surveyor in East Africa. He was a Licensed Surveyor with the Institute of Surveyors Association of Kenya which issues licenses. He had a current Practicing Certificate. He had prepared a report dated 22nd November, 2021 - marked as Plaintiff Exhibit 16 which had been admitted.

41. He told the Court that he first identified where the suit land was located. Its located in approximately 5 kilometers from Kilifi township at a place called Bofa beach area. The settlement scheme opposite it was called Mtondia. It's a beach plot north of the town of Kilifi. Historically, the land fell in the 10 Mile Coastal strip of the Protectorate of Kenya. There had been a first survey under the Crown ordinance – in 1920 – it's in the 10 miles strip; 3490 acres in the names of Sheikh Rashid Bin Salim. The first Survey on the land is recorded at Survey Map/Plan No. F/R 87/21. The 2nd survey was done in February, 1959 and resulting in LR. 10161 to LR No. 10177. His focus in this survey was Plot shown as LR No. 10172. The Government allocated the land and started allocating it along the line. The 3rd survey was done in the year 1970 where the government consolidated Land Reference Numbers 10171 and 10172 and further sub-divided into LR No. 120868 to 120876 being 10 plots. On Plot No. LR. No. 10172 they created a road reserve of 15 meters and eventually it was cancelled. The balance that remained is marked as "GL" meaning it was Government Property.
42. The witness told the Honourable Court that the 4th Survey was the latest survey on the subject matter done in the year 1972 for the Plot No. "GL" depicted on Map/Plan No. 222/24 for Land Reference No. 16123 and its subsequent Deed Plan was prepared – No. 161887 dated 7th April, 198. These documents were used to process title No. CR 22493. Land Reference No. 16123 was what he did as to compare the survey. No survey was done again from the records. There were no records in relation with the plot No. 10172. The acreage was 2.52 acres. He summarized the 2 plots.
 - a. **Title No. CR. 45738 – LR 10172**

There was no F/R backing up this title and it was non - existence. Page 53055 is their title and Deed Plan. On 24th April, 2009 it was not possible to use it. The Deed Plan used was erroneous. It never covered title LR No. 10172 i.e. should not have been in existence
 - b. **Title No. 22493 LR No. 16123**

The witness told the court that on the other hand, 22493 and LR. No. 16123 it had a Deed Plan i.e. in April, 1992. He used the FR No. The witness was the one who conducted this survey from the new GL No. which created several sub-divisions. It was based on the Letter of Allotment and Deed Plant prepared and "GL." was a government land. The F/R were relevant, and those plots were still there. The 5th Defendant Deed Plan on page 14 dated 3rd November, 1988. To him, this Deed Plant never existed. It was bogus/unacceptable. It was for LR No. 10174. The witness concluded that the Plot CR No. 22493 (LR. No. 16123) (original allottee Mr. Makaka then obtained informal transfer to Sigma Developers Limited) was the correct one. They had used the Deed Plan for LR. No 10174 and super imposed on it. From his Survey's report, he observed that this was a situation of two titles in respect of the same parcel of land. It was unfortunate and untenable. The offending title – CR. 45738 (for LR. No. 10172) and its Deep Plan No. 13419 was bogus/fake should be cancelled and expunged from records. That was all.



F. Cross Examination of PW - 2 by Ms. Kiti Advocate:-

43. PW – 2 confirmed that the acreage for 10172 is 2.5 acres. The area acreage is 0.692 HA. After the creation of the road the acreage was reduced.

G. Cross Examination of PW - 2 Mr. Kariu Advocate

44. The witness stated that he had a Land Surveyor from the year 1973. He had worked as such in all the districts in Kisumu of the Nyanza province. He also worked in Nairobi. In 1978 he was posted to the Coast based at Mombasa. He was based within the 3 districts:- Kwale, Lamu and Tana River. He was also posted to the North Eastern Region. He was in charge of survey covering Kilifi. He stopped working for the Government but he continued working as a private surveyor in the year 1989. His position in the government was that of a Provincial Land Surveyor. He was well versed on land matters within the Coastal region. He prepared a Land Survey report. He was instructed by Messrs. Oluga Advocate & Company Advocates through a letter dated 11th November, 2021. He was paid directly by the client. At paragraph 4 of the said letter, it indicated what he was to do, the investigations he was to undertake and how the two titles were founded. He obtained the documents and gave the copies of the titles for the two parcels and part of the proceedings of an ongoing case:- ELC Case No. 79 of 2016.
45. He was referred to his report at page 9. He told the Honourable Court that his signature was not appended in respect to the entire document. There was no document given to him by Mr. Oluga Advocate to form a basis of his investigations. Mr. Oluga Advocate gave him two copies of the two titles and the Deed Plan which were attached and prepared by him. The instructions by Mr. Oluga Advocate was for the witness to prepare expert opinion of the two title deeds. Thus, he was in court to give an expert opinion as a surveyor and his evidence as an expert with 49 years of experience as a Land surveyor. He was giving an opinion of his own survey work. By implications he would give the opinion. He was given instructions to prepare the Deed Plan by Mr. Makaka.
46. He informed Court that in the event the report was negative he would decline to present it to the client. Instead, he would advice the client accordingly. Mr. Makaka gave the witness the instructions. A Letter of Allotment without a map could give proper guidance on the locations of the area. The place he was checking was Mtondia. Mtondia which was a settlement scheme and BOFA were distinct. BOFA was the beach area. Mr. Makaka gave him an original Letter of Allotment and which he submitted to the Director of Survey. There was a MAP attached on it. It had measurements as it was based on a Deed Plan.
47. The witness confirmed to the Honourable Court that the land was un – surveyed land. It had measurements and acreage. The acreage depicted the dimensions, from a survey that had been done there before. The beacons were already named. There were beacons planted on the ground.
48. He told the court that on page 10 of his report he would call the map a location map. This was his own creation and the scales were done by him. The locations map was to provide the Honourable Court a clearer impression of the location. He had shown the locations in red of Parcel Land Reference No. 16123. Its nearer to Bofa area than Mtondia settlement scheme. If one had two titles he could go to the same locations on a scale of 1:2. Mtondia as an area was a settlement scheme while Bofa was a Beach. The document was given to him by Mr. Makaka was a Deed Plan prepared by the surveyor and which was presented to the Director of Survey and issued a number. The sealing was presented to the Commissioner of Lands to make an index. PW – 2 called it Indenting, that is Indenture.
49. Referred to page 5 of his report, PW – 1 had never seen any letter for transfer of the plot to any other third party. Mr. Makaka collected the Letter of Allotment he passed it to the Surveyor. The process



took at least a month or two. The Letter of Allotment on page 2 had the offices where it should be copied to for record purposes. The same were copied to the Clerk of Council Committee District Land Office and Others are Nairobi offices. The Valuation was done later on after the survey as there would be an area.

50. As regards the maps. PW – 2 stated that in his professional experience one could re-survey a surveyed land. However, a new Deed Plan could not be produced where it already existed. All these parcels measured 2.5 acres. The 1st Survey of year 1970 was an amalgamation of parcels LR No. 10171 and 10172 and further sub-division into Plot No. 120868 to 120867. It was sanctioned by the Government of Kenya. Hence, PW – 2 told the Honourable Court that he would not know how they did it. There ought to have been a letter to that effect. A road reserve was introduced and hence caused a reduction of Plot LR No. 10172. He was aware that all these parcels got less than 2.5 acres and hence the acreage and the Deed Plan marked as “GL.” Meaning the Government land. All the parcels were affected in the sizes as a road would be created. There were the same Coordinates as the ones in LR. No. 10172. The Deed Plan would to be authenticated and certified by the Director of Survey Offices. If it was lost, one could get a replacement from the Director of Survey. There would be need for a Certificate issued by the Director of Survey. In his statement, the Deed Plan indicated there was for LR, No. 10172 while it was actually for LR. No. 10174. The measurements were the same.
51. PW -2 was referred to the original of the 5th Defendant (Plaintiff Exhibit 10 pages 53 and 54) compared to the Surveyor’s Report at Pages 26 No. 136419 – which was for LR. No. 10174. The witness confirmed that the measurement were not same. The parcel No. 10174 was correctly found on Page 37. Deed Plan. No. 136419 and the diagram was differently dated 3rd November, 1988 and the measurement and coordinates were different. The signatures, dates and other date were the same. At pages 26 and 37 of the Surveyor’s Reports. The date was to be verified by the Director of Survey. He may need to appear in Court to verify these variations and details to the Honourable Court. The Court observed that there would be need for the Director of Survey to be summoned to verify the authenticity of the said data.
52. The witness told the Honourable Court that the numbers on the Deed Plan were issued by the Director of Surveyors. If there were two identical numbers, it was only the Director who could correct it. On the issue of the parcel marked as “GL.” PW – 2 informed Court that it was created by the 1st Survey of year 1970 – which extinguished parcel L.R. No. 10172. The coordinates were similar from the year 1959 to 1970. It led on the reduction of the acreage of LR. No. 10172 from 2.5 acres to 0.6924 HA due to the hiving off the 15 Metres road. He had never gotten a chance to look at the report by a another Land Surveyor called Mr. Livingstone Gitau dated 20th June, 2021. He had never seen the report and there was no time limit. The Deed Plan for L.R. No.16123 dated 7th April, 1992 while the Deed Plan No. 10172 was issued on 3rd November, 1998. Hence it was older. The title deed was for LR. No. 16123 issued on 14th April, 1992 which took 4 days. He told the court that at pages 17 and 20 was a case of double/ duplication CR. 45738. He had worked for the Plaintiff in different capacity and Mr. Ashok was familiar to him.

H. Re - Examination of PW - 2 by Mr. Oluga Advocate: -

53. The witness confirmed that the report was not signed. However it was on his letter head, He owned it and that was why he produced it. He was also the one who prepared the Deed Plan. In such as case, any other surveyor could produce it although nobody else could defend it. As surveyors they did not defend the report rather they presented the report. The Letter of Allotment given to him by Mr. Makaka which had a map at page 30. The location map the witness brought to court in order to clarify the two areas. The two areas were Bofa and Mtondia. He was not aware how the plot was transferred from Mr.



Makaka to Sigma Developers Limited but he knew it had happened. The transfer from the Deed Plan of Plot No. 16123 from 7th April, 1992 and title issued on 14th April, 1992 was efficient and regular. There was nothing illegal about it. They needed to be congratulated.

54. The Plaintiff closed its case on 11th May, 2022.

III. The 1st, 2nd, 3rd and 4th Defendants' Case

55. On 2nd May, 2017, the 1st to 4th Defendants filed their joint written Statement of Defence dated 28th April, 2017. They averred that they were strangers to the averments contained in Paragraphs 8 and 9 of the Plaintiff. The 1st, 2nd, 3rd and 4th Defendants were not privy to the particulars of Paragraphs 10, 11, 12, 13, 14 and 15 of the Plaintiff. Thus, they were vehemently denied and the Plaintiff put to strict proof. The 4th Defendant were aware of the Judgment that was delivered by the Honourable court ELC case No. 116 of 2011.

56. They denied the contents of Paragraphs 21, 23 and 24 of the Plaintiff and ever taking part in a fraudulent exercise. The Defendants further stated that they had allegations attributed to the Defendants stated therein were in the circumstances misconceived.

57. They confirmed that the cause of action arose within the jurisdiction of this Honourable Court. The 1st, 2nd, 3rd and 4th Defendants sought to have the Plaintiff's suit dismissed with costs.

58. The 1st to 4th Defendants called their witness DW - 1 on 11th May, 2022.

I. Examination in Chief of DW - 1 by Ms. Kiti Advocate

59. DW – 1 was sworn and testified in English. He identified himself as Mr. Sammy Wambua Juma. He was a Land Surveyor by profession based in Mombasa as the Coast Regional Officer. He told the court that he was aware he was there to represent the 2nd, 3rd and 4th Defendants. His report was dated 6th May, 2022 requested by the Attorney General requested for the surveyor to clarify the following issues:-

- a. What was the cause of the double allocation and registration of land?
- b. Which was the legal and valid Deed Plan?
- c. Which of the two-competing title LR. No. 16123 and 10172 was legal and valid?
- d. Any facts disclosing fraud mistakes collection or corrupt scheme on the two titles?

60. He told the Honourable Court that after he got the letter he prepared a report dated 6th May, 2022. On the maps he told the court that the parcels were surveyed – FR 87/21 Survey was done in the year 1959. There were 17 parcels. The survey was prepared and approved Plan Parcel No. 10172. In May 1970, the Director of Survey called for re-survey of LR No. 10169, 10170, 10171 and 10172. It was a re-planning. They are contained in FR 115/88 and which had 10 parcels. These were 12068 to 12078 respectively. The main parcel was renamed “GL”. The effect was that those parcels were cancelled. These were parcels numbers No. 10169 to 10172 – FR 88/21. Those parcels were inscribed there and the changes was noted on the MAP.

61. He further told the court that there had been 4 parcels creating 10 parcels and a road reserve. Hence the land changed in size. The 10 parcels were LR No. 12068 to 12078 and A “GL”. FR 115/88 there was a 15 meters road reserve “GL” i.e. the parcel of the year 1970. There was no number. It was “GL.” Meaning it was Government Land. Further there was a further survey on 7th April, 1992 – Deed Plan No. 16123. Parcel No. 10172 ceased to exist. The Director requested for the two Deed Plans to be send to him for the authentication on which of the two was genuine. The Deed Plan number was assigned



by the Director of Survey. From the Deed Plan for LR. No. 10172 was alleged had been issued on 3rd November, 1988 that raised questions as it happened much later after the original parcel had been cancelled. The coordinates – the beacons are not identical. From the road there was some space that remained. He produced the report dated 6th May, 2022 as “Defence Exhibit 1”.

J. Cross Examination of DW - 1 by Mr. Oluga Advocate

62. DW -1 confirmed being the Coast Regional Surveyor in Mombasa. From the Report Plot No. 10172 was cancelled meaning it ceased to exist and therefore cannot be used for registration. When referred to the Letter dated 1st June, 1998, the witness told the Court that at Page 51 of the 5th Defendant list of documents the property 10172 was not available as it had been cancelled. The Deed Plan ought to have been cancelled.
63. According to him from his report at page 3 Paragraph 1, the Deed Plan no. 72871 for 10172. It would not be possible to allocate the same parcel using a different Deed Plan numbers. With reference to page 24 of the 5th Defendant list of documents bundle, the witness stated that the title deed for Land reference no. 10172 and Deed Plan no. 136419 which was not mentioned in his report. According to the witness from the report by land surveyor report page 37 it showed the Deed Plan no. 136419. It was for the title no. Land Reference No. 10174. From the face of it, it appeared to be a document from the Director of Survey Offices.
64. He told the court that he used to be in Makueni. He knew that there was a settlement scheme at Mtondia on the north side of Kilifi. He had never heard of the area called Bofa.

K. Cross examination of DW - 1 by Mr. Kariu Advocate

65. He informed Court that the Director of Survey was the custodian of all or any survey records. The maps, Deed Plan were prepared by both public and private surveyors were filed with that office. When referred to his report, he told the Honourable Court that in preparation of his report. He had not seen the Cadastral Plan F/R 222/24 neither had come across it though he had mentioned it. In that case, he may not had authoritatively comment on it.
66. He confirmed this Cadastral Plan F/R. 222/24 was erroneously used it to produce the parcels. Up to date the said Cadastral Plan F/R 222/24 had been missing from the records of the Director of Survey. The process of a Deed Plan had to be an authenticated survey plan. The Letter of Allotment on it was attached to a cadastral map i.e. it allowed one to go to the locations where the land was situated. It was marked “GL.” It was not always that the documents attached to a Letter of Allotment could be a Deed Plan and a Part Development Plan (PDP). But the document here was neither a Deed Plan nor a Part Development Plan (PDP).
67. When referred to page 30 of Mr. Kiguru’s report, he told the Court that the Deed Plan had produced several numbers. It had been used to authentication from the Cadastral Map Plan NO. F/R 222/24 which was missing. There were two sets of Deed Plans where one was given to the recipient and one was kept by the Director. He confirmed that he had not produced any Deed Plan for the Plot no. 10172 which ought to have been cancelled. Cancellation of the Deed Plan was a formal process. There was no records for that cancellation. The first survey was done in the year 1959 that is for FR/87/21 and was authenticated by the Director of survey on 5th May, 2022 but the ones by Kiguru Survey never bore the seal and signature of the Director of Survey.
68. The witness was not aware of whether the 11 plots were allocated to private citizens. The process of amalgamation and consolidation was a formal process. It was only the Commissioner of Lands who could do so. The Director could not initiate the sub – division of land, consolidation and



amalgamation. The process was done outside the knowledge of the office and those parcels of the land ended up in the hands of the persons who initiated the process and the Plot No. 10172 was such parcels. These were private land arrangements outside the purview of the officials. He had not come across any documents on this process. The persons who initiated the consolidation, amalgamation and subdivision, that is of the 9 parcels and 10 parcels of land which was the “GL.” and hence he benefited from parcel No. 10172 while it still existed, then it meant all these 10 parcels derived from the Parcel No. 10172 meant all these 10 parcels would not be regular. They were out from a sub-division a settlement scheme plan. The consolidated one was FR No. 115/88 after he original one F.R. No. 87/21. The 10 plots were Parcel No. 12068 to Parcel No. 12076. There was no abnormality in issuing Deed Plan. They did not have to be in any sequence.

69. He told the court that the survey Plan F.R. No. 222/24 page 13 of Kiguru’s Survey Report as the one used to generate the title deed no. 16123 was missing. There was no computation and Survey Plan for Plot No. 16123 which was not in court. When one found beacons on the land, when one had been invited to survey an un-surveyed plot but the person went to the plot and found a beacon it never meant one could not carry on the survey of the plot.
70. His testimony was that he had not said that the records were missing. Instead, he had said that they could not be traced. Mr. Wilfred Muchae was in charge of all legal affairs at the Director of Survey. He was the one who signed all documents and hence signed the report. The increment in size reduced the size of Plot 10168. There was no “GL.” as it became Plot No. 10168. It was not true that Parcel No. 10172 was made into “GL.” He had no knowledge what prompted the cancellation of Plot No. 10172. That was all.
71. The 1st, 2nd, 3rd and 4th Defendants called their second witness on 11th May, 2022 who was stood down by the Honourable Court on 12th May, 2022 and was later called on 22nd February, 2023 as DW - 5 where he testified as below:-

L. Examination in Chief of DW - 5 by Ms. Kiti Advocate

72. The witness told the Honourable Court that he was Sammy Wambua Juma, the Coast Regional Surveyor. Following a ruling delivered by this Court and thus an order of Court made on 11th May, 2022 that the Director of Survey appears and testifies. He was to appear in Court and clarify some information that was missing from the evidence he presented in Court on 6th May, 2022 by the Land Surveyors. Hence, Mr. Juma was send on behalf of the Director of Survey with a report by the Director dated 28th October, 2022 and signed by Mr. Wilfred Muchae, the Acting Director of Surveys in respect of parcel LR. No. 16123 and LR. 10172 respectively. It was based on records held and maintained at the Survey Records office at Nairobi. It indicated that parcel No. 10172 was surveyed as a New Grant parcel as contained in Cadastral Plan Number F/R No 87/21 and Survey Computations Number 10265. The New Grant was parcels LR. Nos. 10161 to 10177 (17 parcels). They were submitted to the Director of Surveys for authentication on 16th April, 1959. Thereafter, a Deed Plans numbers 72860 to 72876 respectively. For parcel LR. No. 10172 the Deed Plan Number was 72871. His testimony was that the report never had the Deed Plan for Land reference no. 10172 and land reference no. 10174. On 11th may, 1970, the Director of Surveys received a New Grant Surveys with authority to re – plan and re - survey four (4) parcels LR. 10169 to 10172. The re – survey was represented in Cadastral Plan No. F/R. No. 115/88, It meant the cancellation of these parcels. They never exited any more. It gave rise to new numbers LR. Nos. 12068 to 12176. Parcel No. 12068 and 12071 (on the south and what was marked “GL”) was a road reserve measuring 15.24 metres for access to other parcels. He attached the letter dated 21st July, 1970 by the Director of surveys – Mr. Christopher Lugogo.



73. He told the court that they had further provided a Deed Plan registries for October 1956 and 3rd to 19th October, 1988 which new information was in the report. They were still not able to trace the survey plan for land reference no. 16173. What they had was a deed plan only which showed the information per the land reference number. Hence his conclusion was that his report was complete save for the few documents which he had indicated were still missing. The report by the Director of Surveys dated 28th October, 2022 was produced as Exhibit in this case.

M. Cross examination of DW - 5 by Mr. Oluga Advocate.

74. According to the witness when referred to the bundle of documents by the 5th Defendant, the title number was LR. No 10172; at page 6 the Deed Plan number was the Land survey plan number which was 136419 for land reference no. 10174. From the report, LR. No. 10172 was cancelled meaning it ceased to exist and therefore could not be used for registration. Referred to the letter dated 1st June, 1998 at Page 51 of the bundles by the 5th Defendant. He reiterated that LR. 10172 was not available as it had been cancelled. He stressed that the Deed Plan ought to have been cancelled as it was contained from the report by the Director of Surveys. It would not be possible to allocate the same parcel using a different Deed Plan numbers. He was referred to Page 24 of the bundle of documents by the 5th Defendant showed parcel No. 10172 and Deed Plan No. 136419. He stated that this was never mentioned from the report by the Director of Surveys. His evidence was that the Deed Plan No. 136419 was for parcel No. 10174 and not Parcel No. 10172 as depicted. Hence his conclusion from the report was that the Deed Plan annexed to the Certificate of Title held by Mr. Ndiritu Wachira Muriuki as Deed Plan number 136419 in respect of Parcel of Land Number Land Reference No. 10172 is not authentic. It never existed on records at all.

N. Cross examination of DW - 5 by Mr. Kariu Advocate

75. He told the court that his testimony was that the Deed Plan held by Mr. Muriuki, the 5th Defendant was not in support of the title he held. The 5th Defendant was claiming parcel No. 10172 the Deed Plan No. 72861. With reference to page 37 of the Plaintiff's documents from that document the witness stated that one could not decipher what the Deed Plan was. Due to the Photocopying the information has been cut out. Deed Plan. No. 8 which were issued sequentially with time, it's time that matters. Once a Deed Plan was issued the number could only change if it is – re-issued or re-surveyed or a surrender. The Deed Plan for parcel No. 10172 – the re-grant was in 1970. The Deed Plan that was issued in 1958 was not the same, i.e. for parcel No. 10172. Parcel No. 10174 it was given Deed Plan No. 72873. The Deed Plan for year 1988 – Land Reference No. 10174 was given 136419, as per the Register of Survey and Deed Plan. The Deed Plans were No. 72231 – 74502.

76. He testified that these changes were done formally and reasons were given as he had stated. Ordinarily there were documents but in this case he did not have the document or reasons why the changes were done. He supposed the reason may have been the surrender. The re-survey was done in the year 1970 but the Deed plan was re-issued in in year 1988. With reference to CR. 87/21. The acreage for Land Reference No. 10172 is 2.57 acres. While C.R. No. 115/88, the size of 0.6924 HA (Approximately 1.71 acres). The conversion from Hectares to acres is to multiply by 2.471.

77. He confirmed that he was not aware that there were two maps by the Director of Surveys. According to him the maps he had produced and the ones which Edward Kiguru the surveyor had produced were similar. There was no difference. He did not have the Deed Plan for LR. number 16123. He had the surveying plan for 10172. Ideally, a Deed Plan could exist without a survey plan. In such a circumstance the survey plan had to be looked for. In the long run it may lead to a re-surveying being ordered. The survey plan was the bedrock of a Title, and should it be missing the title ought to be



queried. There could never be two Deed Plans for one parcel of land. Should there be more than one Deed Plan the one that was issued first taken precedence. In the case of parcel No. 10172 the Deed Plan in the year 1959 and the Survey Plan was done in the year 1958. He did not find any computation. Without computation one could not generate a Deed Plan.

78. The 1st, 2nd, 3rd and 4th Defendant, called their third witness on 24th October, 2022, who testified as follows:-

O. Examination in Chief of (1st and 4th Defendant Land Registrar) by Ms. Kiti Advocate

79. Under oath she testified and identified herself M/s. Sheila Soita, the Land Registrar – Mombasa. She provided her Personal Staff numbers and which were noted by Court. She was employed in the year 2020. She was posted to Mombasa in the year 2022 as the Land Registrar. There were three other Land Registrars at Mombasa. There was a statement by Samuel Mwangi dated 27th October, 2021. He was the Land Registrar which she adopted as the evidence by the 1st Defendant. There were list of documents dated 26th October, 2022. In total they were 6 documents. She produced them as 1st Defendants exhibits numbers 1 to 6 in that order accordingly.
80. The witness testified that briefly on this matter, in their custody they had two land reference numbers. These were first the Land Reference no. 16123 and the second was land reference no. 10172. Both of them were registered as new grants which were allocated by the Government of Kenya.
81. She testified that the allottees went to the Land Registry and got the parcels registered. The 1st and 2nd property being CR No. 22493 and CR. No. 45938 respectively. From their records, the order of the registration priority, CR. No. 22493 was the first registered in the names of the Plaintiff - Sigma Developers Limited given on 22nd April, 1992. The summary of this matter was of two copies. The first registration meant when the documents were brought from Nairobi. The Deed Plan No. 161887 with an area of 0.6924 HA was attached to that title issued on 7th April, 1992.
82. According to her the second land reference was registered by her office for LR. 10172 whose CR. No. 4573, with an area of 0.6924, for Deed Plan No. 136419. From their observations, there were two different title numbers by different owners. Therefore the issue of double allocation could not exist. They were registered and allocated separately from the allocating Authority. The work of the Registrar was only to register the parcels having received the Instruments from the Government of Kenya – The National Land Commission (former the Commissioner of Land). They had/have the authority to survey and establish the legitimacy of the allottee.
83. With regard to the allocation of the public land. The Director of Survey could produce the authentic Deed Plans that were used for the allocation of these parcels once these documents had been prepared. Her office only came at the tail end to cause the registration upon receipt of instruments from the Commissioner of Lands (now the NLC). The parcel No. 10172 had been transferred to Mr. Nderitu Wachira – 5th Defendant. The Transfer documents were in their list of Documents.

Q. Cross Examination of (DW - 2) 1st Defendant by Mr. Oluga Advocate: -

84. She had a copy of the title. She confirmed that, LR. No 16123 of and CR No. 22493 bearing Deed Plan no. 161887 was registered on 22nd April, 1992. However, she could not recalled the date when the instruments were received from the offices of Commissioner of Lands at Nairobi. It was registered and issued in Nairobi on 14th April, 1992. She confirmed it registered after it had been issued in Nairobi. She was not aware that Mr. Nderitu Wachira Muriuki had sued some people. She had heard of a Land Registrar by the name of Mr. Dick Safari.



R. Cross Examination of the 1st Defendant by Mr. Kariu Advocate: -

85. She told the court that she was an advocate of the High Court of Kenya for 6 years standing. She was well versed with matters in this case. As an advocate her knowledge was that it's the Deed Plan that came first before the title deed and there were no time limitations for them. The legal documents were the transfer documents. In Mombasa, she had never come across an informal transfer for transferring land. There was no such instrument. She had come across the file for Land reference no. 16123 (CR. No. 22193) but she did not have the parcel file for Land Reference No. 10172. She could not carry the file as it was Mr. Mwangi to have carried it but he was not present. According to her at page 13 of the Plaintiff's Documents was a standard document. The Grants were sent from Nairobi after they had been registered. But when it got to their office, it's not normally been attested. They received the documents and informed the recipient to take them to an advocate for attestation. From the old grant, there was no attestation until collection. From her copy of the Grant number was 22493 for parcel LR. No. 16123 registered in the name of Sigma developers Limited.

IV. The 5th Defendant's case

86. On 27th October, 2021, the 5th Defendant filed an Amended Defence and Counter - Claim pursuant to leave by the Honourable Court Granted on 12th October, 2021 dated 13th October, 2021.

87. In his defence the 5th Defendant averred that:

- a. He denied the contents of Paragraphs 8, 9, 10, 11 and 12 of the Plaintiff.
- b. The Plaintiff herein had no proprietary interest real or imaginable in the suit property known as L.R. No.10172.
- c. The Plaintiff Title and the land survey number therein are legally nonexistence and cannot warrant, attach or attract any Proprietary interest on the suit land upon the plaintiff as claim.
- d. Mr. Macdonald Makaka had no proprietary interest which was transferable and could not have transferred any to the Plaintiff herein.
- e. The Plaintiff never bought the suit land from Mr. Macdonald Makaka.
- f. The Grant issued to the Plaintiff never conferred any first and indefeasible registration or interest on the suit land.
- g. The 5th Defendant put the Plaintiff to strict proof of payments, of any land rates and rent to Town Council of Kilifi.
- h. He stated that he denied the Plaintiff rights to build a perimeter wall, and the action of building the perimeter wall was done but was an act of trespasses to the 5th Defendant's parcel of land with intent of grabbing of the land by the Plaintiff.
- i. He denied the contents of paragraph 14 of the Plaintiff.
- j. The Declaration that a Letter of Allotment had no transferable proprietary rights which could be transferred. The declaration that under Cap. 281 Laws of Kenya that there were no legal instruments/documents instruments which could transfer Letters of Allotment and any transfer thereon was a nullity in law.
- k. He contended that he was an innocent purchaser of the suit property for value without notice of any defect that may have existed in the 6th Defendant's title.



- l. He was the bona fide purchaser for value of all that property known as L.R. No.10172 from 6th Defendant.
- m. There was a previous but concluded Civil case suit - E.L.C (Mombasa) no. 116 of 2011.
- n. His title was a legal title.
- o. The Plaintiff Title registration and issuance is legally unattainable in Law.
- p. The Plaintiff contents in Paragraphs 20 and 22 were misleading and bent towards influencing the Court.
- q. He denied the contents of Paragraphs 21,23 & 26 of the Plaintiff.
- r. He was a law-abiding citizen and had never colluded with any party so as to obtain the suit Property and relevant documents in support of ownership thereof as stated by the Plaintiff.
- s. The Plaintiff herein Title and ownership of the suit land was fraudulent on the following grounds:-
 - i. The Title was obtained fraudulently.
 - ii. No survey had ever been done prior to issuance of Title.
 - iii. The Plaintiff suit was tailored so as to defeat the 5th Defendant Title and ownership of L.R. No. 10172.
 - iv. Tracing an “unsurveyed plot” of an existing “surveyed plot”.
 - v. Transfer of allotment was done without due process.
 - vi. The Plaintiff’s title was supported by questionable documents.
 - vii. Informal transfer was not a prescribed form under RTA
 - viii. The Plaintiff’s Title was not supported by relevant documents necessary.
 - ix. The Plaintiff caused the processing and issuance of Title illegally and without due process.
- t. The Plaintiff’s title ought to be cancelled and the same deemed and declared a nullity in law as the same was issued without adherence and following of due process of law.

88. On the Counter claim, the 5th Defendant averred that:-

- a. The Plaintiff herein acquisition of land was tainted with illegality, fraudulent and a nullity in law. The Plaintiff’s entire Plaintiff herein based on a claim of L.R No 16123 was a sham and tailor made to defeat justice.
- b. At all material times the owner and entitled to the land known as L.R.No.10172.
- c. There were no legal provisions wherein one parcel of land can have:-
 - i. Two duly registered Deed Plans of the same property
 - ii. Two titles of the same parcel of land
 - iii. The Plaintiff’s parcel of land had no records from Director of Surveys.



- iv. Having a title which is obliterated.
89. The 5th Defendant relied on the following particulars of fraud by the Plaintiff:-
- i. Causing the surveyor to survey land which had already been surveyed.
 - ii. Purporting to have a different title over the same parcel of land.
 - iii. Pretending to lack of knowledge of the 5th Defendant suit i.e. ELC 116/2011 and causing the hearing and determination of the same only for the Plaintiff to file this subsequent suit herein.
 - iv. Procuring an undated PDP with an ulterior motive.
90. In the long run, the 5th Defendant prayed for the Plaintiff's suit to be dismissed with costs and Judgment be entered in favour of the 5th Defendant as prayed for in the counter claim:-
- a. The 5th Defendant seeks a permanent injunction to restrain the Plaintiff from trespassing, alienating, leasing, selling, charging or otherwise interfering with the 5th Defendant's possession of land known as L.R. Numbers 10172 situated in Kilifi.
 - b. The 5th Defendant Counter Claim against the Plaintiff for a declaration that survey plan being F/R No.222/24(computation not found in) in respect of L.R. Numbers16123 together with ought to be cancelled: and a declaration that the 5th Defendant's survey plan F/R number 13649 be declared as legal and that the Director of Surveys should amend the survey records accordingly.
 - c. That an order do issue directing the Chief Land Registrar to cancel the title to certificate no. 226 of the parcels of land L.R. Number 16123. The Plaintiff does pay the 5th Defendant the cost of deprivation of use of his property L.R. No.10172 together with costs of the suits.
 - d. A declaration that L.R. No. 10172 is the rightful parcel of land to and it be returned to the 5th Defendant.
91. On 12th May, 2022, the 5th Defendant called its first witness who was identified as "DW – 3". He told the court as follows:-

S. Examination in Chief of DW - 3 (5th Defendant) by Mr. Kariu Advocate

92. DW – 3 was sworn and testified in English language. He identified himself as Mr. Ndiritu Muchiri. He was an Information Technology (IT) Consultant working for gain and residing at New Jersey, in the United States of America. He also lived at Nairobi, Kenya. He stated that he was the 5th Defendant and the registered owner to the Parcel No. 10172. He recorded a witness statement dated 28th December, 2018 which he adopted and relied on as his evidence. He talked to Britana Oil Kenya who sold them the land. There was a duly executed sale agreement although he did not have it in Court. He had a bundle of documents marked as Defence Exhibit No. 2 to 57 and a further list of documents dated 13th October, 2021 – 5th Defendant Marked for Identification Numbers (5th DMFI - 58 to 59).
93. He stated that he gave his father Mr. Justus Murugu Nderitu the Power of Attorney to get him a beach plot and hence he was the one who entered into the sale agreement. This was the second case. He had won in that case. The Court directed that Britania Oil Limited refunds him the money as he surrendered the title to them. But he was never compensated. In the process of seeking to the surrender of the title, he was informed by Ms. Kiti Advocate that there was another suit and the said Judgment which was in his favour was set aside. In this new suit he was named the 5th Defendant. He asked the



Honourable Court for compensation or to be given legal possession of the land. He got into the land and they saw the beacons. They drilled a borehole for water supply and also applied for electricity connection.

94. DW – 3 had engaged an Architect who prepared an Architectural design. But when his father came over, they found a person building a perimeter wall. They met Mr. Doshi and he came up with a title deed. They reported the matter to the police. They later on went to the Land Registrar and found that the file for the suit property had two documents. The DW -3 went to Nairobi registry which had a lot of documents. They were advised by the Nairobi Land Registry to file a suit and that was how he filed the case. It was not true that Mr. Doshi had been on suit land all along. He had photographs of the land, he had been paying for the water. Mr. Doshi continued building the perimeter wall.

T. Cross Examination of 5th Defendant (DW 3)- by Mr. Oluga Advocate.-

95. DW – 3 confirmed that he took possession of the land in the year 2008. By then it was Britana Oils Company Limited that owned the land. The amount was a lot and they tried to help them. When referred to page 8, the witness stated that the title deed for Britana Oils Limited was registered on 24th April, 2009 as indicated on the Certificate Title Deed. They were the registered proprietors using a Letter of Allotment when they started the sale negotiations in the year 2008. By then, they had not gotten a title deed. It was his father who signed the sale agreement dated 10th September, 2009 as he had the Power of Attorney found at page 14. He signed the same agreement which never bore the number of the Power of Attorney registered on 28th September, 2009. Hence by the time he signed the sale agreement, the Power of Attorney had not been registered.
96. The witness told the court that one could not donate a parcel of land that never belonged to them. The Power of Attorney donated the land to him (the Donee). DW – 3 never met the Directors of Britana Oils Limited. He allowed them to enter the land. He never stayed on the land. He engaged a Land Surveyor, set up for drilling of water and planted beacons. At page 82 it was indicated that there was a receipt dated 5th November, 2010 and not October 2009. From the year 2009, he took possession. He could not be specific on the beacons. They applied for power – one had to engage the KPLC. He had no document to ascertain that.
97. He also told the Court that he engaged an architect to start working on some designs. At page 52 the witness stated that there was an architect agreement which was dated July 2010 on page 59. They had a meeting on 29th December, 2010. The agenda of the meeting was the site visit item No. 7. By the time he had no knowledge whether the Architect had gone on site. At page 17, the witness stated that clause No. 6 of the sale agreement allowed him to take vacant possession upon completion of the purchase price. He completed the purchase price on 17th August, 2010 and according to the sale agreement, he could not take possession though.
98. At page 4, item 39 the witness told the Court it indicated that a letter dated 2nd November, 2010 to a fisherman in Kilifi Township. DW – 3 stated that he would let his father answer that question. At page 10 of Plaintiff's bundle, the witness stated that in that case, he never sued Sigma Developers Limited whom he knew had a title. He urged the Court for a sum of Kenya Shillings Fourteen Million Six Seventy Seven Thousand and Thirty Nine and Sixty Eight cents (Kshs. 14,677,039.68/=) at paragraph 19. He wanted the Government to compensate him as there was double allocations. There was no request for the ownership of the land. At Paragraph 21, on being referred to the contents of the Plaintiff and the prayers sought at Paragraph 19 in the civil suit ELC No. 116 of 2011. The prayers sought as shown was a request on ownership of the land (paragraph 21).



99. The witness reiterated that he never challenged the title deed held by Sigma Developers Limited. He only did it orally. He was not compensated. The only step he took was visiting the offices of the Attorney General. While there, he spoke to Ms. Kiti Advocate. She informed him of the instant case. He was not sure whether the decree was extracted and a taxation proceedings were conducted. The process had started but he was not sure whether there were a stay of execution proceedings.
100. When he was asked by his advocate whether its money or the land that he was pursuing, he opted for the land. The Judgment in the Civil suit ELC No. 116 of 2011 ordered that he should be compensated upon surrender of the Certificate of Title Deed to Britana Oils Limited. At paragraph 24, he told the court that he knew that two searches were done but his father may answer that. At page 32 of the 5th Defendant's documents – the letter dated 25th September, 2009 was a paragraph on them requesting the Director of surveys to authenticate the Deed Plan for the said property. He did not know whether it was done, his father could do so.
101. DW – 3 confirmed that he had heard the word Mtondia for the first time from the advocate. His architect mentioned- the place the word Mtondia/ Bofa; at page 58 was a receipt which indicated the place was at Bofa/Mtondia. At page 77, there was another receipt which referred to Mtondia/ Bofa issued by the Town Council of Kilifi. From the evidence the land could be said to be located at Mtondia/Bofa while other documents called the place known as “Bofa”. At page 85, he told the court that he had paid the stamp duty.
102. On page 90, the witness confirmed that it was a valuation requisition for stamp duty dated 30th December, 2009 for the transfer form which was dated 11th May, 2010. He was paying for both rent and purchase price. At page 23 it was evidenced that it was for land rent. The receipts from pages 24 to 26 were for purchase price. They did not specify the land reference number. At page 16 was clause 3(d) an amount of the purchase price of a sum of Kenya Shillings Ten Million Eight Hundred Thousand (Kshs. 10,800,000/-) part through the Britania Oils Limited and others through the Advocate.

U. Cross examination of the 5th Defendant (DW – 3) by Ms. Kiti Advocate:-

103. The witness confirmed that it was his father who did the transfer on his behalf. He had the Power of Attorney. They had one advocate for both the vendor and the purchaser. It was his evidence that due diligence was conducted.

V. Re - Examination of the 5th Defendant (DW – 3) by Mr. Kariu Advocate.

104. DW – 3 was referred to the sale agreement dated 10th September, 2009. He stated that he donated the Power of Attorney on 2nd September, 2008. He as not involved in the registration of the Power of Attorney after he donated it. He was put to the task on the occupation of the land and that there were no people living in the suit property. He was referred to the Judgment in ELC 116 of 2011 and he confirmed on the cancellation of the title. In this case, and as he was referred to the Plaintiff in the instant case, the witness stated being aware that that the Plaintiff in the Plaintiff was seeking for the cancellation of his Certificate of Title Deed.
105. Upon the cancellation of the title, DW – 3 doubted that the Government would have compensated him. He never had any issues with the title of Sigma Developers Limited. He came to learn about the suit from the notice in the newspaper. He was not fully involved in the main issue of the purchase of land. On the vacant possession, they had a lot they needed to do on the land and they had verbally agreed to do a variation of clause 6. At page 90, the witness stated that it was for validation requisition for stamp duty. He never knew about it. He paid Britana Oils Limited the whole amount as per the purchase price.



106. The 5th Defendant called his second witness marked as DW - 4 on the 12th May, 2022 who told the Court that:-

V. Examination in Chief of DW - 4 by Mr. Kariu Advocate:-

107. DW – 4 on oath testified. He identified himself as Mr. Justus Muritu Nderitu. He was a retired Civil Servant and the father to Nderitu Wachira Muriuki, the 5th Defendant. He recorded a witness statement on 13th October, 2021 which he adopted as part of his evidence in chief. He worked for the Lands Office as a Physical Planner by profession. He was a Land Officer at different places in the Country. He had a Bachelors in Geography and Economics. He studied Land Economics. He also held a Masters Degree in Engineering – Town Planning having attained in the United Kingdom.
108. He told the court that he advertised that he wanted to buy a beach plot. He visited the land in the year 2008. By then he had not bought it. He was taken to the property by an agent, Mr. Mwangara who was acting for the then owners of the land - Britana Oil Limited. He was later taken to the advocate's officer who showed him the original Certificate of Title and he was convinced that that was the land to buy. They agreed that he would take a grace period of one (1) year to complete paying the purchase price. Upon completion on 31st December, 2010 he took his son to the suit property and he found someone constructing a perimeter wall on it.
109. He got a survey done and the boundaries were alright apart from one part and the anomaly was rectified. When they got on the land. It was not occupied but occasionally the fishermen would be offered a temporary shelter. They found a contractor by the name of Mr. Simon Kakwili alias Crocodile who told them he was acting on behalf of Sigma Developers Limited. The fishermen never bothered him. He told them he was the owner. He wrote to them to give them notice so that they would be aware that he was the owner of the plot. He never asked them to leave or evict them after that. The fishermen would leave the plot at night.
110. He made reference to page 71 of the 5th Defendant's bundle of documents. He told the court that was a notice for the fishermen to vacate through a letter dated 2nd November, 2010. When referred to paragraph 4 of his written statement, the contractor called Mr. alias "Crocodile" was contracted and he informed them he was hired by Sigma Developers Limited who owned by Mr. Ashok Doshi. They reported the matter to the police (OB /No. 42 of 31/12/2010).
111. When DW – 4 was referred to paragraph 4 on the page 10 stated with words: "The several attempts" according to him, he meant by the several government land offices were land officers, Anti – Corruption, Police, Permanent Secretary etc. they had not yielded any fruit of recovering land or to confer upon him good title and vacant possession to date because there was a person on the land. There were (a) a good title (b) vacant Possession and (c) Recovering of the land to date they have never been. He was kicked out of the land by Mr. Doshi having been there for two years.
112. He found Mr. Doshi there on 31st December, 2010. By being kicked out, DW - 4 stated that it was after they had applied for water and applied for electricity, Mr. Doshi put up the perimeter wall around the suit land. This caused them to report and conclude that they were now out of the suit land. It was the contractor who was already there. He was already constructing a boundary perimeter wall.
113. He told the court that he was very bitter. The matter was embarrassing as the Government had failed to refund his son his money and the land. He admitted that despite this indeed the judiciary which was the senior most arm of the government granted his son compensation through a Court order in ELC No. 116 of 2011. He tried to follow up the matter but the instant case was filed which halted the remittance of the decretal sum on ELC No. 116 of 2011. They succeeded in the case but they never



- pursued the Certificate of Title Deed because it was in their possession. In the Civil Case ELC No. 116 OF 2011 they never sued Sigma Developers Limited as his advocates advised him so.
114. He told the Court that he sued Britannia Oil Ltd for breach of agreement. They were seeking for compensation. He was unhappy with them because he never got possession as what they alleged to be possession turned out to be not realistic. Instead, he got to be kicked out by a third party. When he was referred to page 9 at paragraph 18 of the Judgment he confirmed never having enjoined the said Mr. Ashok Doshi or Sigma Developers Limited whose names appeared in the second title nor the Director of Surveys. He never assigned any blame on the owner of the second title. The Court held that he had blamed the 1st Defendant for misleading him to believe that the 2nd Defendant had land which he could sell. He approached Court to seek justice where he received a favourable Judgment but was yet to receive any justice from it. According to him he was satisfied and that was why he never appealed the decision. He signed the sale agreement as the agent through the Power of Attorney which was entered in the sale agreement, he could not recall.
115. When referred to page 20 of the bundle of documents being the sale agreement, DW – 4 told the Honourable Court that one director signed it and not the two directors as was required. He never inspected the Deed Plan as part of due diligence. When he reported the matter to the police, they did not take any action, they referred them to the land offices as they never dealt as they had no records. He complained against Sigma Developers/ Ashok Doshi. But he never sued them as his advocates warned him that he would loose the case, Ashok and Sigma Developers would turn around and sue him for damages which could cripple him.
116. He told the Court that apart from doing an official search, he never did anything else. His advocates used to do everything. His advocates wrote a letter to the Director of Survey and there was no answer that was received that was on the issues of the deed plan that was the authentication of the Deed Plan.
117. Cross – Examination of DW – 4 by Mr. Oluga and M/s Kiti Advocates – NIL.

W Re-Examination of DW - 4 by Mr. Kariu Advocate.

118. The witness acknowledged that he was still under oath. There was a Judgment in favour of the 5th Defendant's son. He was not aware that he was in occupation of land for about 7 years until they found him there. They had evidence that they were paying water and land rates to the government in respect to the land.
119. On 24th October, 2022, the 5th Defendant called his third witness marked as DW 4 who told the Court that:-

X. Examination in chief of DW - 5 by Mr. Kariu Advocate

120. He testified that his name was Mr. Gidraph Kuria Mutugi. He was Land Valuer by profession dealing in land agency and estate management – generally the land economics. He had been in this field for 40 years. He was working for the Ministry of Land until he retired. He prepared a land valuer report dated June 2021 for the suit land. It was prepared by Messrs. G.K. Mutugi & Associates which he adopted. He executed the process and the procedure on one acquired the land. He was given two documents by the counsel. They were for Land Reference No. 10172 and 16123 – to examine them as they were.
121. He came up with the preamble. The documents were for Sigma Development and Mr. Ndiritu Wachira Muriuki. At page 31, there was a Letter of Allotment. It appeared quite old, meddled up and defaced. In the year 1990, that type of Letter of Allotment could not be used. It was one used during colonial times until the Department of Physical Planning was established. Its copied to Town Planning Advisor.



122. DW – 5 old the court that in the year 1990 it was unavailable for use in Lands Office. They had the computation of the sums paid. That changed to where the payment was demanded. This was the case because the Land Office used a long time to prepare the documents. After the year 1990, the form would be referred to the Land Value. The bundle of receipts would be the one demanded by allottee before and there would be a receipt before the new Grant was issued. When the Letter of Allotment was issued the allottee would be expected to have a Letter of Acceptance. One could not develop on the land without getting a consent issued by the Commissioner of Land. And one would need to develop it otherwise one could not transfer the land. The issuance of a Grant to the Registration would not take less than 6 months.
123. The witness told the Honourable Court that for a Deed Plan was where the Letter of Allotment was accepted – to the Surveyor – then a Grant was issued. It took approximately 2 months. The Deed Plan – on LR. No. 10172 and 16123. The Deed Plan were numbers in chronologic order. His finding was land reference no. 16123 which was processed from the land office ought to have been processed in the normal way. The Chief Land Registrar wrote a Letter to the Land Registrar, and Allottee is also given a copy. He is asked to go collect his copy. A Deed of Variation – of 22nd August, 2001 and was placed a Commissioner of Lands to append his signature. It would to have been preceded by an application. There was nothing to this effect. It was the Commissioner of Lands who prepared the Deed of Variation. It bore no date on it. Land Reference No. 10172 was owned by Nderitu Kariuki. Land reference No. 16123 was transferred with a consent to Sigma Developers Limited. It was generated without a proper Letter of Allotment. There were people who intercepted it. There was no valuation aspect in the exercise as that he was never asked to undertake any.

Y. Cross Examination of DW - 4 by Mr. Oluga Advocate: -

124. He told the court that a Valuation Survey was for purposes of Land Economics. It had broad aspects. He never undertook the land surveying exercise of the suit land. that was for the land surveyor to do. He was a member of the institute of survey in 1978. The property no. 10172 belonged to Nderitu Wachira Muriuki and property no. 16123 was for Sigma Development Ltd. At page 12 of the bundle of documents, the witness stated that it showed land reference no. 16123 and not 16124 which was a typographical error from the heading of his report. But the main report covered land reference no. 16123, he had never seen the original. There was cancellation of the CR. Number on the top of the report.
125. He further stated that the CR No. 22493/1 was stamped on 22nd April, 1992. The source of what was contained under Paragraph 1.2 of his report were based on practice and not on any police or law. There would not be any consequences but they were practices. They were not mandatory. They were only to be adhered with by the public service expectations as at the time there were no laws. There were laws which gave and guaranteed for the granting of Government Land. In every statute made provision for such allocations. All the surveying exercise had to be approved by the Director of Surveyor.
126. When referred to page 45 on the Deed of Variation, the witness reiterated that could only come from the Commissioner of Lands. There were people who did it. This was one was drawn by Sigma Development Ltd. It's like where the Tenant could not change the terms of Tenancy agreement. All these were practice. They were not necessarily written in any law. Apart from the documents which he received from the client, he tried to locate the actual visit and locate/ physical found the land. He never got any map from the surveyor's office.
127. There were two (2) Letters of Allotments; B1 by the Plaintiff. There were no Letters of Acceptance. B5 was for the 6th Defendant – Britania Oils Limited. Even the said Letter of Allotment had no Letter



of Acceptance. There was a mis-representation of facts for only commenting on this in the report. He only made this comment when it came to the issue of the letter of allotment for the Plaintiff.

128. When referred to clause 2.8 (a), the witness told the court that the stationery was used in the year 1960 was very different from the one used now. He never saw the original the copy was a product of photocopy many times, maybe it was used for faxing. When referred to clause 2.8 (c), it was in the document of the values. When referred to clause 2.8 (d) he did not prove if the abolishment of them offices. Clause 2.8 (e), Mr. Ndiritu was at Mtondia. When referred to page 54 of the 5th Defendant's bundle of documents, the witness confirmed that it showed that the property was in Mtondia and held that this was erroneous.
129. He had seen on page 58 it was a period of 5 to 6 months for the Letter of Allotment to a grant to be issued, but there would be no problem if the same was issued earlier. He had seen the applications which had been signed by Sigma Development.

Z. Cross Examination of DW - 4 by Ms. Kiti Advocate.

130. The witness confirmed that he used the documents given to him by the advocate. But he went to the offices of the Director of Surveys to get more information. For the letters of allotment, he just compared with all the other Letters of allotment. He never used the third letter of allotment. He only applied his knowledge in the survey. He was informed what was available then. He was only able to get a plan for FR as it was available. The process of obtaining the Grant from a Letter of Allotment was a matter of procedure and not law. All Letter of Allotment were not muddled by FAX. They would have a clause for Letter of Acceptance. The issuance of a Grant would involve 10 different offices.
131. The 5th Defendant called his fourth witness marked as DW 6 on the 23rd February, 2023 but the witness was stood down and hearing was adjourned to the 22nd June, 2023. His testimony was follows:-

AA. Examination in chief of DW - 6 by Mr. Kariu Advocate

132. DW – 6 testified on oath. He identified himself as Mr. Livingstone Kamande Gitau. He was a holder of Bachelors of Science Engineering – Survey and Photogrammeter and Master in Engineering Transport and Planning Engineering from the United Kingdom. He was also a member of the Institute of Kenya Licensed Surveyors in Kenya. He was a practicing Surveyor in Kenya. He was invited to prepare a private Land Surveyor to the parcel no. 10172 and 16123, he prepared a report dated 1st March, 2023. There was an earlier report prepared on 20th June, 2021 and he adopted in Court as part of the 5th Defendant's evidence.
133. He told the court that Plot No. 10172 and 16123 were the same in size and locational site. When he was authenticating the documents, he found the record of LR. No. 10172 which were available with the Director of Survey Registry. The records for LR No. 16123 were not available then. He prepared the genesis of this report. Accordingly, in year 1958 the Government planned for Beach plots in Bofa area and alienated them. In the year 1959 these plots were surveyed as given LR. No. 10161 to 10177. In the year 1970, a Part Development Plan (PDP) was produced purporting to re - plan and Re – survey LR No. 10169 to 10172. It was purporting to do so because the property were already alienated to private persons and hence they were not available for alienation as private property. They could only do so if they recalled them.
134. The PDP was carried by the Department of Planning within Ministry of Lands which was the same one that planned earlier one of the year 1958. The new planning would then be PDP No. 9 of 1970. It was re-planned and re - surveyed. They were only talking of 4 plots being LR. No. 10169, 10170, 10171 and 10172 earlier on all the parcels had been planned from LR No. 10161 to 10177. To re - plan



- and re – survey for the 4 Plots, the Government had to get the authority from the private individuals. All the documents produced were by the Court they were instigated by the Government and not the individuals.
135. According to the witness, he told the Court that his hypothesis therefore was that the owners of the four (4) plots, LR. No. 101069 to 10172 wanted to amalgamate them and eventually sub-divide them into small plots perhaps for commercial use and/or speculation. The basis of this was that they were only dealing with 3 parcels – sub-divided D, E, F, G, H and J. They were amalgamated LR. No. 10169, 10181 and 10171 used to give new titles. No. 12068 to 12076 from the Plot 10172 they had a road of access and the remainder of LR. 10172 was surveyed and it was given the same number 10172 but size changed to 0.624 from the earlier of 2.52 acres (1.0198 HA).
136. In the year 1998, 1st June, this plot was allocated to Britania Oils Limited as surveyed plot. It was a very specific and title deed issued on 11th March, 1992 while a Letter of Allotment of un-surveyed land was given to McDonald Makaka. This Letter of Allotment by looking at it he had the following reservations:-
- a. The Letter of Allotment out to had a PDP attached to it. This one had none. The PDP was crucial as it showed the shape and location of the plot being given.
 - b. Letter of Allotment was a standard form with the telephone number of the Ministry of Lands. This one was typed. The number for the Ministry was shown as being 8071718050, while in this Letter of Allotment was 7260. He wondered therefore whether this was the standard form.
 - c. The rate was normally on demand. On this Letter of allotment they are typed “Provisional”
 - d. On this one it was copied to the Town Advisor – Nairobi City Council.
 - e. The same letter was copied to the City Valuation Nairobi. This never happened these days. They were copied to the County Clerk of the County where the plot was located.
137. DW – 6 stated that he had 50 years’ experience, he was not aware of the land that had been surveyed to become again un-surveyed land. if the land was un-surveyed to become again un – surveyed land without the PDP. PDP showed the shape and the location where the Land was situated. If this was to happen then allottee would be free to decide where they wanted the plot to be and the size. He totally disagreed with the reasoning of Edward Kiguru surveyor on this issue. The commencement date on the Letter of Allotment was the same; it was inserted on the title deed. The date on Letter of allotment was 11th March, 1992 yet the title deed issued to Sigma Developers Limited was dated 11th March, 1992. This was strange because the title ought to have been dated thereafter 11th March, 1992.
138. Despite of the short falls, the witness told the court that his colleague – Mr. Edward Kiguru surveyor went and surveyed the land using the Letter of Allotment of un-surveyed plot in Mtondoa. The question was how Mr. Edward knew where the plot was considering that the area was a big. But he said he was shown the area by the Allottee. It’s not known as then the allottee would be deciding where they wanted and the size. Edward said that there were two plots on the same place but he still went to survey on the land. Irrespective of knowing there were two plots on top of the other. This was unethical. Instead he should have consulted the authority – Director of Survey or the Commissioner of Land – using the Letter of Allotment. Besides of these, the Director of survey authenticated the survey yet Edward had all the information and documents that these plots were overlapping, he should have returned the report to the surveyor instead.
139. DW – 6 informed the court that there still worst scenario. All the records and computations were missing from the Director of Surveys. When this happened, it was normally instigated by the allottee



to conceal material facts he/ she never wanted to be known. With all these facts like Plot No. 16123 should not have existed. The Director should had cancelled it as it overlapped another plot.

140. The witness stood by the conclusion and finding of the two (2) survey reports. According to him once a Director of Survey got 2 plots he should have returned/ or cancelled the previous survey Plan then make a record that it never existed. The Director and the surveyor allusion of the same PDP for LR. Nos. 10172 and 10174 was pathetic. It was something that never happened. The two (2) title deeds and their PDP ought to have been brought to court for verification. The witness had not visited any of the officers of the Director of survey or Commissioner of lands to raise these issues and the anomalies.

AB. Cross examination of DW - 6 by Ms. Kiti Advocate

141. The witness told the court that in the whole settlement scheme there were 4 parcels. But only 3 were the subject matter. He had his own hypothesis. He had never worked with the Director of Surveys but he was making comparables to the Letter of Allotments. He had knowledge that there had never been any amendment to the Letter of Allotment in the year 1960. He told the court he was not giving the information as an expert. If there were new surveys the PDP remained be the same – the sizes and the distances. Plot No. 10172 was re-surveyed when they took the road although the map would still be showing it. A road was hived off from Plot No. 10172.
142. The Director still gave the portion that remained the number 10172. This was because he was the only one who gave numbers. There was no re-arrangement but only amalgamation and sub-division. The previous, surveyor Mr. Edward Kiguru –was shown the location by the allottee and found two plots on the other, he had the authority from the Letter of Allotment. He should have informed this to the Director of Surveys. The witness did not know the owner of Plot No. 10172 he only saw the title.

AC. Cross examination of DW - 6 by Mr. Oluga Advocate:-

143. He told the Court that the two titles referred to one property on the geographical area. Bofa was in Kilifi. He never knew whether it was called Mtondia. When referred to Page 44 Item (f) on the survey report dated 20th June, 2021. On paper they were different but they were from the same place. He had never been to the place even one day. When referred to page 54 of the 5th Defendant bundle of documents dated 15th March, 2019, he told the Honourable Court that they were proposed subdivision. It was Bofa in Mtondia. When he went to the Director of surveys, he never found:
- a. Survey Plan F.R. No. 222/24
 - b. Computation for the same.
144. The witness told the court that he had written a lot of conclusions onto the Letter of Allotment given by Mr. Makaka. Not finding the documents at the Director’s officers and that it never existed elsewhere then it was illegal. He also confirmed that there could be cases of misfiling, but they are normally found – as every Friday they were collected and returned to their places. He was not aware of the Letter of Allotment at page 5 of the Plaintiff’s bundle of documents.
145. There was a copy of the PDP attached to the Letter of Allotment. He could not use the same to identify a location of the property. A Letter of Allotment should be standard form. It was prescribed by the Ministry of Lands. He did not know whether it was prescribed from any Gazzette or the statutory provisions. On the issue of the telephone numbers. DW – 6 confirmed that the court that the Ministry may change its numbers and may have many numbers.
146. The witness confirmed that in the late 1960 the position of Town Planning Adviser Nairobi City Council never existed. It was removed and the Letter of Allotment may have changed but it had



remained the same since the late 1960's when the Department of Physical Planning was created in the late 1960. With reference to page 49 of the Plaintiff's list of documents bundle he told the court that it was copied to the clerk of the Council of Kilifi.

147. As per reference to page 52 of the Plaintiff's bundle, the witness stated that the transfer was ascertained by the Commissioner of Lands which he confirmed. With reference to page 37 of the 5th Defendants bundle dated 27th October, 2021, the witness stated that the title was registered on 22nd April, 1992. It came after the PDP which was normal.
148. He told the court that at page 34 of the 5th Defendant's list of documents bundle the witness told the court that the title Land Reference No. 16123, the title number was not there. The 5th Defendant was seeking to revoke the said title. The title number for the Plaintiff's property was 22493 and it's not seen from the copy. It's also shown at the bottom of CR No. 22493/1 No. 1 meaning (First entry).
149. When he made reference to the Letter of Allotment at page 48 and the surveyor's report at page 5 he told the court that Paragraph 3 (ii) (c) if it was continuous Lease date 1st March, 1992 when the Letter of Allotment was dated 11th March, 1992, there was no issue there. The title deed came out on 22nd April, 1992 before the form of transfer which was in reference to the format of transfer was for 9th April, 1992 on Page 32 of the Plaintiff's bundle.
150. According to the witness, Mr. Kiguru committed an unethical act by re-surveying a plot which was un-surveyed and cancelled. What existed were Land Reference CR. 22493 and Land Reference 10172 CR 45738. No survey was canceled and that was why they say it was a mistake caused by the Director of Surveyor for failing to cancel. The title No. 10169 to 10170 were cancelled in the year 1970 and GL was created meaning – Government Land. Nobody had complained about those cancellations. He had been informed that those parcels were given to private persons and he knew the said individuals. He was aware that the director of survey held parcel No. 136419. Which gave to rise to Land reference 10172 which meant that it was not genuine. He disagreed with the assertion made by the Counsel that he never conducted any investigations on the said land.

AD. Re - examination of DW - 6 by Mr. Kariu Advocate:-

151. When referred to the form of transfer, the witness testified that he had come across a consent of the parcel, as at 9th April, 1992 the owner was endeavoring to transfer the un-surveyed title. On 7th April, 1992, it was un-surveyed and deed plan drawn. The Letter of Allotment was dated 11th March, 1992 and the title deed dated 1st March, 1999, this is when the term commenced according to the report of the director of survey.
152. On 22nd June, 2023, the 5th Defendant closed its case.

VI. Submissions

153. On 22nd June, 2023 upon the closure of the case by both the Plaintiff and the 1st, 2nd, 3rd, 4th, 4th and 5th Defendants and in the presence of all parties, the Honourable Court gave directions for all the parties with stringent timelines to file and serve written Submissions accordingly. Indeed, pursuant to that all parties obliged accordingly and the Honourable Court reserved to deliver the Judgment on notice.
154. At this juncture, the Honourable Court feels expressly indebted to sincerely appreciate Mr. Oluga, Mr. Kareu and M/s. Kiti Advocates in the high most professional manner in which they conducted this rather complex and convoluted matter full of dedication, diligence and devotion throughout the case.



A. The Written Submissions of the Plaintiff

155. The Plaintiff through the Law firm of Messrs. Oluga & Company Advocates filed their written submission dated 26th October, 2023. Mr. Oluga Advocate commenced by stating that this suit was commenced vide a Plaint dated 14th April, 2016 and filed on 20th April, 2016. Initially, only the 1st to 4th Defendants entered appearance vide a Memorandum of Appearance dated 23rd May 2016 filed by Charles Mutinda, Senior Principal State Counsel. Subsequent to the filing of the suit, the Plaintiff filed an application dated 23rd June, 2016 and filed on even date seeking leave to serve the 5th and 6th Defendants through advertisement. The application was allowed on 10th October 2016. The Plaintiff put up a notice of advertisement in the Daily Nation 3rd November 2016. An affidavit of service sworn by AMIT ASHOK DOSHI sworn 1st December 2016 (refer to court file). The 6th Defendant neither entered appearance nor filed defence.
156. According to the Learned Counsel the Plaintiff's case was that the Plaintiff is the registered owner of the known as L.R. No.16123 measuring 0.06924 hectares and situate North of Kilifi Town in Kilifi County - the suit property - pursuant to a Grant of Lease issued to the Plaintiff by the Government of Kenya for a term of ninety-nine (99) years from 1st March 1992. The suit property is delineated on Land Survey Number 161887. Before registration in the Plaintiff's name, the suit property was unregistered but the interest, title and rights thereto vested on one Mr. Makaka as the beneficial owner thereof by virtue of a Letter of Allotment dated 11th March 1992 Reference 54188/IV/46 issued to the said beneficial owner by the Commissioner of Lands.
157. Sometime in the month of April 1992 the Plaintiff approached and Mr. Makaka agreed to transfer his interest, rights and title over the suit property to the Plaintiff for a consideration of a sum of Kenya Shillings Two Million Three Hundred Thousand (Kshs. 2,300,000.00/=). The parties duly executed a Transfer on 9th April, 1992 under which it was agreed that the Grant/Lease in respect of the suit property would be issued directly to the Plaintiff. Hence, when the land was registered, the Grant was issued directly in the Plaintiff's name. The Plaintiff averred that the Grant issued in its name was a first and indefeasible registration. Ensuing from a news report in one of the local dailies "the Daily Nation" with a caption entitled "State to pay trader for issuing two land titles", the Plaintiff learnt of a Civil case - ELC (Mombasa) Case No. 116 of 2011 which had been filed by the 5th Defendant before this Court and which from the said case it revealed the existence of a parallel title of the suit property being L.R. No. 10172 registered in the name of the 5th Defendant.
158. The Plaintiff averred that it followed the due process in obtaining its title to the suit property which title was a first and indefeasible registration. By issuing another Title Deed in respect of the Plaintiff's suit property, the 1st to 4th Defendants breached the constitutional mandate bestowed upon them as the official custodians and guarantors of land documents and titles in Kenya. They acted illegally and in bad faith. The Plaintiff further averred that the 5th Defendant having got the refund of his purchase price in ELC (Mombasa) Case No.116 of 2011 has no interest whatsoever on the suit property.
159. The Plaintiff contended that the Defendants breached their statutory obligations and colluded amongst themselves in order to defraud the Plaintiff of its legally registered property by issuing another title deed in the name of the 6th Defendant which was later transferred to the 5th Defendant. The Plaintiff sought, inter alia, a declaration that the Plaintiff's Certificate of Title Number L.R. No. 16123 is the valid document of title in respect of the suit property and a declaration that the Certificate of Title Number L.R No.10172 (the 5th Defendant's title) is null and void for having been issued irregularly and against the law.



160. The Learned Counsel averred that the 1st, 2nd, 3rd and 4th Defendants' filed a joint Statement of Defence dated 28th April and filed on 2nd May 2017. The 1st, 2nd, 3rd and 4th Defendants admitted being aware of the Judgment delivered in the Civil suit ELC (Mombasa) NO. 116 of 2011. However, their defence comprises of general denials without pleading any specific material issues.
161. On its part, the 5th Defendant filed his original statement of Defence dated 9th May 2018 but later filed an Amended Defence and Counterclaim dated 13th October 2021. The 5th Defendant denied that the Plaintiff bought the suit property from Mr. Makaka. The 5th Defendant contended that he was an innocent purchaser of the suit property for value without notice of any defect in the title and that his title is the legal one. The 5th Defendant argued that the Plaintiff's title and ownership of the suit land was fraudulent and particularized a total of nine (9) reasons for that allegation. Additionally, the 5th Defendant filed a Counter - Claim alleging that the Plaintiff's acquisition of the suit property was tainted with illegality and was a nullity in law. In his Counter - Claim, the 5th Defendant posited that the Plaintiff committed fraud by: surveying land that already been surveyed; purporting to have different title over the same parcel of land; pretending to lack knowledge of the Civil case ELC (Mombasa) NO. 116 of 2011; and procuring sedated Part Development Plan (PDP) with interior motive.
162. From all these, the 5th Defendant sought for a permanent injunction to restrain the Plaintiff from trespassing, alienating, leasing, selling, charging or interfering with the 5th Defendant's possession of the suit property. Further, the 5th Defendant sought an order to declaration that the survey plan. F/R No. 222/24 in respect of L.R Number 16123 together with Deed Plan number 16887 are unlawful and fraudulent and ought to be cancelled that a declaration that the 5th Defendant's Survey Plan F/R number 87/21 in respect of L.R No. 10172 together with Deed Plan number 13649 be declared as legal. The 5th Defendant also sought for an order directing the Land Registrar to cancel the title to certificate no. 226 of L.R No. 16123 as well as the costs of deprivation of the use of the suit property.
163. The Learned Counsel submitted that in response to the 5th Defendant's Amended Defence and Counterclaim, the Plaintiff filed a Reply to the 5th Defendant's Amended Defence and Deference to Counter - Claim which was dated 12th March 2021 and was filed on 15th March 2021. The Plaintiff also filed a Notice of Preliminary Objection to the 5th Defendant's Counterclaim which was dated 6th December 2021 and filed 7th December 2021. The Learned Counsel went on to submit that this case appears complicated but it was very straightforward. It was a case involving two rival, parallel and competing titles and the court was called upon to decide which of the two should stand. It was a case where one party (the 5th Defendant), after obtaining a court Judgment awarding him compensation for the suit property and an order that he surrenders his title, continues to agitate rights which he no longer has over the suit property.
164. The Learned Counsel stated that the following were not disputed issues:-
- i. The Plaintiff held title Number L.R No. 16123 while the 5th Defendant held title number L.R No. 10172.
 - ii. Both L.R No. 16123 and L.R No. 10172 refer to the same parcel of land physically – the suit land.
 - iii. The Plaintiff's title was issued on 14th April 1992 and therefore was earlier than the 5th Defendant's title which was issued on 24th April 2009.
 - iv. The 5th Defendant filed the Civil Case Number ELC (Mombasa) No. 116 of 2011 in which the 5th Defendant was awarded damages of a sum of Kenya Shillings Fourteen Million Six Seventy



Seven Thousand and Ninety Nine and Sixty Eight cents (Kshs. 14,677,039.68/=) and was ordered to surrender his title bank to Britana Oils Limited, the 6th Defendant herein.

165. In accordance with the Learned Counsel, the two (2) issues were for the determination by the Court. These as per the Learned Counsel were as follows:- Firstly, whether the 5th Defendant had any interest in the suit property. The Learned Counsel submitted that the 5th Defendant had no interest in the suit property. The 5th Defendant filed ELC No. 116 of 2011(see the judgment at page 5 of the Plaintiff's Bundles of Documents dated 14th April 2016). The 5th Defendant prayed for and was awarded compensation for the purchase price of the suit property plus expenses incurred to pay certain professionals totaling to a sum of Kenya Shillings a sum of Kenya Shillings Fourteen Million Six Seventy Seven Thousand and Ninety Nine and Sixty Eight cents (Kshs.14,677,039.68) and the 5th Plaintiff was ordered to surrender his title. The Judgment delivered by this Court in ELC No. 116 of 2022 stated at Paragraph 18 as follows:

“When he [the 5th Defendant] filed this suit, he did not enjoin the said Ashok Doshi or Sigma Developers Ltd whose names appears in the second title. Neither did he sue the director of survey. I have also perused the plaint and find that he has not assigned any blame on the owner of this second title. Instead he has blamed the 1st Defendant inter alia for misleading him to believe that the 2nd Defendant had land in CR 45738/1 which he could sell.”

166. From the above - quoted portion of the Judgment, it was clear that the 5th Defendant was not only aware of but also acknowledged the existence of the Plaintiff's title. In the said case, ELC No. 116 of 2011, the 5th Defendant never blamed the Plaintiff or its Director, Mr. Ashok Doshi for any wrong doing. Instead, the 5th Defendant blamed the Attorney General for misleading him to believe that Britana Oils Limited had land in CR 45738/1 which he could sell. The 5th Defendant prayed for and was granted compensation of a sum of a sum of Kenya Shillings Fourteen Million Six Seventy Seven Thousand and Ninety Nine and Sixty Eight cents (Kshs. 14,677,039.60) which included a sum of a sum of Kenya Shillings Twelve Million (Kshs. 12,000.000.00/=) being the purchase that the 5th Defendant had paid for the suit property and expenses he incurred.

167. The Learned Counsel referred Court to an order by this Court directing the 5th Defendant to surrender his title upon being paid and stated as follows at ultimate Paragraph of her Judgment, inter alia”:

“24. Once the Plaintiff (5th Defendant) is paid his money in full, he must surrender his title back to the 2nd Defendant. I make this order because it will be wrong for the Plaintiff to receive both the money and also keep the title in his name.”[Emphasis added].

168. He asserted that the Judgment in ELC No. 116 of 2011 was not appealed or reviewed. It was binding to date. The 5th Defendant was bound by the Judgment. The 5th Defendant already had a Judgment of a sum of Kenya Shillings Fourteen Million Six Seventy Seven Thousand and Ninety Nine and Sixty Eight cents Kshs. 14, 667, 039.60). Instead of pursuing his Judgment, the 5th Defendant was now chasing the Plaintiff for the same property that he had already been compensated for by said Judgement. The 5th Defendant could not seek redress from the court twice over the same property. Any wrong that the 5th Defendant suffered was already remedied in the said Judgment. The 5th Defendant no longer had any right capable of being agitated as far as the suit property was concerned. He could only pursue the Judgment delivered in his favour to the conclusive end by executing for the money awarded to him.



169. The Learned Counsel averred that it was for the above reason that when the 5th Defendant served his Counter - Claim, the Plaintiff filed a Notice of Preliminary Objection dated 6th December 2021 and filed on 7th December 2021 on the following grounds:
- i. The prayers sought in the 5th Defendant's Counter - Claim were barred by the doctrine of “stare decisis’ because the 5th Defendant’s rights and interest in the suit property was determined in the ELC (Mombasa) Case No. 116 of 2011.
 - ii. The prayers challenging the Survey Plan and Deed Plan for LR. No. 16123 and the order seeking the cancellation of the title for L.R. No. 16123 were all statute barred by limitation.
170. Having been compensated for the suit property in the Civil Case ELC (Mombasa) No. 116 of 2011, the 5th Defendant no longer had any interest on the suit property and the 5th Defendant's rights over the suit property were already extinguished by the said Judgment and were therefore barred by “the doctrines of Stare decisis and Res Judicata” and this Honourable Court lacked jurisdiction to grant the orders sought by the 5th Defendant in his Counter - Claim. The Learned Counsel urged the Honourable Court to disallow the Counter – Claim by the 5th Defendant.
171. Secondly, which of the two rival title deeds were valid. The Learned Counsel asserted that was only the 5th Defendant who challenged the Plaintiff's title. The other Defendants never challenged the Plaintiff's title. As the Learned Counsel had already pointed out, the 5th Defendant was already compensated by the Judgment from the above Civil case, for any wrongs that he may have suffered regarding the suit property. He was ordered to get the money and return the title to Britana Oils Limited who was the 6th Defendant herein. In the given circumstances, it was only the 6th Defendant who could agitate any rights over the suit property. However, the 6th Defendant never entered appearance or file any defence despite being served by substituted service through publishing of the advertisement in the newspaper. Perhaps the failure to enter appearance and file defence was informed by the fact that the title for the 6th Defendant was so hopeless and incapable of being defended.
172. It was curious that the 5th Defendant who had acknowledged in the Civil Case ELC No.116 of 2011 that he was duped by Britana Oils Limited and misled by the Government choosing to only pursue the money and not the property now had changed tune in this case by purporting to challenge the Plaintiff's title. The basis upon which the 5th Defendant impugns the Plaintiff's title was that the Plaintiff committed fraud by: surveying land that already been surveyed; purporting to have different title over the same parcel of land; pretending to lack knowledge of ELC NO. 116 of 2011; and procuring undated Part Development Plan (PDP) with interior motive. The 5th Defendant contended that although the Plaintiff's title was the first to be issued, the Deed Plan used to procure the Plaintiff's title deed was prepared on 3rd November 1988 while the Deed Plan for the 5th Defendant's title was prepared on 7th April 1992. From the face value, it would appear that what the 5th Defendant is saying on the dates of the deed plans was true. However, on close scrutiny, the contrary was true.
173. First, the Plaintiff's title No.16123 was issued on 14th April 1992 (see page 38 of the Plaintiff's Bundle of Documents) and therefore was earlier in time than the 5th Defendant's title No. 10172 which was issued on 24th April 2009, 17 years later (see page 27 of the 5th Defendant's Bundle of Documents). Secondly, it was not true that the suit property had two Deed Plans as the 5th Defendant alleged. The Deed Plan for the Plaintiff's title No. 16123 is Deed Plan No.161887 (see page 14 of Mr. Kiguru's Survey Report). It is the only valid deed plan for the suit property. The Deed Plan for the 5th Defendant's title No.10172 was Deed Plan No. 136419. That Deed Plan was not for the suit property. Mr. Kiguru in his Survey Report dated 22nd November 2021 and the Director of Surveys in his Report dated 6th May 2022 proved that



- Deed Plan No. 136419 belonged to a totally different property being L.R. No.10174 and not the 5th Defendant's title (see page 37 of Mr. Kiguru's Survey Report).
174. The Learned Counsel submitted that in the report dated 6th May 2022 by the Director of Surveys, it was observed as follows on the third page, paragraph 1:
- “The Deed Plan prepared by the Director of Surveys in respect of Parcel of Land Number L.R. No. 10172 is Deed Plan Number 72871.”(Emphasis added).
175. The report by the Director of Surveys clearly showed that the Deed Plan that was prepared for the 5th Defendant's title L.R. No. 10172 is Deed Plan No.72871 and not Deed Plan No. 136419 which was used to illegally and irregularly procure the 5th Defendant's title. Therefore, it was clear that the suit property never had two Deed Plans because Deed Plan No.136419 which the 5th Defendant was relying on belonged to a totally different property (L.R. No. 10174).
176. Thirdly, the Survey Report by Mr. Kiguru dated 22nd November 2021 as well as the report dated 6th May 2022 by the Director of Surveyors which was filed in court by the Attorney General clearly showed that Deed Plan No.136419 was cancelled in the year 1970 and the suit property was converted to Government Land (“GL”) [see page 30 of Kiguru's Survey Report). At page 12 of Kiguru's Report there was big map FR. NO 115/88 which clearly showed on the bottom right caption that “Plan of L.R. Nos. 10169-72” were cancelled in 1970 by Plans for “Plan of L.R. Nos. 12068-76”. The 5th Defendants title number L.R. No. 10172 fell in the series which were cancelled. In his report dated 6th May 2022, the Director of Survey observed as follows on the third page Paragraph 3:
- “Notably, the cancellation of the survey of Parcel of Land Numbers L. R. Nos. 10169, 10170, 10171 & 10172 is indicated in the bottom right caption of the Cadestral Plan Number F/ R No. 115/88.....”
177. It meant, therefore, that other than the fact that 5th Defendant's purported Deed Plan No.136419 was for a different title (L.R. No. 10174), the said Deed Plan was cancelled way back in the year 1970 and the same could not therefore be used to procure the 5th Defendant's title in the year 2009. It was important to point out that all the parties relied on the same set of maps. The maps contained in the Plaintiff's Surveyor Report were the same ones contained in the 5th Defendant's Survey Report as well as the report of the Director of Survey dated 6th May 2022 filed by the Attorney General.
178. For the reasons discussed above, it was clear that the 5th Defendant's title was fatally defective, illegal and invalid because it was procured fraudulently using a Deed Plan that belonged to a different title (L.R. No. 10174) and which in any event had been cancelled way back in the year 1970. On that score alone, the 5th Defendant's title deed could not stand and must suffer only one fate, revocation and cancellation. The Learned Counsel urged the Honourable Court to revoke and cancel the 5th Defendant's title L.R. No. 10174 and to validate the Plaintiff's title deed which not only came earlier than the 5th Defendant's title but was regularly and lawfully processed using the correct deed plan which has not been questioned or impugned.
179. The Learned Counsel held that it was important to point out that the Government of the Republic of Kenya had not complained that the Plaintiff's title was illegal. In any case, the Government was represented in this suit by the Attorney General and by the relevant departments, the 1st to 3rd Defendants, did not file a Counter - Claim seeking to revoke the Plaintiff's title. Instead, it was the 5th Defendant who was already compensated by this civil case who had asked the court to revoke the



Plaintiff's title and uphold the 5th Defendant's title despite the 5th Defendant having been ordered to surrender the same after receiving full compensation.

180. Without challenge having been received from the other Defendants apart from the 5th Defendant, they never thought this court should cancel the Plaintiff's title even if the court were to find the same to be irregular. Doing so would result in a situation where the land reverted to the State who had not sought revocation of the Plaintiff's title. The Government was clearly comfortable with the suit property remaining as private land. That was why the Government never file a Counter - Claim or even pray that the Plaintiff's title should be revoked. Therefore, the Honorable Court must avoid, at all costs, a scenario where the land reverted to the Government.
181. Finally, the Learned Counsel posited that there was one more issue to be considered as part of the submission. The 5th Defendant attacked the title Plaintiff because the Letter of Allotment showed the area was situated at a place known as Mtondia and not Bofa. Mr. Kiguru confirmed that Mtondia and Bofa both refer to one and the same place. Indeed, some of the 5th Defendant's own documents refer to both Mtondia and Bofa. For instance, at page 54 of the 5th Defendant's Bundle of Documents dated 15th March 2018 was a drawing by Archmetric Design Systems which referred to Plot No. 10172-Mtondia Kilifi while at page 58 was a receipt by Archmetric Design Systems which referred to Plot No.10172 BOFA/MTONDIA. It would be a travesty of justice for this Honourable Court to cancel the title by the Plaintiff on the basis of the challenge to the same mounted by the 5th Defendant who himself had gone to court and awarded compensation and ordered to surrender the title deed. The 5th Defendant could not have both money and the suit property.
182. In conclusion, and in viewing of the foregoing reasons, the Learned Counsel urged the Honourable Court to allow the Plaintiff's suit and dismiss the Defendants' respective defences as well as the Counter - Claim by the 5th Defendant. The Plaintiff should also get costs of the suit.

B. The Written Submissions by the 1st, 2nd, 3rd and 4th Defendants

183. The 1st, 2nd, 3rd and 4th Defendants through the offices of the Attorney General, filed their written submissions dated 23rd January, 2024. M/s. Kiti Advocate commenced the submissions on the brief facts by stating that the Plaintiff filed the suit on the 20th April 2016 vide a Plaint seeking among other prayers:-
- a. a declaration of ownership in his favour of LR 16123 CR 22493/1 and a declaration of validity of title issued to them on the 22nd April 1992.
 - b. A declaration certificate of title for LR.10172 registered as CR 45738 on 26th June 2009 in favour of Britana Oils limited is null and void having been issued irregularly and against the law.
184. The 1st to 4th Defendants filed a defence dated 28th April 2017. The 5th Defendant filed a defence dated the 9th May 2018. The Plaintiff filed a response to the 1st to 4th Defendant's Defence which was dated 4th June 2018 and another response to the Amended Defence and Counter - Claim dated 12th March 2023.
185. The Learned Counsel averred that they would rely on two (2) issues for determination. These were:- Firstly, whether the title by the Plaintiff was valid. The Learned Counsel opined that the crux of the suit being the validity of two competing titles belonging to two opposing parties before the court. They were Sigma Properties Limited a limited company owned by One Mr. Ashok Doshi against Mr. Nderitu Wachira Muriuki, the 5th Defendant. The title belonging to Sigma Properties Limited being LR. 16123 measured approximately 0.06924 Ha, while the title belonging to the 5th Defendant being LR.10172. Where there were two competing titles the court must interrogate the two with



an aim of looking into the validity of titles in order to uphold a title. To buttress on this point, the Learned Counsel cited the case of:- “Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others[2016] eKLR” stated this position as follows:

“The court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand.”

186. The Learned Counsel persuaded the Honourable Court to look at the procedures for allocation of the titles to ensure its compliance with the law to vitiate any fraud or irregularities and uphold the title that was legally and procedurally issued. The court in “Hubert L. Martin & 2 Others (Supra)” further emphasis this position by stating that reliance of on a title is not sufficient.

“The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

187. The titles being grants the process of allocation of grants must then be interrogated to show how the original owners came into ownership. The 5th Defendant had stated that his title (L.R.10172) was obtained after purchasing the same from the 6th Defendant. He further claimed that his title was valid as such was an innocent purchaser for value without notice. It was worth noting that this was not the first time the two titles were subject of a dispute. The Civil suit ELC (Mombasa)116 of 2023 dealt with the land dispute and made a Judgment awarding compensation to the 5th Defendant. In accordance with the witness statement of one Samuel K Mwangi, Land Registrar, filed on the 27th October 2023 L.R 10172 was first registered in the name of Britana Oils limited in 26th June 2009 and the same was further transferred to Nderitu Wachira Muriuki through a transfer dated 11th May 2010.

188. The Learned Counsel argued that from the records at the Survey of Kenya. This was supplied to the court and detailed in their letter dated 28th October 2022 and filed on the 2nd November 2022. From this history the land parcel 10172 was first surveyed and indicated in cadastral plan number F/R 87/21 and survey computation number 10265. The grant survey was for parcel L.R 10161 to 10177. This was however cancelled, and a new survey was done targeting Land Reference Numbers 10169,10170,10171 & 10172 which was prepared as Cadastral plan number F/R 115/88 survey computation 13910. The title L.R 10172 was accompanied by the Deed Plan Number 136419 as seen from the 5th Defendant’s list of documents. However, from the records at the survey of Kenya, Deed Plan No. 136419 was actually issued for land LR 10174. This was evidenced from the report of the office of the surveyor at page 4, in the form of the letter dated 28th October 2022. The report of the survey of Kenya also produced the register of Deed Plan from April 1959 to October 1988 which led to clearly showed the discrepancy in between the alleged title and the actual deed plan belonging to LR. No. 10174.

189. According to the Learned Counsel, there could only be one conclusion from this finding. The conclusion being that the title issued for LR 10172 was not valid. While a look at the Title by the petitioner, LR number 16123, there was a clear trace of records of the particular survey and Deed Plan that resulted into the allocation of the grant. The first survey of the Land was done in 29th May 1959 as depicted in Cadastral Plan number F/R No.87/21. This created the land as LR No. 10172 with Deed Plan 72871 which was seen in Map 2 in the Plaintiff’s list of documents. The suit parcel of land was seen in Cadastral plan Number F/R No.115/88 (map number 3 in the Plaintiff’s supplementary list of Documents). It was adjacent to the road and clearly marked as GL depicting government ownership as



at that time and the area demarcated being 0.6924 Ha. Further the parcel was surveyed on the 2nd April 1992 in F.R 222/24 that produced Deed Plan No. 161887 (this was map number 4 in the Plaintiff's Supplementary list of Documents). The new survey converted the property into L.R No. 16123.

190. Secondly, whether the 5th Defendant had any interest in the suit property. The Learned Counsel submitted that the 5th Defendant instituted a suit, ELC (Mombasa) No. 116 of 2011 as against the Attorney General and the 6th Defendant. In the suit he sought compensation. The matter was heard and concluded with the 5th Defendant being awarded compensation for payment for the parcel of land. The Honourable court in its wisdom refused to declare the title by the 5th Defendant as a valid title noting that the Plaintiff (herein), Sigma Developers Limited was not enjoined in the suit.

191. According to the Counsel, it went without saying that once a party was compensated for a sale of land that never materialized they then relinquished their claim to the said land. The Honourable Court in ELC 116 of 2011 "Nderitu Wachira Muriuki – Versus - Attorney General & another [2015] eKLR" stated as much:

"Once the Plaintiff is paid his money in full, he must surrender his title back to the 2nd Defendant. I make this order because it will be wrong for the Plaintiff to receive both the money and also the keep the title in his name."

192. From the proceedings in the Civil case ELC (Mombasa) No. 116 of 2021, the court should impugn ill motive on part of the 5th Defendant who was not interested in acquiring the title to the Land but sought only compensation and yet now claimed ownership of the same piece of land in the current suit. Furthermore, it was suspicious that his title was accompanied by a Deed Plan belonging to another parcel. The court could only deduce and should make such an inference that the 5th Defendant understood that his title was irregular and hence sought compensation rather than ownership. The Learned Counsel referred the Court of Appeal case in "Samuel Kamere – Versus - Lands Registrar, [Kajiado Civil Appeal No. 28 of 2005 [2015] eKLR]" stated as follows:-

"...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a Valid and Legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property....."

193. Further, in order for one to benefit from the defence that one was a bona fide purchaser of land, a purchaser shall now be required to take such steps as necessary to investigate the history of the land and "go to the root of the title" as opposed to simply concluding that the title held by the seller is evidence of the seller's absolute and indefeasible title. Such steps could include:

- a. requesting the Letter of Allotment and similar documents in certain cases where a question on whether the land could be public land could arise;
- b. undertaking customary searches at the Lands Office and requesting for an inspection of the files in respect of the Property at the Lands Office;
- c. engaging a surveyor to undertake appropriate searches at the Survey of Kenya.

194. It was the Learned Counsel's submission that they never deliberately open two parallel files as stated by the Plaintiff. The parcels files were opened in different years apart and assigned different numbers thus it would not have occurred to the 1st Defendant that they referred to the same parcel of land. Further as



had been demonstrated by the 2nd and 3rd Defendants, the Deed Plan number refer to different parcel of land.

195. In conclusion therefore, the Learned Counsel submitted that the 1st, 2nd, 3rd and 4th Defendants prayed that the prayers sought by the Plaintiff as against the Defendants be dismissed by this Honourable court.

C. The Written Submissions by the 5th Defendant

196. The 5th Defendant through the Law firm of Messrs. Andrew Loketo Kariu Advocates filed their written submissions dated 20th February, 2024. Mr. Kariu Advocate commenced his submissions by stating that this Honorable court orders for the dismissal with costs of Plaintiff's suit with costs to the 5th Defendant. The Plaintiff moved this Honourable court claiming ownership of title which they submit based on the doctrine of the root of title and the law, the Plaintiff's title was a bogus title.
197. According to the Learned Counsel, the main issues for determination were firstly, which of the two titles before the court being L.R. NO. 10172 and L.R. NO.16123 were an authentic one. He averred that from the Letter of Allotment for the L.R. No 10172 belonging to the 5th Defendant which was produced in evidence stated that it was an allotment for the said surveyed Plot L.R No. 10172. This survey was done in the year 1970 during the re-planning period of L.R. Nos. 10169, 10170, 10171 and 10172. Therefore, he emphasised that the said Letter of Allotment was the specific one for "A Surveyed Plot". The Learned counsel stressed that the said plot was surveyed in the year 1959 and once land is surveyed the land remained surveyed, as it never ceased (d) to be surveyed. After this beach properties were allocated to members of the public in the year 1958. The 5th Defendant purchased a property from the 6th Defendant after carrying out all the due diligence of the title for valuable consideration and paid for it in full devoid of any fraud. During the prosecution of this matter no evidence whatsoever was ever produced by any party in this suit challenging the legality of this title.
198. With regard to the title L.R. No. 16123, the Learned Counsel submitted that the title derived its existence from a Letter of Allotment of "Un-surveyed" residential plot in 'Mtondia', Kilifi in favour of one Mr. Makaka dated 11th March 1992. On further scrutiny of the said Letter of Allotment, Deed Plan, survey and the constituent title by the Plaintiff, the following adverse comments were made. These were:-
- a. The said Letter of Allotment which generated the Plaintiff's title - L.R No. 16123 was bogus and bore no evidential value. It could not be relied upon by this Honourable Court in support of the Plaintiff's title.
 - b. The said Letter of Allotment had numerous irregularities and illegalities which rendered it not to confer any legal rights enforceable by this Honourable court.
 - c. The Letter of Allotment produced by the Plaintiff in evidence never had the standard format as the one used by the Ministry of Lands at this time. The 5th Defendant through the testimony of his 4th Witness DW - 6, Mr. Livingstone Gitau produced in his expert report two (2) samples of the standard form in the expert report marked as "E1" and "E2".
 - d. The term of the lease commenced before the issuance of the letter of allotment (1st March 1992 while the letter of allotment was dated 11th March 1992) which were irregular and illegal).
 - e. The exact location where the plot was situated. The Plaintiff's letter of allotment of L.R. No 16123 referred to (Unsurveyed Residential Plot "mtodia" Kilifi). Indeed, it was an undisputed fact, supported by evidence that, the suit land was a beach plot. Therefore, the letter of



allotment referred to a residential plot could which should not be accepted by this Honourable court. Clearly, it was superimposed from a residential area and now the Plaintiff referred to it as a beach plot.

- f. The Letter of Allotment was muddled. It was not only illegible and unclear but was not of any evidential value to support any claim by a party on claim of ownership of land. It was not a genuine Letter of Allotment.
- g. The Letter of Allotment of un-surveyed plot, as a standard practice must have Part Development Plan (PDP) attached to it showing which plot was being allocated, its location and area. The PDP allowed the Land Surveyor who is surveying the “un-surveyed plot” to be able to identify the un-surveyed land location on the ground and its shape. The Letter of Allotment by the Plaintiff never had a PDP attached to it. It was actually a photocopy of a Deed Plan and not a PDP as claimed by them. The PDP was missing.
- h. The Plaintiff’s surveyor, Mr. Kiguru, both in his evidence in chief and under cross-examination stated that he was taken to the ground by the Plaintiff. This was clear demonstration of a party who was fraudulently preparing/ manufacture documents to support the land they were interested in (grabbing). However of the Plaintiff’s surveyor Mr. Kiguru had indeed visited the suit land he would have established that the land was already surveyed. The land purported surveyed by Mr. Kiguru was private surveyed land and therefore unavailable for allocation within the meaning of Section 2 of the Government Lands Act(now repealed) as it that was already surveyed land surveyed in the year 1959, following the allocation of beach plots in that area in the year 1958 as evidenced stated by the Regional Surveyor in court in the Civil Case ELC (Mombasa) 116 Of 2011. It was undisputed fact that the beacons of both the 5th Defendant’s land and the Plaintiff’s land as they currently lie, were the same i.e. as installed in the year 1950 suffice to emphasis of the Plaintiff’s surveyor in his survey nor evidence alluded that nor state that he had placed beacon on the property he allegedly surveyed.
- i. The Letter of Allotment by the Plaintiff had the words registered as a normally just a line below the title of the form “Republic Of Kenya”. The name was somewhere to the left and substantially below this Title. The telephone number of the Ministry was usually permanently written on the form as 718050/9 used by lands office i.e. 728060. Hence, it brought in the fact that this was not a government standard form of the Letter of allotment.
- j. The rates due and payable were not demanded as provisional the rates then were on demand.
- k. Among the offices upon which the Letter of Allotment was copied to on the second page. These were the offices the Town Planning Adviser Nairobi a title that no longer existed. This ‘Title’ ceased to exist in the late sixties after the creation of the department of physical planning, under the Director, within the Ministry of Lands and Settlement.(see the comparable Letters of Allotment produced by DW - 6 in his report as evidence in this matter).
- l. The Plaintiff’s allotment Letter was of UNSURVEYED RESIDENTIAL PLOT- “MTODIA” KILIFI as against the 5th Defendant plot L.R. No10172 which was located on beach land known as BOFA/KILIFI town. These were two different areas.
- m. It was trite law that a letter of allotment had no transferrable proprietary rights. The Plaintiff’s letter of allotment was alleged to have been transferred from Mr. Makaka to Sigma Developers Limited but the devoid of consent of the Commissioner of Lands. How could he have sold something which did not belong to him?



- n. The Plaintiff's allotment letter transfer had been without the specific approval and consent of Commissioner of Lands so that informal transfer was rendered a fraudulent and illegal transfer and a nullity in law.
 - o. The Commissioner of Lands lacked the necessary legal authority to allocate the Plaintiff private land which had been surveyed as un-surveyed plot. As the same had ceased been public land in the year 1958 as evidence in folio 8 of the Plaintiff's list of documents captured a testimony of Regional Surveyor, Mombasa.
 - p. No transfer of land more so a letter of allotment could be done without the specific approval and consent of Commissioner of Lands. Therefore, this was fraudulent and illegal transfer.
 - q. The Plaintiff witness Ashok, stated that Mr. Makaka had never been a shareholder nor a director of the Plaintiff's company. Therefore the letter produced by the Plaintiff authored by Mr. Makaka to the Commissioner of Lands, stating that Mr. Makaka was transferring the allotment to his company Sigma Developers Limited was a misrepresentation of facts and falsehood letter rendering this transfer an illegality.
 - r. The alleged allottee Mr. Makaka never fulfilled the critical terms and conditions of the Letter of Allotment issued to him but failing to formally accept the same as formally demanded by that letter together with conditions attached there so as to constitute a contract between the allottee and the government. In other words at no time was he seized of any interest in the said piece of un-surveyed land which he could transact on for himself or even dispose to others.
 - s. On the second page of Plaintiff's letter of allotment, it referred to two references. This court could not rely on that allotment letter as the court was unable to discern which of the two referenced numbers belonged to the allotment letter i.e. the letter of allotment has reference No.54188/IV/44 and reference No.54188/IV/46. Thus which of the references was to be utilized to cause the issuance of the Plaintiff's title which the Plaintiff now sought to issue a judgement in its favour.
199. The Learned Counsel relied on the Black's Law Dictionary Ninth Edition at Page 731 which also defines 'fraud' as:-

“A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.”

The definition of fraud it then follows that there were deceitful, misrepresentation and falsehood peddling to the Commissioner of lands by the Plaintiffs' which included acts of providing documents that were not genuine or whose authenticity was in doubt. Thus, that amounted to fraud.

The Learned Counsel averred that the Plaintiff had produced in their evidence in folio 50 in the Plaintiffs list of documents “informal transfer” as exhibit. His contention was that in law there was no legal instrument to demand under the provision of Section 34 of Registration of Titles Act Cap 281. Instead, there must be a transfer in to look at that “informal transfer” the same was void in law in the absence of an application and or letter written by an allottee requesting the Commissioner of Lands for consent to transfer an allotment letter stating the reasons the allottee desires for an transfer of an allotment letter. To buttress on his point, the Learned Counsel relied upon the case of “Munyu Maina – Versus - Hiram Gathiha Maina, Civil Appeal No.239 of 2009”



200. Additionally he referred Court to the case of:- “Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 Others [2015] eKLR” the, that court held that:-

“.....it will not provide succor for any crook using forgery, deceit or any kind of fraud to acquire a legal and valuable title deceitfully” and the Learned Counsel submitted that from this decision, the Honourable court should not uphold the Plaintiff title as the title was fraudulently acquired.

201. Secondly, with regard to the Deed Plan. The Learned Counsel submitted that this Honourable court critically observes the two Deed Plans for the Plaintiff and the 5th Defendant properties:

- (a) From the casual look they look completely identical.
- (b) Distance and bearings are exactly the same.
- (c) The areas are exactly the same.

202. The Learned Counsel invited the Honourable court to take judicial notice that when, the Registrar of Titles Mombasa gave the land which were both identical/similar, and on the same ground position. They both referred to the same place It was trite law that once a parcel of land was found to have two Deed Plans only the Director of Survey could cancel the Deed Plan once he was made aware of two Deed Plans. However the Learned Counsel asked the Honourable Court to take note that the Deed Plan for L.R. No.10172 was signed and sealed on 3rd November 1988 while that of L.R. No.16123 was signed and sealed on 7th April 1992.

203. The Learned Counsel submitted that the 5th Defendant Deed Plan having been issued first was the correct one. As it was a tenet of law that ‘the first in time, first in right’ whoever recorded the deed first owned the property. The 5th Defendant’s Deed Plan for L.R. No.10172 was unchallenged and had never been cancelled. Therefore the latter Deed Plan being that for the Plaintiff ought to have been cancelled as it super imposed itself on the 5th Defendant’s land. Thus, the Learned Counsel invited this court to find that a title borne out of an superimposed Deed Plan of another was an invalid title as it is irregular and illegal title. It was imperative to state the Plaintiff witness PW - 3 despite having carried out the survey of the Plaintiff’s parcel of land had never written to the Director of Surveys complaining of the allegations he was making against the 5th Defendant. The Learned Counsel averred that, in his testimony there were wild and baseless allegations lacking any legal backing and ought to be disregard by this Honourable court.

204. The Learned Counsel asserted that the registration of L.R. NO. 10172 should have been effected before Registration of L.R. NO. 16123 since it had an earlier Deed Plan no 136419 which had a latter Deed Plan no 161887. To him, this would have been in the natural flow of things. He submitted that once any land or a party had been issued with a Deed Plan there was no demand in law nor a time limit within which they ought to cause the registration and issuance of the title. Suffice it to say, a Deed Plan was actually the title of a property as a holder of a Deed Plan and the entries contained in it actually contained the information which was lifted so as to be entered on the title document. In other sense, a title which is supported by a Deed Plan could not exist without a Deed Plan attached/stitched on it.

205. According to the Counsel, it was further to be noted that by law only the Director of Survey could issue Deed Plans. They were issued sequentially. Therefore, whenever there were two conflicting Deed Plans, it was the one with a higher number in law that prevailed. There was no law nor time limit set for registration of a Deed Plan. Therefore, it was no wonder that the registration of the Plaintiffs parcel of land even though bearing a latter Deed Plan no. 161887 was done earlier than the 5th Defendant parcel



of land which bore the earlier Deed Plan no. 136419 and that act never made the Deed Plan number of the 5th Defendant title of L.R.NO. 10172 and illegality.

206. Thirdly, on the issue of the title deed. The Learned Counsel submitted that, the 5th Defendant's title of L.R. NO. 10172 CR 45738 was registered on 26th June, 2009 while the Plaintiff's Title for L.R.No.16123 CR 22493 was registered on 29th August 2002. However, as earlier noted the Deed Plan for L.R. NO. 10172 was signed and sealed on 3rd November, 1988 while that of L.R. No. 16123 was signed and sealed on 7th April, 1992, and since the Deed Plan was the beginning of the registration process. Then there was everything normal that the of Title of L.R. NO.10172 would had been done earlier.
207. The Learned Counsel contended that on further scrutiny of two competing Titles, the titles for L.R. NO. 16123 had the following irregularities/illegality:-
- a. The embossing of stamps were placed in such a manner that they obliterated the Title Number. That is to say, one could not be able to tell which Title number it was. This was abnormal as a title should speak for itself. It appeared to insinuate that either the embossing was done in a hurry or it was done by a quack.
 - b. Sigma Developers limited were to hold any land allocated to them for a term of 99. This was extremely strange that the Letter of Allotment they relied upon as the root of their title was dated 11th March 1992. This was not tenable in law. One could not have a letter of allotment issued after that land has a commencement date of the lease. The issue was who owned the land for the ten (10 days before the Letter of Allotment was issued to the Plaintiff? The answer is the Plaintiff letter of allotment could not support the ownership of the parcel of land claimed by the Plaintiff nor could the title held by them support the allotment letter. The Learned Counsel submitted that the only tenable and logical answer was that the allottee had the parcel of land beforehand which they were working with as so as to cause the:
 - i. Acceptance;
 - ii. Any payments in the letter of allotment,
 - iii. Surveying of his land and the preparation of the deed plan for registration and issuance of the parcel number.

The Learned Counsel submitted that it was not legally possible for any Deed Plan, title deed to be generated from such a Letter of Allotment. Such a title would be a fraudulent and illegal title and ought to be canceled in the interest of justice.

208. It was also noteworthy that the Plaintiff had produced documentary evidence in support of his case which caused confusion in support of his of the registration of the Letter of Allotment of the two different legal entities who were communicating and times registered as the Plaintiff's suit land owners. The parties which are communicating and exchanging letters were at times Doshi Ironmongers Limited while at other times they wrote to Mr. Doshi of Sigma Developers Limited. The Plaintiff in this suit had introduced three legal entities which were all claiming to have interest on the suit property namely Doshi Ironmongers Limited, Sigma Properties Limited (see folio 22 to 33) and Sigma Developers Limited.
209. In folio18 the Plaintiff was still purporting to be paying for the purchase of a Letter of Allotment of an un-surveyed plot vide a letter dated 29th April 1992 whereas the property that they claim to be purchasing vide an Letter of Allotment had a Deed Plan and actually a registered title which was already issued on the 7th April 1992 and registered on the 14th April 1992.



210. As far as the Learned Counsel is concerned, what dislodged the Plaintiff's title was the document in folio 21 of the List of Documents by the Plaintiff written on the 23rd June, 1992. While Mr. Makaka was informally transferring the Letter of Allotment to the Plaintiff herein, the title of the parcel of land claimed by the Plaintiff should be a transfer document. On the contrary, there was no transfer document offered by Mr. Makaka which was a nullity in law and a clear manifestation of a fraudulent land acquisition process commenced and perpetrated by the Plaintiff.
211. He reiterated an issue already stated numerously above that in Folio 26 of the List of documents by Plaintiffs showed that the purchaser of L.R NO 16123 were buying a beach plot not the parcel of land in the Letter of Allotment which was a residential plot. He stressed that there was a distinction between a beach plot and residential plot. The person paying stamp duty was Doshi Iron Mongers Limited and wondered for they were paying the stamp duty. To him this was a fraud as stamp duty was only payable to the government after a transfer. In the instant case, the property was already in existence and there was no transfer documents produced in evidence to support the payment of stamp duty.
212. The Learned Counsel posited that the registration of a title from the time of issuance of the Deed plan to signing of the grant by the Commissioner of Land took about Three (3) months. But the Plaintiff wanted this Honourable court believe that in a record of five (5) working days, the Deed Plan in the custody of the Plaintiff's went through the following process detailed below of registration and issuance of a title deed. Suffice to emphasis that the procedure of the processing a Deed Plan into a grant was as evidenced by the 5th Defendant herein below;
- i. Signed and seal the Deed Plan on 7th April at survey of Kenya at Ruaraka, Nairobi;
 - ii. The Deed Plan was sent from Survey in Ruaraka to the Commissioner of Lands in Ardhi house for verification;
 - iii. The Commissioner of Lands verified that the survey was conducted on the land as per the letter of allotment as stitched to the PDP;
 - iv. The Commissioner of Lands endorsed the Deed Plan and send it back to Director of Survey at Ruaraka for the Deed Plan to be sealed;
 - v. The Director of Survey send it back to the Commissioner of Lands in Ardhi house for further verification by the Senior Planning Records Officer (SPRO).
 - vi. The SPRO send the Deed Plan to the Chief Land Registrar to initiate the preparation of a new grant.
 - vii. The process of preparing a new grant commenced. Upon completion of the process, the new Grant was issued by the Chief Land Registrar.
213. The Learned Counsel submitted that the Court should take judicial notice that the New Grant to the Plaintiff was registered at 10.00 am on the 22nd day of April, 1992 as evidenced in folio 14 while the Plaintiff submitted that the New Grant for registration on the 22nd day of April at 10.10 am as evidenced in Folio 13 of the List of documents by the Plaintiff. The Learned Counsel submitted that it was not humanly impossible but also anomaly, as the Plaintiff never came into contact with the grant until it had been registered by the Registrar of Lands Mombasa, suffice to say Kenyan Post office physically and vide registered post.
214. As the official occurrence of the registration process was that the Chief Land Registrar forwarded the (in this case the Plaintiff) and at no time does the new grant to be issued to the allottee of land came in contact with the new grant until it was registered in the relevant lands offices concerned. However



the Plaintiff's in his evidence and documents produced in court of the new grant (title) formally issued to him to submit, the booking form, in folio 13 submitted as evidence was a clear demonstration of a fraudulent title registration process. Needless to emphasize that the title by the Plaintiff was not backed by any records as archived in the lands office in the Mombasa Lands office as stated by the evidence of Registrar of the 1st Defendant who tendered evidence in court. He averred that with the above glaring anomalies the title for L.R No. 16123 could be described as a legally obtained title.

215. In support of their submissions, the Learned Counsel relied upon the court of appeal findings in the case of:- "Palace Investment Ltd – Versus Geoffrey Kariuki Mwenda & Another (2015) eKLR", where the judges of Appeal held that:-

“Denning J.in Miller – Versus - Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say;-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probabilities are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.”

216. The Learned Counsel opined that the Plaintiff had not discharged their burden of proof to warrant a Judgement in their favour. He submitted that as a general preposition the legal burden of proof lied upon the party who invoked the aid of the law and substantially asserts the affirmative of the issue under Section 107(i)of the Evidence Act, Chapter 80 Laws of Kenya. Furthermore the evidential burden was cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That was captured in Section 109 and 112 of law that proof of that fact shall lie on any particular person. The Plaintiff never discharged that burden. He failed to demonstrate how the 5th Defendant as an innocent purchaser for value fraudulent acquired their title to the contrary they submitted that under Section 108 of the Evidence Act provides the burden lies in that person who would fail if no evidence at all were given as either side. On the other hand, the 5th Defendant had demonstrated evidential that the Plaintiff title as pleaded in their Counter - Claim was acquired fraudulent and together with article 40 (6) of the Constitution.

217. Fourthly, on the issue of survey. The Learned Counsel submitted that the most absurd occurrence in this matter, was that the very same surveyor who had prepared the Plaintiff as PW - 2, to give an expert evidence of his own work he had carried out while working in the knowledge, skills, education, or experience in a particular field who was called upon to provide their issues. To the Counsel, an expert witness's duty was to give to the court an impartial opinion on particular respected expert witness, one must embody the four key pillars: knowledge and expertise, impartiality and objectivity, effective communication, and adherence to ethical standards. Their duty should be a scientific function of collecting, testing, and evaluating evidence and forming an opinion as to that evidence and communicating that opinion and its basis to the Judge which the PW - 3 never did any of this. The Plaintiff's expert witness PW - 3 could not be deemed as an expert witness but a witness who was called to defend his survey work. Thus, as the learned Counsel argued was found lacking and an illegality on the following grounds:-

- a. The Plaintiff brought in expert witness to give evidence but the expert witness actually emerged to be the author and architect of all the fraudulent activities which bore the Plaintiff title. Mr.



Kiguru was not an expert opinion but the evidence of the culpable person who was the author of the scheme that manufactured the Plaintiff's title.

- b. The survey work conducted by him which resulted to Deed Plan of L.R No. 16123, if done professionally and ethically, he would have noticed that land he was purporting to vide the Letter of Allotment as presented by the Plaintiff for survey lied on a parcel of land which had already been surveyed. He should have proceeded to inform and advise both the allottee and the Director of Survey of that anomaly and not proceed with any survey and continue to create a Deed Plan.
- c. Despite of him being aware of this anomaly to date both the Plaintiff and his surveyor, the PW - 3 never took any steps to address the anomaly which they found in survey. To the Learned Counsel they were aware that their survey work was bogus.

From the above three points, the Learned Counsel stated thus:-

- a. How could the Director of Surveys authenticate the Plaintiff's survey when he had the cadastral plans F/R 87/21 and F/R 115/88 with him? Noting that the survey that contained the survey of the Deed Plan that generated the Plaintiff's title was not only unavailable in the government records but had and was never been produced in any court dealing with the issues of the two titles herein.
- b. That there was no PDP attached to the letter of Allotment thus how did the surveyor go to the site and decipher the shape of the plot? The surveyor was taken to site by the allottee, who happened to have known this extra plot from the re-planning and this was why the surveyor did not bother about the location of the plot whether it was in Mtondia or in Bofa Beach.
- c. The surveyor if indeed independent and using the Letter of Allotment as the authority to carry out this survey, would have noticed some or all the irregularities /illegalities highlighted in this report. After the Learned Counsel submitted that any survey more so of a surveyed plot one of was Director of surveys did not notice this? The Learned Counsel submitted that the Plaintiff to-date had never had LR. No. 16123, or to initiate the process of surveying the alleged allotment letter. What he gave were not the records for this survey as they were not with the Director of Surveys who was the custodian of these records as testified by.
 - i. The Regional Surveyor in the year 2015.
 - ii. The Regional Surveyor in the year 2023.

This showed that the Plaintiff was asking this court to award orders in their favour with the relevant government agencies involved in the land not having any documents in their custody. The Learned Counsel submitted that on the Director of Surveys Letter in respect of the issues before this Honourable in court to the attorney General touched on a number of issues now produced before this court the Learned Counsel submit that on.

218. Sixthly, on the re - planning part of F/R 87/21. The Learned Counsel submitted that:-

- a. The Director of Survey wrote a letter on 11th May,1970, the Director of Surveys received had received a New Grant Survey executed by one Mr. Christopher Lugogo which Survey represented a re-planning and Resurvey of parcel of Land Numbers 10169,10170,10171 and 10172 as previously Surveyed and shown on cadastral Plan Number F/R 87/21. This statement has the following issues;
 - i. How could he have done so without the Director of Surveys direction since you say "you received" implying you had no prior knowledge of this survey.



- ii. The Director of Surveys appreciated that the area had been planned surveyed and alienated. The Director was very much aware that once land was alienated. It became private land and for the Government to deal with it, it must invoke compulsory acquisition. How was the Government carrying out a re-planning on private properties? He talked of the letter by the Commissioner of Land reference numbers 30434/4 dated 31st October, 1969 as the authority but failed to attach this authority letter.
- iii. The Director of Surveys never produced the authority for carrying out this survey which was mandatory for carrying out any survey. The Learned Counsel submitted that without any authority in support of the survey of 1970 makes that re - survey illegal.

How did the Director of Surveys accept that this was new grant survey when he had already in his custody at his disposal the survey contained F/R 87/21? Therefore the government survey was manufacturing evidence to support the Plaintiff's case evidence devoid of any legal backing.

- b. The director vide a letter CT 52/334 seem to imply that the Commissioner of Lands had only asked for survey of plots "A – J" but what came out was an authorized remainder that was not planned i.e. the survey exceeded its mandate.
- c. Further the PDP that the Director of Survey produced in this court as evidence for this re-planning had some issues:-
 - i. It was not of the current format of PDP produced by the Ministry of Lands and wondered where it came from.
 - ii. The PDP was re - planning the whole area and introduced a residential over private land whereas the whole area had been planned Beach plots.

In a nutshell, the Learned Counsel submitted that the survey of the year 1970 was not a government project.

- 219. According to the Learned Counsel, the above shortfalls of the re-planning as said above notwithstanding, the re-planning after taking a way plot A-J was surveyed and had an area of 0.6924Ha which he numbered as L.R No 10172. The Director of Survey having numbered this remainder L.R NO.10172, it was the same plot that was allotted to the Britana oils Limited who later transferred it to Ndiritu Wachira Muriuki. The Learned Counsel submitted that Plot L.R No.10172 had never been cancelled as alleged by the Plaintiffs. Therefore, it meant that when the Director of Surveys wrote that LR No. 10172 was cancelled, he had not gotten the knowledge of the record the Director of Surveys kept. In accordance with F/R155/88 the parcel of land LR NO 10172 with an area of about 1.0279Ha surveyed in 1959 is what was cancelled but the parcel of land LR NO 10172 with an area of about 0.6924 surveyed in 1970 was not cancelled, and that was the plot that was allotted to Britana oils Limited.
- 220. From the above issues on this re-planning it was the Learned Counsel's considered opinion that this re-planning was not done by the Government, but it was the owners' of LR NO 10169, 10170 and 10171 who wanted to amalgamate these plots and then sub - divide them into smaller plots that were easy to sell. According to the Learned Counsel, it was during the preparation of their PDP that a plan was hatched to defraud the owner of Plot LR No.10172 as surveyed earlier in 1959 by cunningly introducing a road between the plots being amalgamated and LR. No 10172. This meant that LR No. 10172 had to surrender some land for this road. For this plan to succeed, it had to be made to be a



- Government project because of interfering with a private property LR No.10172. This was why there were many issues raised above nonetheless that notwithstanding the re-planning was done and parcel of land number LR. No 10172 was created.
221. On this point, the Learned Counsel relied on the Judgment of the civil case ELC at Mombasa Case No. 116 of 2011. Particularly, the Learned Counsel submitted that it was undisputed fact that all the documentary evidence produced by the 5th Defendant to prove his case were unchallenged and they all the authenticity the legality of the claim for ownership of L.R. NO. 10172 by the 5th Defendant. The Registrar of Titles Mombasa as witness DW - 1 in the Civil case ELC (Mombasa) No. 116 of 2011 testified in relation to the two Titles in dispute namely; CR 22493 L.R. No. 16123 which he stated was registered on 29th August 2002 and CR 45738 L.R. No. 10172 registered on 26th June, 2009. He told 45738 was currently registered in the name of Ndiritu Wachira Muriuki but on the ground they both refer to the same parcel which he described as an anomaly.
 222. According to the Learned Counsel, DW - 2 (the Regional Surveyor Mombasa county) testified on 23rd July 2015 by stating that L.R plots ranging from L.R No. 10161 to 10177. He also stated that the map in the Registry contained plot L.R No.10172. He told court that there was a re-arrangement of plots bearing numbers L.R.No.10161-10172. He also said that plots created here were L.R No. 12068 to 2076 but not L.R No.16123. Thus the Counsel wondered from where did Plot emanate from as it was not within the offices of the legal custodian of all survey records in Republic of Kenya i.e. Director of Survey.
 223. He reiterated that this could also be noticed on the undated PDP alleged produced by department of land as the Learned Counsel submitted that the government never produce undated documents. (Attached for ease reference E 4 in report of the Surveyor Livingstone Gitau).It is also to be noted that the PDP purported to authorize the survey of plots as per F/R 115/88 had a few comments. It never had the format of the Department of Physical planning of the Ministry of Lands and it interfered with an already surveyed area. Which was not normal.It was further noted that the plan 115/88(attached E 11)which created the new plots as alleged by the Plaintiffs' did not show plot L.R No.16123.
 224. DW - 2 stated that the subsequent survey of 155/88 (attached for ease of reference E11) altered part of the initial survey of 1959 from LR. No. 10161 to 10172 but never cancelled the initial survey as it only affected part of it. He further testified that records relating to the Deed Plan of year 1992 i.e. for L.R. NO.16123 never existed in the Registry. He further testified that it was not possible to have two Deed Plans for one plot. That one had to be cancelled. That there was no evidence of the cancellation of the 1988 Deed Plan or the 1992 Deed Plan as they same is done formally and no letter had been produced by any of the witness who tender evidence that indeed there was a cancellation of the deed plans in the year 1988 as alleged by the witness. The Learned Counsel submitted that it was an afterthought and the evidence concocted by the witness in furtherance of their evidence in their defeat the 5th Defendant's title and support the Plaintiff's fraudulent title.
 225. He wondered how this could happen. The answer to that was that once the survey practice if such situation arose the latter survey was canceled since it was the one that overlaps the older one. The Learned Counsel submitted that the Plaintiff's Deed Plan was number this whereas the 5th Defendant is number. Therefore they stated the Plaintiff which was the latter deed plan and ought to be cancelled and they invited the court to cancel it.
 226. On the evidence, the Learned Counsel submitted that the 5th Defendant the Plaintiff herein title and ownership of the suit land was fraudulent on the following grounds:-



- a. The 5th Defendant witness Justus Muriuki DW - 3 evidence stated that when he visited the suit property on 31st December 2010 so as to show his son Wachira Nderitu DW - 4 the parcel of land he had bought for him under the Power of Attorney he met a gentleman known as Mr. Kakwili alias “Crocodile” constructing a perimeter fence who later produced a copy of the Plaintiff’s title of the same parcel of land. That it was in a meeting between DW - 3, DW - 4 and Kakwili (agent of the Plaintiff) agreed to stop further construction of the fence until the issue of the title deed was sorted out.
 - b. The Plaintiff witness – 1 Mr. Ashok Doshi’s evidence and pleadings were a falsehood as they stated they only got to know of the dispute of this land in the newspaper notice in the year 2011 of the 5th Defendant’s award. The Plaintiff could not therefore, pretend that he was never aware of the steps taken by the 5th Defendant in more she cannot plead that he only learnt of the suit when he saw it in the newspaper advert.
 - c. The Plaintiff’s title deed never existed in government office records as evidenced by the several government officers who have testified in this Honourable court in the Civil Case ELC (Mombasa) 116 of 2011 and also in this suit. But of special emphasis is the continued lack of records of the Plaintiff title documents in support of their legality and custody in the government records.
227. On the law. The Plaintiff’s evidence was that he purchased the property from Mr. Makaka. The Learned Counsel submitted that if that was the case the Plaintiff never produced any sale agreement entered between the Plaintiff and Mr. Makaka. It was trite law that any agreement to sell land must be deduced in writing. This is tenet of all transactions of land under the provision of Section 3(3) of Chapter 22 of the Kenyan Law of Contract. The [Law of Contract Act](#) clearly defines the requirements for a valid instrument convey an interest in land with an agreement reduced in writing has been a fundamental requirement in this case. The Learned Counsel further submitted there was none and therefore no privity of contract between the Plaintiff and Mr. Makaka. Additionally, there was no genuine and legal Letter of Allotment from the government to Mr. Makaka in relation to the suit property so as to proof the origin of the Plaintiff’s title. Their submissions were supported by reported case of “Mike Maina Kama – Versus - Attorney General [2017]eKLR”.
228. On what constitutes a licence. The Learned Counsel contended that there was no transferable interest of licence. It was trite law that one could only transfer what he/she owned. Thus, Mr. Makaka never owned any parcel of land which was transferable to the Plaintiff. A Letter of Allotment in law was a license which had no transferable interest and best constituted an offer by the government. Until such time the title was issued when it was deemed that an acceptable. They submitted that the Plaintiff as alleged by his agents in this suit had to prove his root of title is proper. He had not produced any Letter of Allotment which could assist the Honourable Court i.e. he had produced some document which was illegible and incoherent and now invited this Honourable Court to believe that this was his Letter of Allotment. Further they stated that there was no evidence on record that Mr. Makaka accepted the Letter of Allotment by written reply and paid any monies to the government as demanded by law once a party was issued with an allotment. Therefore, the Learned Counsel submitted that Mr. Makaka never met the terms and conditions of any Letter of Allotment to constitute an acceptance of the offer letter of allotment that may have been issued to him. Hence, any land born out of such letter of allotment in favour of the Plaintiff was a nullity in law.
229. But even if they assumed he had accepted the offer, the title born out of that transaction was a fraudulent transaction for the following reasons:-



- a. A Letter of Allotment was not transferable. Mr. Makaka fraudulently held out that he was the owner of the Plaintiff's company Sigma Developers Limited yet he was not an owner or Director as per PW - 1 herein witness testimony.
 - b. A Letter of Allotment by definition was a formal document issued by the government authority or land owner to confirm the allocation of a piece of land to a person or a company.
 - c. The alleged initial Letter of Allotment in this matter was issued to Mr. Makaka. There was no evidence on record showing how a letter issued to an individual could have been transferred to another person. As a general proposition the legal burden of proof lies upon the party who invoked the aid of the law and substantially asserts the affirmative of the issue that was the purport of the provision of Section 107 (i) of the *Evidence Act* Chapter 80 Laws of Kenya. The fact that the Plaintiff never called upon Mr. Makaka to tender evidence under the provision of Section 150 of the *Evidence Act* Cap. Of the Laws of Kenya despite of him being available. It was by inference also a clear demonstration that he had something to hide from.
 - d. On fraud, there was no evidence placed by the Plaintiff before the court to show that the land was transferred to Sigma Developers Limited. The Plaintiff witness PW1 Ashok Shah stated on oath that Mr. Makaka was not a director of the Plaintiff's company. It was trite law that the individual was an independent entity from the company.
 - e. The title issued by the Registrar of Titles - the Plaintiff's title for L.R No 16123 was obtained fraudulently. It could not be sanitized by this court as it fell short of the protection for which the Plaintiff sought protection of his title under the provision of Section 23 (1) of the Registration of Titles Act.
 - f. The alleged original allotment was dishonest and fraudulently caused the Land Registrar to transfer the Letter of Allotment to a company that he never owned.
 - g. The alleged title registered in the name of the Plaintiff herein was a fraudulent title as it was not backed by or authenticated neither by the Director of survey nor by the records held by the Director of Survey. Any title which never had records backing it in the director of survey offices and the Registrar of titles office was a nullity.
 - h. Any transfer of land in Kenya could only be done using an instrument known as transfer was nullity in law and an illegality. The Plaintiff had fraudulently purchased the land for a lower value than what he disclosed to the Commissioner of Land. This was fraudulent.
 - i. Mr. Makaka fraudulently lied to the registrar that he was transferring land to himself whereas he had never been an owner of Sigma Developers Limited.
230. The Learned Counsel averred that the Plaintiff's title could be legally challenged in law, on the grounds that it was in this suit actually proven fraud and misrepresentation in the root of title acquisition by the Plaintiff. It was trite that the registration of a person. The holding of such title was not absolute as the same may be impeached under certain circumstances. He referred Court to the provision of Section 26 (1) of the *Land Registration Act*, which provides;

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or



endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

He stated that this Honourable Court had held in numerous occasions that once fraud imputed in the root of title, such a title fell under the category of titles that must be impeached and any protection under by law. Such a title must then be lifted once the Court holds that there was fraud and misrepresentation of facts. In the case of:- “Alice Chemutai Too – Versus - Nickson Kipkurui Korir & 2 Others [2015] eKLR”, the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

- 231. The Learned Counsel submitted that having found and held that the Certificate of title held by the Plaintiff was procured by fraud and therefore null and void must then determine whether the said title could be cancelled. The Learned Counsel submitted that this Honourable Court could cancel the Plaintiff’s title under the provision of Section 80(1) of the [Land Registration Act](#), No. 3 of 2012.
- 232. On the reply to the 1st, 2nd, 3rd and 4th Defendants’ submissions, the Learned Counsels submitted that the submissions were biased and skewed. It failed this Court in determination of issue Two (2) titles as they were geared towards supporting the Plaintiff’s suit. It was a clear manifestation and confirmation by a party who fraudulently now colluded with the Plaintiff to defeat the 5th Defendant’s title despite having participated in previous suit wherein they supported the 5th Defendant title deed. He wondered what changed.
- 233. He affirmed that the 1st, 2nd, 3rd and 4th Defendants had abrogated their role to Defend this suit, as their agencies and more so the 1st Defendant never produced any iota of evidence to provide this the bona fide owner of the two (2) competing titles. The Learned Counsel submitted that all records of lands were stored and archived in the offices of the 1st, 2nd, 3rd and the 4th Defendants’ offices; the failure by them to produce the correspondence file of the documents of the Plaintiff title documents as archived in the lands office as demanded by law was a clear demonstration that the Plaintiff parcel of land was not backed up by any valid letter of allotment ever issued to them nor by government records as demanded by law.
- 234. The Learned Counsel further submitted it was trite law that any party who failed to produce evidence in support of their case a matter was deemed by law unable to prove his case. All government records more so in relations to private registration were public documents under the provision of Section 79 of the Evidence Chapter 80 Laws of Kenya. The government was the custodian of all land records. Therefore, the failure by the government to produce evidence of the records of the title as contained in the Register of Titles. The Learned Counsel submitted that this was an admission that they had no



records of L.R NO 16123 CR. 22493/1 and therefore was a confirmation that the title was a fraudulent and bogus title which ought to be cancelled by in limine. The government could not rely, more so the 1st, 2nd, 3rd and the 4th Defendants could not rely on the authenticated documents produced by the Plaintiff in support of the Plaintiff's Case as they were accused of being fraudulent in their actions by the Plaintiff.

235. The Learned Counsel submitted that their submissions were actually in admission of the fraud. Therefore this Honourable court should order that the Plaintiff pays for the costs incurred by the 5th Defendant in this suit. To buttress on his point, the Counsel cited the case of:- "Hubert L. Martin & 2 Others – Versus -Margaret J. Kamar & 5 Others [2016] eKLR", where the Court held that;

"A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.

236. According to the Learned Counsel, in its entirety safe to say that the onus was on the 1st, 2nd, 3rd and 4th Defendant to prove that the root of the title as derived and owned by the 5th Defendant, as purchased from the 6th Defendant was a fraudulent title as the 1st, 2nd and 3rd Defendants were the sole custodians of all titles document. The Court ought to disregard and dismiss their submissions hereto in total and continue to uphold the 5th Defendant title as been upheld by a similar court of similar jurisdiction with this Honourable Court.

237. The Learned Counsel asserted that the Plaintiff's title was not a sacrosanct title as they alleged. As the Plaintiff's land title although he alleges that it was first registration, time and time again this under *the constitution* if acquired fraudulently. The Learned Counsel submitted that *the constitution* under Article 40 of the Kenyan Constitution has demystified land the doctrine of first registration more so is the land was acquired by fraud and misrepresentations. The Learned Counsel argued that the Plaintiff's land is not a first and indefeasible registration owing to the fraud and misrepresentation as the Plaintiff's land was acquired fraudulently.

238. The 5th Defendant had produced evidence and been in occupation of his parcel of land from the date he purchased in the year 2009, land having done the following things to improve on his land i.e. he had applied and installed water, applied for electricity and applied for sub division from Kilifi county and contracted an architect to design and build three houses. The Plaintiff only assumed possession after the Plaintiff had instituted the suit in 2011. The Plaintiff could not be relied upon to say the truth more so since the Plaintiff and the 5th Defendant's witness Mr. Justus Muriuki met on the first instance in the year 31st December 2010 on the contested land building a wall prior to the commencement of this suit. It was therefore false evidence tendered by the Plaintiff's witness that they only learnt of this suit after the matter was reported on the Daily Nation as he alleged. The Plaintiff's land herein was acquired in total disregard of all the legal processes of acquiring land and the Learned Counsel submitted that his title is not supported by any legal process as he alleged.



239. The Learned Court urged this Honourable court not to grant the Plaintiff the declaration orders sought as all order can only be granted based on law. The Plaintiff's title was devoid of legal process. The Learned Counsel submitted that it was trite law that once land had been surveyed could not be re-surveyed nor a letter of allotment issued on a land purporting it to be un-surveyed whereas the records show that the land was surveyed as alleged by the Plaintiff in their testimony in this suit. The root of the title allegation as alleged by the Plaintiff and 1st, 2nd, 3rd and 4th Defendants actually dislodges the Plaintiff's own title, as the root origin of any title that commenced the survey by the Director of Survey. The 5th Defendant was surveyed earlier than the Plaintiff, and therefore the mere registration of the Plaintiff's land before the 5th Defendant's land never rendered his title first in time.
240. The Learned Counsel averred that even assuming that the 5th Defendant's title deed plan was erroneous as alleged by the Plaintiff herein the continued existence of the 5th Defendant's Deed Plan sanctifies the Plaintiff's land as it was trite law that once a Deed Plan on a parcel of land had been issued unless cancellation by the Director of Survey it continued to be valid legal document authenticating the parcel of land.
241. The Director of survey had tendered evidence in the past in a prior the Civil case ELC (Mombasa) No. 116 of 2011, stating that the 5th Defendant's title was legitimate, and thereafter an order issued by this Honourable court in favour of the 5th Defendant upholding his land title which remained unchallenged nor appealed against by even the 1st, 2nd, 3rd and 4th Defendants. The Learned Counsel submitted that the pen-ultimate findings of the ruling of Honourable Justice claim compensation. The 5th Defendant had elicited to keep his title of the land and position which was in favour of the Plaintiff's matter; neither could this Honourable court force the 5th Defendant herein to take up the compensation of his land. This Honourable Court never cancelled his title in suit "ELC (Mombasa) No. 116 of 2011 and that order today remained un-challenged or appealed against.
242. Therefore, the Learned Counsel submitted that this court ought to take judicial notice of that judgment contained therein and orders ensuing thereafter which the 5th Defendant relied upon wholly in his evidence and submissions in this case. This court was being asked through the back door by the Plaintiff to render judgement in the Plaintiff's favour whereas the Plaintiff had not discharged their burden of proof. The 5th Defendant was in occupation of the suit land prior to the forceful interruptions by the Plaintiff when they filed this suit.
243. On the issue of costs. The Learned Counsel contended that it was trite law that costs usually follow the events. Section 27 of the [Civil Procedure Act](#), Cap. 21 gives the Court discretion to grants costs. The 5th Defendant was entitled to costs in this suit as he was dragged into this suit by the Plaintiff whereas the Plaintiff claimed that the 5th Defendant was awarded costs on his land. He wondered why the Plaintiff file the suit against the 5th Defendant if not to vex him and if indeed he believed that he had no claim on the suit land as he alleged.
244. In conclusion, the Learned Counsel submitted that from the aforestated the Plaintiff's entire suit ought to be dismissed by this Honorable court as it lacked merit with costs to the 5th Defendant. He held that their entire submissions were fortified by the Supreme case of "Torino Enterprises Limited – Versus - Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment)" and other wherein faced with the myriad of similar issues for determination similar to this suit upheld the position that the 5th Defendant had maintained in this suit. The Learned Counsel further submitted that their title was genuine and legal. That by way evidence they had proved their root of title as been legal and also 'by way of been bona fide purchaser for value. They therefore prayed that their Counter - Claim ought to be granted as prayed for and request the Honourable court to



grant the 5th Defendant the prayers sought as outlined in the counter claim against the Plaintiff and 1st, 2nd and 3rd, 4th and 5th Defendants jointly and severally.

VII. Analysis and Determination

245. I have keenly assessed the filed pleadings by all the parties herein, the written submissions, the myriad of cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
246. To enable the Honorable Court arrive at an informed, fair, equitable and reasonable decision, the Honorable Court has crystallized the subject matter into the following four (4) salient issues for its determination herein. These are as follows:-
- a. Whether the suit by the Plaintiff through the filed Plaint dated 14th April, 2016 and the Plaintiff in the Amended Counter Claim dated 13th October, 2021?
 - b. Whether the 5th Defendant's counter claim is sustainable?
 - c. Whether the Plaintiff is entitled to the orders sought?
 - d. Who bears the costs of this suit and the Counter claim?

Issue No. a). Whether the suit by the Plaintiff through the filed Plaint dated 14th April, 2016 and the Plaintiff in the Amended Counter Claim dated 13th October, 2021?

247. Under this sub title, the Honourable Court, perceives the main substrata of this matter, and as the Learned Counsel for the Plaintiff rightfully puts it, it is rather straight forward though deducing the issues appear rather complex as being – which of the two conflicting title deeds is valid and legal and hence who is the entitled legal and absolute registered owner to the suit land. Simply put, between the Plaintiff and the 5th Defendant herein who has the indefeasible title, rights and interest as vested in law to the suit property. Separately, each of these two parties wish to have this Court declare who is the lawful owner of the suit property. When a person's ownership to a property is called into question, it is trite that the said proprietor has to show the root of his ownership. See the case of “Hubert L. Martin & 2 Others (Supra) where the Court of Appeal held that:-

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

248. Additionally, in the case of “Munyu Maina (Supra), as already cited by the Learned Counsel for the 5th Defendant, the Appeal Court held that:-

“We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality



of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

249. From the very onset, the Honourable Court wishes to underscore the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.

250. I have noted that the Certificate of Title Deed for the suit land here was issued in under the Registered Titles Act, Cap. 281 (Now Repealed). Thus, the relevant provisions would be Sections 23 (1) to wit:-

“The Certificate of title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of land is the absolute and indefeasible owner thereof subject to the encumbrances, easement, restrictions and conditions contained therein or endorsed therein, and the title of that proprietor shall not be subject to challenge, except on ground of fraud or misrepresentation to which he is proved to be a party”

Section 24 of the Act provides that:-

“Any person deprived of land or of any interest in land in consequence of fraud or through the bringing of that land under the operation of this Act, or by the registration of any other person or proprietor of the land or interest or in consequence of error or misdescription in any grant or Certificate of title or any entry or memorial in the register, or any certificate of search, may bring and prosecute an action at law for the recovery of damages against the person upon whose application the land was brought under the operation of this Act, or the erroneous registration was made, or who acquired title to this interest through fraud, error or misdescription.

251. However, considering that the Registered Titles *Land Act*, Cap. 281 has now been repealed, based on the saving Clause under the provision of 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 and which I will be dealing with in a more elaborate manner later on. 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”

The said 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” .

Having stated that, the Provisions of Section 7 of the *Land Act* No. 6 of 2012 provides the said methods on how titles may be acquired in Kenya.

S. 7 Title to land may be acquired through:-



- i. Allocations;
- ii. Land Adjudication process;
- iii. Compulsory acquisition;
- iv. Prescription;
- v. Settlement programs;
- vi. Transmissions;
- vii. Transfers;
- viii. Long term leases exceeding Twenty one years created out private land; or
- ix. Any other manner prescribed in the Act of Parliament.

252. In order for this Honorable Court to effectively deal with the afore stated the main issues of conflicting titles by the Plaintiff and the 5th Defendant, I wish to commence by citing the provisions of Sections 24, 25 and 26 (1) of the [Land Registration Act](#) Verbatim as follows:-

The registration of person as a proprietor vests in them the absolute rights and privileges.

Section 24. 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; and
- (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 or expressed agreements, liabilities or incidents of the lease.

25. Rights of a proprietor.

- (1) “The rights of 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 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) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register”.

However, this registration of land is not absolute as a person must prove that the said registration was one that was in accordance with the law and the laid down procedures as stated out under the provision of Section 26(1) of the [Land Registration Act](#), No, 3 of 2012.

According to the provision of Section 26 (1) of the [Land Registration Act](#) (2012), it provides as follows:

“ A Certificate of Title issued by the Registrar upon registration shall be taken by all courts as a prima facie evidence that the person named as proprietor of the land is the absolute and



indefeasible owner, except on grounds of fraud, misrepresentation, illegality and corrupt scheme.

Section 26(2) provides that

“certified copy of only registered instrument signed by the registrar, shall be received in evidence in the same manner as the original”.

As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme. The import of the provision of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions. That is to say, this is where the Certificate of Title is doubtful, suspect or obtained by fraud or forgery unprocedurally, illegally or corrupt means or by mistake or omission as envisaged under the above provision of Section 26 (1) of *Land Registration Act*, No. 3 of 2012. See the cases of “Joseph Komen Somek - Versus - Patrick Kennedy Suter ELC Eldoret Appeal No. 2 of 2016 (2018) eKLR and Alice Chemutai Too – Versus - Nickson Kipkurui Korir & 2 Others [2015] eKLR”, where the Court held that:-

“It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme

I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists.”

253. As may be observed, the law is extremely protective of title and provides only two instances for the challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.
254. The import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, un-procedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) is to protect the real title holders from being deprived of their titles by subsequent transactions.
255. From the facts of this case, the Plaintiff produced his Certificate of Lease for LR No. 16123 and Deed Plan No. 161887 registered on 14th April, 1992 for 99 years while that of the 5th Defendant for LR No. 10172 and Deed Plan No. 136419 was registered on 24th April, 2009 – close to 17 years thereafter. The steps to be followed in allocation of Government land were laid down in “Abdi Mohamed Kahiya – Versus - Fatuma Haji Kasim (2019) eKLR” as follows: -
1. An application is made to the County Council under which the subject plot is situated.



2. The application then goes through an allocation committee who carry out their independent investigation as to the availability of the property by preparing a ground report which reveals whether there are occupants occupying the property or not.
 3. The Physical Planner also prepares a Part Development Plan to ascertain the position on the ground especially on whether the plot is occupied or not. After the PDP is published, the Director of Physical Planning submits the same to the Minister for approval.
 4. If the Committee is certain about the availability, it then recommends and sends a recommendation to the Full Council Meeting where the same is either adopted or rejected.
 5. Should the full Council adopt the recommendations, then minutes are forwarded to the Commissioner of Lands for the purposes of issuing a letter of allotment in accordance with the PDP.
 6. The Applicant is then to make an acceptance of the offer by making payments and fulfilling the conditions set out in the letter of offer.
256. Who between the Plaintiff and 5th Defendant or the 6th Defendant has certainly shown the root of their title? The brief facts of the case as per the plaint are that at all material to this suit, the Plaintiff was and still is the registered owner of all that piece of land known as L.R. No.16123 measuring 0.06924 hectares and situate in the North of Kilifi Town in Kilifi County (hereinafter also referred to as ‘the suit property’) pursuant to a Grant of Lease issued to the Plaintiff by the Government of Kenya for a term of ninety-nine (99) years from the 1st day of March 1992. The suit property is delineated on Land Survey Number 161887. Before registration in the Plaintiff’s name, the suit property was unregistered but the interest, title and rights thereto vested on one Mr. Makaka as the beneficial owner thereof by virtue of a Letter of Allotment Reference 54188/IV/4and dated 11th March 1992 issued to the said Macdonald Makaka by the Commissioner of Lands. Sometime in the month of April 1992, the said Macdonald Makaka agreed to transfer his interest, rights and title over the suit property to the Plaintiff for a consideration of a sum of Kenya Shillings Nine Hundred Thousand (Kshs. 900,000.00/=). The parties duly executed a Transfer on 9th April 1992 under which it was agreed that the Grant/Lease in respect of the suit property would be issued directly to the Plaintiff. Hence, when the land was registered, the Grant was issued directly in favour of the Plaintiff. This means that the lease by the Plaintiff would have expired on 8th April, 2091.
257. When PW - 1, Ashok Doshi, a director in the Plaintiff company, was cross examined he stated that he acquired the property on 14th April, 1992. He confirmed that it first on letter of allotment was on 11th March, 1992 and their informal transfer. The 1st Development Plan (PDP) they were issued with on signed 12th March, 1992. The Letter of allotment was issued to Makaka and then to them. They made the payment to the Ministry of Lands, by a bankers cheque for a sum of Kenya Shillings Fifty Six Thousand Three Seventy Thousand (Kshs 56,370/-) and a receipt issued No. C278227 dated 1st April, 1992 it’s through these documents that enable him acquire the title through their lawyer.
258. According to the Plaintiff’s advocate, the plaintiff’s title number was 22493/1 which number I have confirmed from the documents attached to the Plaint as Plaintiff’s exhibits. According to the Plaintiff he had bought the land on 9th April, 1992 and the deed plan was issued on 7th April, 1992. The title for the 5th Defendant was attached at page 9 for title issued on 3rd November, 1998 which deed plan for the 5th Defendant came earlier but it was through fraud.
259. The 5th Defendant on the other hand contended that the Plaintiff herein has no proprietary interest real or imaginable in the suit property known as L.R. No.10172. The Plaintiff Title and the land survey



number therein are legally nonexistence and cannot warrant, attach or attract any Proprietary interest on the suit land upon the plaintiff as claim.

260. In the case of “Hubert L. Martin & 2 Others (Supra), as referred to Court by the Learned Counsel for the 2nd, 3rd and 4th Defendants, Munyao J held as follows;

‘ A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.’

261. It is trite law that when there are two competing titles, the first in time will prevail. This position was emphasized in the case of “Wreck Motors Enterprises – Versus - The Commissioner of Lands and Others Civil Appeal Civil Appeal No. 71 of 1997”, where the court held that:

‘ Where there are two competing titles the one registered earlier is the one that takes priority’

262. The same position was held in the case of “Gitwany Investment Limited – Versus - Tajmal Ltd & 3 Others (2006) eKLR” where the Court held that:-

‘the first in time prevails, so that in the event such as this one whereby a mistake that is admitted, the Commissioner of Lands issues two title in respect of the same parcel of land, then if both are apparently and on the face of them issued regularly and procedurally, without fraud save for the mistake then the first in time must prevail’

263. DW - 1 told the Court that his report in relation to the suit property dated 6th May, 2022 requested by the Attorney General requested for the surveyor to clarify the following issues:-

- a. What was the cause of the double allocation and registration of land?
- b. Which is the legal and valid deed plan?
- c. Which of the two-competing title LR. No. 16123 and 10172 is legal and valid?
- d. Any facts disclosing fraud mistakes collection or corrupt scheme on the two titles?

264. DW - 1 told the court that after he got the letter he prepared a report dated 6th May, 2022. On the maps he told the court that the parcels were surveyed – FR 87/21 Survey was done in the year 1959, there were 17 parcels. The survey was prepared and approved Plan Parcel No. 10172. In May 1970, the Director of Survey called for re-survey and re – planning for parcels Numbers LR No. 10169, 10170, 10171 and 10172. They are contained in FR 115/88 and has 10 parcels. That is 12068 to 12078. The main parcel was renamed “GL” meaning land for Government land. Indeed, a road reserve measuring 15 metres was created and in essence the land was reduced in size. The effect is that those parcels No. 10169 to 10172 – FR 88/21 were cancelled. Those parcels are inscribed there and the changes was noted on the MAP. He further told the court that there had been 4 parcels creating 10 parcels and a



Road hence the acreage changes in size. The 10 parcels were 12068 to 12078 and A “GL”. FR 115/88 there was a 15 meters road reserve + “GL” i.e. the parcel of 1970. There was no number. “GL.” meant Government Land. Further there was a further survey in 7th April, 1992 – Deed Plan No. 16123. Parcel No. 10172 ceased to exist. The Director requested that for the two deed plans to be send to him for the authentication which of the two was genuine. The Deed Plan number which was assigned by the Director of Survey. From the Deed Plan for 10172 is alleged has been issued on 3rd November, 1988 that raised questions as it happened much later after the original parcel had been cancelled. The coordinates – the beacons are not identical. From the road there was some space that remained. He produced the report dated 6th May, 2022 as “Defence Exhibit 1”.

265. According to the DW - 1, from the Report Plot No. 10172 was cancelled meaning it ceased to exist and therefore cannot be used for registration. When referred to the Letter dated 1st June, 1998, the witness told the Court that at Page 51 of the 5th Defendant list of documents the property LR No. 10172 was not available as it had been cancelled. The Deed Plan ought to have been cancelled. According to him from his report at page 3 paragraph 1, the Deed Plan no. 72871 for 10172. It would not be possible to allocate the same parcel using a different deed plan numbers. With reference to page 24 of the 5th Defendant list of documents bundle, the witness stated that the title deed for Land reference no. 10172 and deed land plan no. 136419 which was not mentioned in his report. According to the witness from the report by land surveyor report page 37 it showed the deed plan no. 136419 it showed it was for the title no. Land Reference No. 10174. From the face of it, it appears to be a document from the Director of Surveys Offices.
266. The Land Registrar for the 1st and 4th Defendants confirmed to the Court that it was the allottee that went to their registry who registered the 1st and 2nd property being (a) CR No. 22493 and (b) CR. No. 45938 respectively. From their records in the order of the registrar priority, CR. No.22493 was the first registered in the names of the Plaintiff - Sigma Developers Ltd given on 22nd April, 1993. The summary of this matter was of two copies. The first registration meant when the documents were brought from Nairobi. The Deed Plan No. 161887 with an area of 0.6924 HA was attached to that title issued on 7th April, 1992. According to her the second land reference was registered by her office for 10172 whose CR. No. 4573, with an area of 0.6924, for deed plan 136419. From their observations there were two different title numbers with different owners and therefore the issue of double allocation cannot exist.
267. Looking at the evidence adduced by DW - 5, the report did not have the Deed Plan. In the new one they still did not have the Deed Plan for land reference no. 10172 and land reference no. 10174. They had authority to re-survey and re – planning as they had attached the letter dated 21st July, 1970 by the Director of survey. He told the court that they had further provided a deed plan registries for October 1956 and 3rd to 19th October, 1988 which new information was in the report. They were still not able to trace the survey plan for land reference no. 16173. What they had was a deed plan only which showed the information per the land reference number. Hence his conclusion was that his report was now complete save for the few documents which he had indicated were still missing.
268. According to the witness when referred to the bundle of documents by the 5th Defendant, the title number was 10172; at page 6 the deed plan number was the land survey plan number which was 136419 for land reference no. 10174. Hence his conclusion from the report was that the deed plan annexed to the certificate of title held by Ms. Ndritu Wachira Muriuki as deed plan number 136419 in respect of Parcel of Land Number Land Reference No. 10172 is not authentic. Once a Deed Plan was issued the number could only change if it is – re-issued or re-surveyed or a surrender. The Deed Plan for parcel No. 10172 – the re-grant was in 1970. The Deed Plan that was issued in 1958 was not the same, i.e. for parcel No. 10172. Parcel No. 10174 it was given Deed Plan No. 72873. The Deed Plan for 1988 – Land Reference No. 10174 was given 136419, as per the Register of Survey and Deed



Plan. Plans No. 727231 – 74502. There can be never be two Deed Plans of one parcels. Should there be more than one Deed Plan the one that was issued first taken precedence. In the case of parcel No. 10172 the Deed Plan in 1959 and the Survey Plan was done 1958. He did not find any computation without computation one cannot generate a deed plan.

269. In the course of the hearing and penning down this this Judgement extensive reference to the Civil Case - Environment and Land Case 116 of 2011 – “Nderitu Wachira Muriuki - Versus - Attorney General & another [2015] eKLR” has been made. The Judgment delivered on 27th November, 2015, by my sister Justice Lady Anne Omollo. The Honourable Court was clear on its orders as below:-

“ 23. Consequently, I am satisfied that the Plaintiff has proved his case as regards prayer (a) of the Plaint and enter Judgement in his favour forthwith jointly and severally against the Defendants plus interest at Court rates from date of filing this case till payment is made in full. On the prayer for exemplary damages, the Plaintiff has not indicated what pain or damage he has suffered as a result of the Defendants action beyond the monetary loss pleaded thus this claim fails. The costs of the suit is also awarded to the Plaintiff.

24. Once the Plaintiff is paid his money in full, he must surrender his title back to the 2nd Defendant. I make this order because it will be wrong for the plaintiff to receive both the money and also the keep the title in his name.”

270. Upon causing intensive assessment to the surrounding facts and inferences in this matter, I strongly hold that the Plaintiff’s title was the first in time and reiterate as equity teaches in its maxim that:- “when two equities are equal, the first in time prevails”, then the Plaintiff’s title deed was the first in time and should prevail there having been no evidence called by the Defendants to challenge the same. Indeed, apart from the 5th Defendant, the 1st, 2nd, 3rd and 4th Defendants seem to be in support of this legal position whatsoever. It is clear from the Judgment on ELC Suit No. 116 of 2011 that the 5th Defendant was no longer the owner of L.R. No. 10172 as the land does not exists and hence not available to be utilized by any individual as we speak.

271. Ordinarily, no land should be registered more than once and having two separate title deeds held by separate persons. Therefore in this case, there must be one title deed which is genuine and one which was issued either unlawfully or through mistake and thus double allocation. Balancing the two competing titles, it is my view that the Plaintiff hold the good title to the suit property. The title of the 5th Defendant in my view and in the absence of evidence to rebut the same from the purported former owner the 6th Defendant could only have been obtained either by fraud, or by the mistake of the Land Registrar or both.

Issue No. b). Whether the 5th Defendant’s counter claim is sustainable?

272. Under this sub title, this Honourable Court ill examine if the 5th Defendant’s counter claim is sustainable. On 27th October, 2021, the 5th Defendant filed an amended Defense and Counter claim pursuant to leave by the Honourable Court Granted on 12th October, 2021 dated 13th October, 2021.

273. The 5th Defendant prayed for the Plaintiff’s suit to be dismissed with costs and judgment be entered in favour of the 5th Defendant as prayed for in the counter claim:-

a. The 5th Defendant seeks a permanent injunction to restrain the Plaintiff from trespassing, alienating, leasing, selling, charging or otherwise interfering with the 5th Defendant’s possession of land known as L.R. Numbers 10172 situated in Kilifi.



- b. The 5th Defendant counter claim against the Plaintiff for a declaration that survey plan being F/R No.222/24(computation not found in) in respect of L.R. Numbers16123 together with ought to be cancelled: and a declaration that the 5th Defendant's survey plan F/R number number 13649 be declared as legal and that the Director of Surveys should amend the survey records accordingly.
- c. That an order do issue directing the Chief Land Registrar to cancel the title to certificate no. 226 of the parcels of land L.R. Number 16123. The Plaintiff does pay the 5th Defendant the cost of deprivation of use of his property L.R. No.10172 together with costs of the suits.
- d. A declaration that L.R. No. 10172 is the rightful parcel of land to and it be returned to the 5th Defendant.

274. On the Counter claim, the 5th Defendant averred that:-

- a. The Plaintiff herein acquisition of land was tainted with illegality, fraudulent and a nullity in law. The Plaintiff's entire Plaint herein based on a claim of L.R No 16123 is a sham and tailor made to defeat justice.
- b. At all material times he was the owner and entitled to the land known as L.R.No.10172.
- c. There wereno legal provisions wherein one parcel of land can have:-
 - i. Two duly registered Deed Plans of the same property
 - ii. Two titles of the same parcel of land
 - iii. The Plaintiff's parcel of land has no records from director of survey.
 - iv. Having a title which is obliterated.

275. The 5th Defendant relied on the following particulars of fraud by the Plaintiff:-

- i. Causing the surveyor to survey land which has already been surveyed.
- ii. Purporting to have a different title over the same parcel of land.
- iii. Pretending to lack of knowledge of the 5th Defendant suit i.e. ELC 116/2011 and causing the hearing and determination of the same only for the Plaintiff to file this subsequent suit herein.
- iv. Procuring an undated PDP with an ulterior motive.

276. In the said judgment quoted by the 5th Defendant, the 5th Defendant in this case was the Plaintiff suing the Attorney General and Britania Oils Limited, in that case, the 5th Defendant alleged that he commenced the process of developing holiday homes on the suit property and that he therefore engaged structural professionals in drawing up plans for the intended holiday homes at a total cost of a sum of Kenya Shillings One Million One Fifty-Nine Thousand Six Hundred (Kshs. 1,159,600.00/=) and a further sum of Kenya Shillings One Million Five Seventeen Thousand Four Thirty-Nine Hundred and sixty-eight cents (Kshs. 1,517,439.68) in related expenses for travel approvals and preparation of development. The Plaintiff sought judgment for the purchase price of a sum of Kenya Shillings Twelve Million (Kshs. 12,000,000.00), a sum of Kenya Shillings One Million One Fifty-Nine Thousand Six Hundred (Kshs. 1,159,600.00/=) for legal and professional fees and sum of Kenya Shillings One Million Five Seventeen Thousand Four Thirty-Nine Hundred and sixty eight cents (Kshs. 1,517,439.68) on account of disbursements. The Plaintiff also sought interest on the said amounts, exemplary damages for anguish suffered and costs of the suit.



277. Additionally, from the Judgment of the Civil Case ELC (Mombasa) No. 116 of 2011, the Honourable Court held that:-

“ 14. DW - 2, Antony Munyasi, Regional Surveyor, Mombasa County, testified on 23rd July 2015. He stated that LR No. 10172 was a result of allocations done in 1958 and Deed Plans done in 1988 for several plots ranging from 10161 to 10177. He also stated that the map in the Registry contains plot no. 10172.

15. The witness told court that there was a re-arrangement of plots from No. 10161 after which the plots were given new numbers. That the re-arrangement affected plot no. 10172. That the new map is file Reference No. 115/88 which created plot nos. 12068 to 12076. That however, the new plan does not show plot no. 16123. The witness stated that he needed more time to trace the file reference for 16123 which has no indication that its number had changed.....

16. On cross-examination, DW - 2 stated that the subsequent survey of 155/88 altered part of the initial survey from 10161 to 10172 but it did not cancel the initial survey as it only affected part of it. He testified that records relating to the deed plan of 1992 did not exist in the Registry.

According to the witness, it was not possible to have two deed plans for one plot. That one had to be canceled. That there was no cancellation of the 1988 Deed Plan.

17. The evidence presented by the 1st Defendant shows there exist two Deed Plans and two certificates of titles in respect of the same plot. The Land Registrar and the Regional Surveyor told the Court that it is only the Director of Surveys who could explain this anomaly. Before the Plaintiff filed this suit, he knew about the existence of the parallel title since this is what made him file the suit. In fact, he stated that when he went to visit the plot he found a wall was being constructed. He made enquiries who was building the wall and was told that it was Ashok Doshi.

18. When he filed this suit, he did not enjoin the said Ashok Doshi or Sigma Developers Ltd whose name appears in the second title. Neither did he sue the director of survey. I have also perused the plaint and find that he has not assigned any blame on the owner of this second title. Instead he has blamed the 1st Defendant inter alia for misleading him to believe that the 2nd Defendant had land in CR 45738/1 which he could sell. In his evidence, he stated that the government guarantees the sanctity of title.

19. The Plaintiff in the oral evidence attempted to say that he wanted the Court to determine who is the valid owner of the land and in case he lost the land, he prayed for compensation for costs of legal and professional fees incurred. The pleadings did not ask the Court to determine who is the valid owner of this land and under the Civil Procedure Rules Order 18 provides that parties are bound by their pleadings and claims must be specifically pleaded. The Plaintiff in the plaint prayed for :

i. Damages amounting to Kshs 14,677,039.68/=



- ii. Interest on (i)
 - iii. Exemplary damages
 - iv. Costs of this suit
20. The Plaintiff vide his submissions filed has relied on Section 23 of the Registered Titles Act (repealed) and Section 25(1) & 26(1) of the Land Registration Act which provides of the sanctity of title and the effect of registration. The Plaintiff's advocate submitted further that since the deed plan No 16123 issued in 1992 to Sigma Developers Ltd four years after the Plaintiff's could only have been obtained by an illegality, unprocedurally or by a corrupt scheme was therefore not capable of conferring a good title. The government was thus in breach of its cardinal duty to guarantee the title acquired by the Plaintiff. He asked the Court to exercise its inherent powers under article 159(1) (d) of the Constitution and order that the Plaintiff's title is valid and or the government be ordered to compensate the Plaintiff to the tune of Kshs 14,677,039.60 plus interest as prayed in the Plaintiff.
21. In view of the fact no claim and prayer was made for a declaration as to who is the owner of the suit land. And in view of the fact that the owner of the parallel title was not made a party to these proceedings, it would go against the rules of natural justice for this Court to declare the second title as invalid without giving the holder thereof a hearing. The result is, the circumstance of the case before me does not permit me room to cancel any of the titles as no such prayer was made and not all necessary parties were joined. Further no clear evidence was provided as to which of the titles should be cancelled. The Court cannot exercise inherent powers without any justification and or basis,
22. Now to the prayers for compensation in case the land is lost, the Plaintiff has proved through his bundle of documents that he has paid the entire purchase price. He also incurred legal expenses and other professional charges towards acquiring certificate of title and or developing the plot. The 2nd Defendant did not enter appearance to challenge these payments. The 1st Defendant was non-committal on the cause of the anomaly. I am in agreement with the Plaintiff that had the 1st Defendant exercised the duty of care it is statutorily owes the citizens then the plaintiff's interest would have been protected. The 1st Defendant is therefore liable to also pay the Plaintiff compensation for keeping in his custody two parallel files for the same plot of land thus making it hard for the members of public to know which of the two is the genuine title. The 1st Defendant's witness did not offer any explanation to excuse them from this blame
23. Consequently, I am satisfied that the Plaintiff has proved his case as regards prayer (a) of the plaintiff and enter judgement in his favour forthwith jointly and severally against the defendants plus interest at Court rates from date of filing this case till payment is made in full. On the prayer for exemplary damages, the Plaintiff has not indicated what pain or damage he has suffered as a result of the Defendants action beyond the monetary loss pleaded thus this claim fails. The costs of the suit is also awarded to the Plaintiff.



24. Once the Plaintiff is paid his money in full, he must surrender his title back to the 2nd Defendant. I make this order because it will be wrong for the plaintiff to receive both the money and also the keep the title in his name.
278. From his testimony the 5th Defendant told the Court that he did challenge the Sigma title orally, but never directly to them. He was not compensated as when he went to the Attorney General or spoke to Ms. Kiti Advocate as the only follow up he made. He was not sure whether the decree was extracted and a taxation proceedings were conducted. The process had stated but he was not sure whether there were a stay of execution proceedings. When he was asked by his advocate whether its money or the land; he opted for the land. The Judgment in ELC No. 116 of 2011 ordered that he should be compensated, as condition, upon surrender of the title deed. At paragraph 24, he told the court that he knew that two searches were done but his father may answer that. At page 32 of the 5th Defendant's documents – the letter dated 25th September, 2009 was a paragraph on them requesting the Director of Surveys to authenticate the deed plan for he said property. He did not know whether it was done, his father could do so. From the Judgment in the Civil case numbers ELC 116 of 2011 on the cancellation of the title. In this case, the witness stated that the Plaintiff in the Plaint was seeking for the cancellation of his title deed (when the witness was referred to the Plaint). Upon the cancellation of the title, he doubted that the government would have compensated him. He never had any issues with the title of Sigma Developers Ltd. The Plaintiff came to learn about the suit from the notice in the newspaper. He was not fully involved in the main issue of the purchase of land.
279. The Honourable Court takes note that the Plaintiff's defence to the counter claim was that their acquisition of the land was not tainted with illegality, fraud and a nullity in law. The Plaintiff denied the allegations at paragraph 25 of the Amended Defence and Counterclaim and pleaded that the 5th Defendant's interest over LR. No. 10172 was extinguished by the Judgment delivered on 27th November 2015 in ELC Case No. 116 of 2011 in which the 5th Defendant was awarded refund of the full purchase price he paid for the said property and was ordered to surrender his title back to the 6th Defendant herein.
280. The Plaintiff admitted the contents of paragraph 26 of the Amended Defence to the extent that one parcel of land cannot have two duly registered Deed Plans and title deeds and adds that the same is the reason the Plaintiff seeks the nullification of the title deed issued in favour of the 6th Defendant. Further, the Plaintiff denies the allegations that the Plaintiff's parcel of land has no records from director of survey and that the Plaintiff has a title which is obliterated. The Plaintiff put the 5th Defendant to the denied contents of paragraph 26 of the Amended Defence. The Plaintiff denied the particulars of fraud as pleaded at paragraph 26 (a) - (d) of the Amended Defence.
281. According to the Plaintiff, the 5th Defendant's Counterclaim was bad in law and cannot be granted for the reasons stated herein and for further reasons that:-
- i. The 5th Defendant's rights and interest over the suit property were extinguished by the Judgment delivered on 27th November 2015 in ELC Case No.116 of 2011 in which the 5th Defendant was awarded refund of the full purchase price he paid for the said property and was ordered to surrender his title back to the 6th Defendant herein.
 - ii. The 5th Defendant's claim over the suit property offends the doctrine of "Res Judicata" and "Stare Decisis" having been determined in ELC Case No. 116 of 2011.



- iii. The prayer in the Counterclaim seeking the cancellation of the Plaintiff's certificate of title for L.R. No. 16123 is statute barred by limitation because the said title was issued way back on 14th April 1992.
282. In his defence, the 5th Defendant claims to be an innocent purchaser for value. In the Case of "Lawrence Muchiri – Versus - Attorney General & 4 others" sets what a bona fide purchaser needs to prove. For this defence to be available to the 5th defendant, he had to demonstrate as was held in the Case of "Samuel Kamere – Versus - L.R. Kajiado Nairobi Civil Appeal No. 28 of 2005" that;
- (i) He had acquired a valid and legal title.
 - (ii) He had carried the necessary due diligence.
 - (iii) He paid valuable consideration.
283. Black's Law dictionary 10th Edition defines "bona fide purchaser for value" as
- “someone who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims. Generally, a bona fide purchaser for value is not affected by the transferor's fraud against a third party and has a superior right to the transferred property as against the transferor's creditor to the extent of the consideration that the purchaser has paid.”
284. In several Court of Appeal decisions inter alia "Elizabeth Wambui Githinji & 29 others – Versus - Kenya Urban Roads Authority supra" and "Lawrence P. Mukiri Mungai, Attorney Francis M. Mwaura Vs A. G. & 4 others" the court rendered itself thus;
- “Bona fide purchaser, the courts have maintained, is assured of protection, notwithstanding that previous dealings might be shown to have been mired in fraud. See Dr. Joseph Arap Ngok V Justice Moijo ole Keiwua & 5 others, Civil Appeal No. Nai. 60 of 1997.
- The Ugandan case of *Katende v. Haridar & Company Limited* (2008) 2 E.A.173, has been cited extensively with approval in many local decisions. It developed the following strictures to be satisfied before a conclusion can be drawn that the purchaser is innocent and acquired the property for value and without notice:-
- “..... it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, (he) must prove that:
- a. he holds a certificate of title;
 - b. he purchased the property in good faith;
 - c. he had no knowledge of the fraud;
 - d. he purchased for valuable consideration;
 - e. the vendors had apparent valid title;
 - f. he purchased without notice of any fraud;
 - g. he was not party to any fraud.



A bona fide purchaser of a legal estate without notice has absolute unqualified and answerable defence against claim of any prior equitable owner.”

285. From his own evidence, it is clear that there was already a determination of this matter and the officers from the 1st and 4th Defendants testified under oath that L.R. No. 10172 does not exist anymore and the judgment by my sister in the Civil case ELC 116 OF 2011 clearly indicated that the Plaintiff who in this case is the 5th Defendant was to be paid his money in full and surrender his title back to the 2nd Defendant in this case the 6th Defendant who has not contested the claims of the Plaintiff or filed any documentation to defend its title to the suit. The impression created is that the 5th Defendant decided to retain the Certificate of Title and forfeited pursuing the refund from Britania Oils Limited. Clearly, that was a breach of a Court order. I need not belabor on the legal significance of obeying Court orders and the consequence of disregarding them. I wonder loudly what exactly is this that the 5th Defendant expects from the prayers sought from the Counter – Claim. I am only compelled to seek warm refuge from the English adages of a case “Eating the cake and having the cake and what is good for goose is good for the Gander”. I dare say, and reiterate the contents of the preamble of this Judgement that this Court is guided by the Doctrine of “Stare Decisis” and hence the Civil Case of ELC No. 116 of 2011 forms as precedent. The said decree which has never been appealed against nor set aside nor reviewed are the only legal remedy available to the 5th Defendant herein (and the named Plaintiff in the case).
286. For all these reasons, I discern that the Counter – Claim by the 5th Defendant is not sustainable. It cannot succeed and therefore it is hereby dismissed with costs.

Issue No. c). Whether the Plaintiff is entitled to the orders sought?

287. Under this sub title we examine whether the Plaintiff is entitled to the prayers sought out in the Plaint. I note that these properties were registered under the repealed Registered Title Act which is now governed by The Land Act, 2012 and The Land Registration Act, 2012. The Honourable Court has already pointed out that the provisions of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012 are very clear on the position of a holder of a title deed in respect of land. I need not belabor the point any further. The Court of Appeal in the case of “Munyu Maina (Supra) held as follows:-

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

288. Section 80 (1) of the Land Registration Act provides that:-

“Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

289. From the above provisions it is clear that the court has powers to order rectification of a register by directing that the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake. From the evidence adduced above by PW - 2 and the 1st and 4th Defendant’s witness L.R. No. 10172, which evidence was not contested by the 6th Defendant who did not file a defence in this suit or in the previous civil case ELC (Mombasa) 116 OF



2011. Therefore the Plaintiff's evidence that the same did not exist is not disputed by the alleged legal proprietor, the 6th Defendant.

290. The Court has already held and found that the Plaintiff is the lawful owner of the suit property, the registration of the 5th Defendant the same having been reverted back to the 6th Defendant in ELC No. 116 of 2011. According to the surveyors report dated 24th November, 2021, his observations were that there were two titles in respect to the same parcel of land. The surveyor considered that Title No. CR. 45738 (for L.R. No. 101172 was faulty as it is not supported by a correct survey map and its purported deed plan no. 136419 was bogus/fake. The surveyor went further to state that to this end, he was able to get the true copy of the deed plan No. 136419 (which was actually DP for L.R. No. 10174. In order to understand the same, we have to understand the conversion of land. he original Deed Plan would in any event always indicate whatever changes are made to it and the Directorate of Survey would keep the Survey Plan with those changes.
291. It is this Court's understanding from the evidence of PW - 2, in his further evidence delved into the question of a Deed Plan which he said should always accompany a title document and becomes part of the register and that the land reference number in the deed plan must correspond word by word with that appearing on the title document. The acreage in both must also be similar and all these pieces of information authenticate the title and the register and therefore ownership.
292. Having found that the Plaintiff properly acquired the title to the suit property and that the 5th Defendant has no proprietary rights over L.R. No. 10172. It is trite that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. See the case of "Alice Chemutai Too (Supra)" where the Court held that:-
- "It will be seen from the above that title is protected, but the protection is removed and title can be impeached, if it is procured through fraud or misrepresentation, to which the person is proved to be a party; or where it is procured illegally, unprocedurally, or through a corrupt scheme
- I do not see how a person with a perfectly good title should be deprived of his title by activities of fraudsters. It is in fact time to put down our feet and affirm that no fraudster, nor any beneficiary of fraudulent activities, stands to gain for his fraud, and no title holder will ever be deprived of his good title by the tricks of con artists."
293. The Court having found and held that the Certificate of title held by the 6th Defendant was procured by fraud and therefore null and void must then determine whether the said title can be cancelled as provided under the provision of Section 80 (1) of the *Land Registration Act*. By and large, this Court is fully satisfied that the Deed Plan used to register Certificate of Title for L.R No.10172 registered as No.C.R.45738 on 26th June 2009 in favour of Britana Oils Limited, was faulty as it belonged to another suit property L.R. No. 10174 and as such it is impeachable and ought to be cancelled.
294. The Plaintiff also prayed for permanent injunction to restrain the Defendants either by themselves or through their servants, employees or assigns or any other person acting on their behalf or capacity, from registering, selling, transferring or in any other manner dealing with the suit property L.R. No. 16123.



295. Korir, J aptly captured the position as regards what constitutes a permanent or perpetual injunction in the case of “Kenya Power & Lighting Co. Ltd - Versus - Sheriff Molana Habib (2018) eKLR” when he stated thus:-

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the Court and is thus a decree of the Court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

296. In this case, the Honourable Court has ascertained that the Defendants have no legal mandate to use the suit land in any manner unless as directed by the Honourable Court. As such this prayer is meritorious. The principles on Injunction were established in the celebrated case of “Giella – Versus - Cassman Brown & Co. Ltd (1973) EA 358”. Having perused the Plaintiff’s title deeds, and the Plaintiff’s exhibits produced in court, I hold that the Plaintiff has indeed established a prima facie case and proved its case to the required threshold to warrant the grant of permanent injunctive orders sought. This far the prayer for a permanent injunction is merited.

297. The Plaintiff also sought for general damages. Assessment of quantum of damages is matter of discretion of the court. When determining the appropriate award of general damages, the courts are guided by the principles that have been established through various authorities of the superior courts. The Court of Appeal, while shedding light on these principles in the case of “Gitobu Imanyara & 2 others -Versus - Attorney General [2016] eKLR” opined as follows:

“...the South African Case of Dendy v University of Witwatersrand, Johannesburg & Others - [2006] 1 LRC 291 where the Constitutional Court of South Africa held that:

“...The primary purpose of a constitutional remedy was to vindicate guaranteed rights and prevent or deter future infringements. In this context an award of damages was a secondary remedy to be made in only the most appropriate cases.

“...The primary object of constitutional relief was not compensatory but to vindicate the fundamental rights infringement and to deter their future infringement. The test was not what would alleviate the hurt which plaintiff contended for but what was appropriate relief required to protect the rights that had been infringed. Public policy considerations also played a significant role. It was not only the plaintiff’s interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy.”

298. The same Court, while stating the principles of assessment of this damage in the case of “Peter M. Kariuki – Versus - Attorney General [2014] eKLR” held as follows:

“it bears repeating that assessment of quantum of damages is a matter for the discretion of the trial judge, which must be exercised judicially and with regard to the general conditions prevailing in the country and to prior relevant decisions...”

299. Guided by the above cases, I do hereby exercise my discretion and grant the petitioner Kshs. 1,500,000/ = as general damages for unlawful interference with the suit property by the Defendants.



Issue No. d). Who bears the costs of this suit and the Counter claim?

300. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
301. In the present case, the Plaintiff has been able to establish its case as pleaded from the filed pleadings. Therefore, the Plaintiff is entitled to be awarded costs of the suit to be borne jointly and severally by the Defendants and that from the and those of the Counter claim exclusively by the 5th Defendant accordingly.

VIII. Conclusion and Disposition

302. 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 against the 1st, 2nd, 3rd, 4th and 5th Defendants herein in terms of the Plaint dated 14th April, 2016 and filed on 20th April, 2016.
 - b. That the 5th Defendant’s Amended Counter - Claim dated 13th October, 2021 filed on 27th October, 2021 be and is hereby found to lack merit and hence stands dismissed.
 - c. That an order be and is hereby made that this Honourable Court is bound by the Doctrine of “*Stare Decisis*” and hence the 5th Defendant herein already has clear legal remedies by causing the execution of the Decree from the execution of pronounced Judgement in the Civil Case - ELC (Mombasa) Case No. 116 of 2011 delivered on 27th November, 2015 thereof.
 - d. That a declaration be and is hereby issued that the Certificate of Title registered as No. C.R. 22493/1 on 22nd April 1992 in favour of the Plaintiff be and is here found to be the valid document of title in respect of land parcel Number L.R.No.16123 measuring 0.06924 hectares and situate in North of Kilifi Town in Kilifi County.
 - e. That a declaration be and is hereby issued that the Certificate of Title for L.R No. 10172 registered as No. C.R.45738 on 26th June 2009 in favour of Britana Oils Limited is null and void for having been issued illegally, irregularly and against the law.
 - f. That a declaration be and is hereby issued that any development, sale, transfer or transaction carried out on the suit property on account of the Certificate of Title for L.R No. 10172 registered as No .C.R. 45738, including but not limited to the sale and transfer to the 5th Defendant herein, is null and void.
 - g. That an order be and is hereby issued directing the 1st Defendant to recall and cancel Certificate of Title for L.R No.10172 registered as No.C.R.45738 on 26th June 2009 in favour of Britana



Oils Limited and to remove from the Land Registry any documents and/or files relating to the said L.R No. 10172.

- h. That an order of permanent injunction be and is hereby made restraining the 1st, 2nd, 3rd, 4th and 5th Defendants either by themselves or through their servants, employees or assigns or any other person acting on their behalf or capacity, from registering, selling, transferring or in any other manner dealing with the suit property L.R. No. 16123.
- i. That an order is hereby made that the Plaintiff be and is hereby awarded general damages of sum of Kenya Shillings One Million, Five Hundred only (Kshs. 1,500,000/-) to be paid jointly and severally by the 1st, 2nd, 3rd, 4th and 5th Defendants herein.
- j. That the costs of the suit and the Counter - Claim to be awarded to the Plaintiff – for the suit be borne by the 1st, 2nd, 3rd, 4th and 5th Defendants while for the Counter – Claim to be exclusively met by the 5th Defendant whatsoever.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH DAY OF MARCH 2024.

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HON. JUSTICE L.L NAIKUNI

ENVIRONMENT AND LAND COURT ATMOMBASA

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant
- b. M/s. Machogu Advocate holding brief for Mr. Oluga Advocate for the Plaintiff
- c. M/s. Kiti Advocates for the 1st to 4th Defendant
- d. Mr. Kariu Advocates for the 5th Defendant
- e. No appearance for the 6th Defendant

