



**Thome Dynamics Ltd & another v Nzioka & 12 others; County Government of Nairobi & another (Interested Parties) (Environment & Land Case 21 of 2012) [2024] KEELC 3258 (KLR) (9 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3258 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 21 OF 2012**

**JA MOGENI, J  
APRIL 9, 2024**

**BETWEEN**

**THOME DYNAMICS LTD ..... 1<sup>ST</sup> PLAINTIFF  
JOHN IRUNGU HUMA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOSEPH WAMBUA NZIOKA ..... 1<sup>ST</sup> DEFENDANT  
PATRICK MAGU KAMAU ..... 2<sup>ND</sup> DEFENDANT  
ANTHONY S.N KAMAU ..... 3<sup>RD</sup> DEFENDANT  
JOHN CHEPTAI OCHEMBO ..... 4<sup>TH</sup> DEFENDANT  
HEZEKIAH MULONDOLO ..... 5<sup>TH</sup> DEFENDANT  
BENJAMIN M. MACHARIA & SUSAN W. MAINA ..... 6<sup>TH</sup> DEFENDANT  
PAUL MUIGAI KANYOTU ..... 7<sup>TH</sup> DEFENDANT  
STELLAMARRIS NDINDA MUTUA ..... 8<sup>TH</sup> DEFENDANT  
JAMES W. SIRWERI MURO ..... 9<sup>TH</sup> DEFENDANT  
DAVID N. KABOKI & BETH N. KIMANI ..... 10<sup>TH</sup> DEFENDANT  
FREDRICK KITARI MATHENGE ..... 11<sup>TH</sup> DEFENDANT  
STEPHEN MBOGO MAINA ..... 12<sup>TH</sup> DEFENDANT  
BAHATI DEVELOPMENT COMPANY AKA BAHATI DEVELOPMENT  
WELFARE ASSOCIATION ..... 13<sup>TH</sup> DEFENDANT**

**AND**



## JUDGMENT

1. The Plaintiffs instituted a suit vide a Plaint dated 17/01/2012, Amended Plaint dated 4/11/2020 and a Further Amended Plaint dated 10/06/2022 and sued the Defendants seeking the following orders:
  - a. A permanent injunction restraining the defendants and/ or their agents from carrying out any further developments on all that parcel of land known as L.R. No. 209/11391 situated along Kangundo Road in the city of Nairobi.
  - b. An order of declaration that the 2<sup>nd</sup> Plaintiff is the registered, lawful and bona fide owner of all that parcel of land known as L.R. No. 209/11391 situated along Kangundo Road in Nairobi.
  - c. An order compelling the defendants and/ or their agents to demolish/ pull down/ remove all the illegal developments that they have undertaken on all that land known as L.R. NO. 209/11391 situated along Kangundo Road in the city of Nairobi.
  - d. An eviction order against the defendants and/or their agents from the parcel of land known as LR No. 208/11391 situated along Kangundo Road in the city of Nairobi.
  - e. Mesne profits
  - f. Costs of the suit and interest
  - g. The OCS Kayole Police Station to ensure compliance of the orders (c) and (d).
2. The suit is opposed. The 1<sup>st</sup> Defendant entered appearance on 7/08/2017 and filed a defence and counterclaim dated 26/02/2018, an amended defence and counterclaim dated 3/06/2021 and a further amended defence and counterclaim dated 24/06/2022. The 1<sup>st</sup> Defendant prays for judgment against the Plaintiffs as follows: -
  1. Cancellation of the certificate of title for land parcel L.R No. 209/11391 issued to the 2<sup>nd</sup> Plaintiff herein.
  - 1A. A declaration that the certificate of title for L.R No. 209/11391 held by the 2<sup>nd</sup> Plaintiff was fraudulently obtained.
  2. A permanent injunction restraining the 2<sup>nd</sup> Plaintiff either by himself or his agents and/or employees and/or servants from interacting with the 1<sup>st</sup> Defendant's quiet possession of Plot No. 92 comprised in L.R No. 209/11391.
  - 2A. A declaration that the 1<sup>st</sup> Defendant is the legal owner of Plot No. 92 comprised in L.R No. 209/11391.
  3. Costs of the counterclaim.
4. The 2<sup>nd</sup> – 12<sup>th</sup> Defendants entered appearance on 22/03/2018 and filed a statement of defence dated 19/03/2018 and a defence to further amended plaint and counterclaim dated 10/08/2022. The 2<sup>nd</sup> – 12<sup>th</sup> Defendants pray for judgment against the Plaintiffs as follows:
  - a. Cancellation of the title issued to the 1<sup>st</sup> Plaintiff and the subsequent transfer to the 2<sup>nd</sup> plaintiff.



- b. A declaration that the 2<sup>nd</sup> – 12<sup>th</sup> Defendants have acquired L.R No. 209/11391 by adverse possession.
  - c. An order directed to the Chief Land Registrar to issue a title in favour of the 2<sup>nd</sup> -12<sup>th</sup> Defendants for the plots they are in occupation namely plot Nos. 47, 50, 52, 71, 90, 108, 115, 123. 124 & 130.
  - d. Costs of the suit.
5. The 13<sup>th</sup> Defendant entered appearance and filed a defence and counterclaim dated 27/04/2021 and an amended defence and counterclaim dated 14/06/2022. The 13<sup>th</sup> Defendant prays for judgment against the Plaintiffs and the 1<sup>st</sup> Interested Party as follows: -
- i. A declaration that the Plaintiff in the counter claim is the rightful registered allottee of the parcel of land known as L.R NO 209/11391 situated along Kangundo Road Nairobi and its members are entitled to exclusive use and possession of the property to exclusion of the defendants and any other persons claiming under them.
  - ii. A declaration that the title deed L.R No 209/ 11391(IR NO:76726) held by the 2<sup>nd</sup> defendant was obtained fraudulently and therefore all procedural steps leading thereto are null and void.
  - iii. An Order Canceling Title No LR NO 209/11391 held by the 2<sup>nd</sup> defendant.
  - iv. An injunction to restrain the Defendants to the counter claim whether by themselves or their agents or servants or otherwise howsoever from trespassing unto the parcel of land known as L.R NO. 209/11391 situated along Kangundo Road Nairobi.
6. Upon pleadings being closed, the suit proceeded by way of viva voce evidence. The Plaintiffs called three witnesses who testified on 31/05/2023 and 2/10/2023. The Defendants called four witnesses who testified on 2/10/2023. Expert witnesses testified on 29/01/2024.

**Plaintiffs' Case: -**

7. In summary, the Plaintiffs assert ownership of the suit property known as L.R No. 209/11391 situated along Kangundo Road in Nairobi, acquired from Kenya Association of Manufacturers (hereinafter referred to as "KAM") on 18/11/1999. The 1<sup>st</sup> Plaintiff was subsequently issued with a title on 27/12/2000. The 1<sup>st</sup> Plaintiff thereafter transferred ownership to the 2<sup>nd</sup> plaintiff on 23/03/2021. They assert that the Defendants, without authorization, trespassed and erected illegal structures despite resistance. To them, the 13<sup>th</sup> defendant wrongly allocated plots to the other Defendants. The Plaintiffs seek to restrain further illegal developments, demolish existing structures, and vacate the premises. They request for judgment to be entered against the Defendants as prayed.

**Plaintiffs' Evidence**

8. PW1 – John Irungu Huma gave evidence that he is the 2<sup>nd</sup> Plaintiff. He adopted his undated witness statement together with a list of documents filed in the Plaintiff's bundle dated 13/06/2022 and produced them as his evidence in chief. PW1 sought to rely on documents 1-8 and the same were marked as PW1-Exh 1-8 and documents 13-17 marked as PW1-Exh. 13-17.
9. PW1 testified that he acquired ownership of the property in 2021, transferred from Thome Dynamics, with documents indicating the purchase from KAM in 1999.



10. During cross-examination, doubts were raised about the completeness and validity of the documents provided, including the absence of a search certificate and discrepancies in signatures and stamps. Additionally, questions were raised regarding the lack of action against trespassers since 2002, despite ongoing construction and utility connections.
11. In re-examination, PW1 emphasized due diligence efforts, correspondence with KAM as seen on page 17 and highlighted the absence of challenges to the title's authenticity. It was his testimony that the matter was filed in 2012 and construction has been ongoing on the suit property. He added that there is no injunction preventing him from accessing the property.
12. PW2 – Stephen Kuthuita Mwangi testified that he was employed in Nairobi City Council in 1985. He has worked and was seconded to NMS as Director of Land Housing Event Planning and Urban Development. During the proceedings, PW2 referred to a letter dated 25/01/2021 and another dated 28/01/2021, confirming details about the lease and acreage to the DCIO Kayole, attaching supporting documents such as the letter from the chief valuer and rate receipts.
13. In cross-examination, he reiterated that the County Government of Nairobi cannot allot private property, highlighting discrepancies in the lease and ownership records. He emphasized that without proper documentation, the record reflects the original owner. Despite not conducting a search, he affirmed his confirmation to the DCIO based on existing records.
14. In re-examination, PW2 clarified the purpose of the letters from the DCIO and reaffirmed the role of the county government in maintaining records of allotment letters.
15. PW3 – Chief Inspector Moses Kenga informed the court that his service number is 237446. He gave evidence that he is stationed at Jomo Kenyatta Airport. He previously worked at the DCIO Kayole. During the proceedings, PW3 testified that he authored a letter seeking documents related to rates payment, lease documents, and the allotment letter, discovering discrepancies in their authenticity during investigations. He visited the disputed area between 2019 and 2022, noting developed structures since 2001 and receiving complaints from buyers of Bahati development company plots.
16. In cross-examination, he discussed investigations, discrepancies in documents, and turnover of the case to DCI headquarters. Despite lacking complete investigation records, he confirmed findings suggesting the 1<sup>st</sup> plaintiff paid rates and the lease document between the 1<sup>st</sup> Interested Party and the 13<sup>th</sup> Defendant was fake.
17. In re-examination, PW3 reiterated the response from the director of lands regarding the authenticity of the documents and clarified procedures regarding document access and information dissemination within law enforcement agencies.

### **1<sup>st</sup> Expert Witness - Valuer**

18. Nyoike Isaac testified that he is a valuer working with Nairobi city County. He added that he is familiar with the matter in court. During the proceedings, the witness referred to a letter dated 28/01/2021 addressed to the CID in Kayole division, responding to an inquiry about property number 209/11391. The letter confirmed that Kenya Association of Manufacturers (KAM) was paying rates for the property, supported by a rates demand notice provided as evidence.
19. In cross-examination, the witness clarified details about the rates invoice and acknowledged his limited knowledge about the suit property's development status. He explained the role of the HDD office in maintaining property records and emphasized that ratable ownership is determined by registration.



20. In re-examination, he reiterated that rating records alone cannot determine property ownership and explained the process of updating ownership records after a transfer at the Ministry of Lands.

### **2<sup>nd</sup> Expert witness – Land Registrar**

21. George Gitonga testified that he is a Land Registrar in the Chief Land Registrar's office based at Ardhi House. The expert witness provided details regarding the registration history of the suit property. According to land records, the property was granted to Kenya Association of Manufacturers (KAM) in 1998 under the number IR 76726, corresponding to LR 209/11391. Special conditions stipulated that the property was to be used for inoffensive light industrial purposes.
22. In cross-examination, the witness faced scrutiny regarding the specifics of the registration process and the documentation associated with it. He was asked about the absence of certain details, such as the name of the surveyor on the deed plan, and questioned about the practices of the land office in the 1990s. Additionally, he was pressed on the issue of double allocations and the process of lodging transfer documents.
23. During re-examination, the witness reaffirmed the details regarding the original transfer between KAM and the 1st plaintiff. He reiterated the point that private property cannot be allotted, as it is already owned by an individual, underlining the significance of ownership records in the registration process.

### **3<sup>rd</sup> Expert Witness – Chief Inspector Mandera**

24. Mike Miles Karimi testified that he is familiar with this matter. In the year 2020, the 2<sup>nd</sup> plaintiff, a director of the 1<sup>st</sup> plaintiff reported about invasion of his land located at Saika, Kayole. Mr. Karimi was assigned the file together with Mr. Kenga CI. In this testimony, the witness described the investigative process undertaken regarding the ownership of the suit property. They visited the location, discovered it was divided into plots, and were informed it belonged to Bahati Company. However, further investigation revealed conflicting information. They corresponded with various authorities, including Nairobi Metropolitan Services and Bahati Company's director. The chief valuer stated the property belonged to Kenya Association of Manufacturers (KAM), and they obtained purchase documents from John Huma. Despite efforts to clarify ownership, discrepancies persisted.
25. During cross-examination, the witness addressed queries about the involvement of KAM in land fraud investigations and the summoning of its officials. They discussed the transfer of the case file to the Office of the Director of Public Prosecutions (ODPP), the development status of the property, and the records provided by John Huma. Additionally, the witness clarified interactions with HDD Dandora and City Hall.
26. In re-examination, the witness reiterated that the case file was forwarded to the fraud unit and highlighted letters from Nairobi Metropolitan denying the production of certain documents. They also mentioned additional correspondence dated 25/01/2021 and 11/07/2022, involving the lease and other relevant matters, respectively.
27. After hearing the testimony of the six witnesses, the Plaintiffs' case was closed.

### **Defendant's Case: -**

#### **1<sup>st</sup> Defendant**

28. The 1<sup>st</sup> Defendant denies the contents of the further amended plaint. He contends that in any event, if any certificate of title exists, which is expressly denied, then it was fraudulently/irregularly obtained.



In summary, the 1<sup>st</sup> Defendant claims to have purchased plot number 92 from Bahati Development Welfare Association in 1999 and asserts rightful ownership, alleging that the transfer from the 1<sup>st</sup> plaintiff to the 2<sup>nd</sup> plaintiff was conducted secretly and unlawfully. Additionally, the 1<sup>st</sup> Defendant contends that being a member of Bahati Development Company, the 13<sup>th</sup> Defendant legally allocated the plot to him for development, refuting any allegations of illegal allocation to KAM.

29. The 1<sup>st</sup> defendant prays that the plaintiff's suit be dismissed with costs.

### **Counter-claim**

30. In his counterclaim, the 1<sup>st</sup> Defendant reiterated their defense, asserting their legal ownership of plot number 92 within L.R No. 209/11391 since 1999, acquired from Bahati Development Company with a letter of allotment from the City Council of Nairobi. They claim to have extensively developed the property by constructing a commercial structure named Masii Pentagon in 2001, leasing it to various businesses. Additionally, the 1<sup>st</sup> Defendant alleges that the registration and title acquisition by the 2<sup>nd</sup> Plaintiff were fraudulent, involving misrepresentation, illegal procedures, and corruption.

31. The 1<sup>st</sup> Defendant listed the particulars of fraud as follows: Plaintiff's failure to inform the defendant that they intended to obtain title to the land parcel L.R No.209/11391 while knowing that the defendant had interests in the land, Plaintiff's failure to give notice to the defendant who was in possession of the property (since 1999) prior to the issuance of a new title, Plaintiff obtained the certificate of title illegally through a corrupt scheme and collusion between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff to transfer the suit property on 23/03/2021 to the 2<sup>nd</sup> plaintiff while the 1st defendant had been in occupation and possession of the suit occupation.

32. Reasons wherefore, the 1<sup>st</sup> Defendant prays that the Plaintiffs' suit be dismissed with costs and judgment be entered against the Plaintiffs jointly and severally on the counterclaim as prayed.

### **Plaintiffs' Defence To The Counterclaim To The 1<sup>st</sup> Defendant's Defence**

33. The plaintiffs refute all allegations in the counterclaim, denying the 1<sup>st</sup> Defendant's ownership and possession of plot no. 92 within L.R No. 209/11391 since 1999. They assert their purchase of the entire property from the KAM, being the registered owner of L.R No. 209/11391. The Plaintiffs allege fraud on the Defendant's part, including obtaining a letter of allotment from the City Council of Nairobi and developing structures without approval. They pray for the dismissal of the 1<sup>st</sup> Defendant's counterclaim with costs.

### **2<sup>nd</sup> – 12<sup>th</sup> Defendants**

34. The 2<sup>nd</sup>- 12<sup>th</sup> Defendants deny each and every allegation made in the plaint. In particular that the 1<sup>st</sup> Plaintiff is the registered or lawful owner of the suit property. The 2<sup>nd</sup>- 12<sup>th</sup> Defendants contended that the issuance of the alleged title to the 1<sup>st</sup> plaintiff was unlawful and fraudulent. They aver that the transfer to the 2<sup>nd</sup> plaintiff was unlawful, unprocedural and fraudulent as the transfer is tainted with illegality and was effected with the intention of defeating the cause of justice as the same was done when the parties were aware that the suit land was a subject of court proceedings.

35. They deny trespassing into the disputed property. They aver that they were allocated their respective plots by virtue of being members of the 13<sup>th</sup> Defendant or bought from such members who were lawfully allocated the suit property by the Nairobi City council vide a letter dated 14/02/1992.

36. By virtue of the said allocation or purchase the 2<sup>nd</sup> - 12<sup>th</sup> Defendants took possession of their respective plots and thereon constructed stored/permanent commercial and residential buildings some of which



were constructed prior to the purported allocation and transfer of the property to the Plaintiff. The 2<sup>nd</sup> - 12<sup>th</sup> Defendants aver that they are the lawful owners of their respective plots within L.R No. 209/11391.

37. The 2<sup>nd</sup> -12<sup>th</sup> Defendants pray that the plaintiffs' suit be dismissed with costs.

### **Counterclaim**

38. The 2<sup>nd</sup>-12<sup>th</sup> Defendants aver that they have been in continuous, uninterrupted occupation and use of the portions of Title No. 209/11391 namely plots 27,50, 52,90, 130, 115, 123, 124, 108 among others being sub-divisions of the above title for a period of over 12 years. The 1<sup>st</sup> Plaintiff in a conspiracy to defeat the 2<sup>nd</sup> – 12<sup>th</sup> claims of the disputed property fraudulently purported to transfer the ownership interest to the 2<sup>nd</sup> plaintiff while aware that the dispute was active in court. They also listed particulars of conspiracy and fraud by the plaintiffs. They consequently sought for various prayers among them being that the Plaintiffs' suit against them be dismissed with costs.

### **Plaintiffs' Reply To The 2<sup>Nd</sup> – 12<sup>Th</sup> Defendants' Defence And Defence To The Counterclaim**

39. The plaintiffs deny the contents of the statement of defence of the 2<sup>nd</sup> -12<sup>th</sup> Defendants and reiterates the contents of their plaint. The Plaintiffs pray the Defendants' statement of defence be dismissed with costs to the Plaintiff and judgment be entered in favour of the plaintiff herein. The plaintiffs aver that their suit/ claim against the 2<sup>nd</sup> - 12<sup>th</sup> Defendants is good and valid and that any claim/counterclaim by the defendant may raise shall be a non-starter, frivolous and an abuse of the court process and the same shall be defended at the defendant's risk as to costs thereto.

### **Defence to the Counterclaim**

40. The plaintiffs (defendants by counterclaim) refute all allegations made in the counterclaim. They deny the assertion that the 2<sup>nd</sup> - 12<sup>th</sup> Defendants have continuously occupied portions of Title No. 209/11391 for 12 years. The plaintiffs affirm their purchase of the entire property from KAM and their registration as the rightful owners until transferring it to the 2<sup>nd</sup> Plaintiff. They also deny accusations of conspiracy and fraud. The plaintiffs argue that the reliefs sought by the 2<sup>nd</sup> - 12<sup>th</sup> Defendants have no legal or factual basis and should be dismissed with costs. They pray for the dismissal of the 2<sup>nd</sup> - 12<sup>th</sup> Defendants' further amended statement of defence and counterclaim, with costs awarded to the plaintiffs, and judgment entered in their favor.

### **13<sup>th</sup> Defendant**

41. The 13<sup>th</sup> Defendant denies the singular and several allegations of fact made in the further amended plaint.

42. The 13<sup>th</sup> defendant avers that it is the registered proprietor of the suit parcel of land having been allocated the same by the interested party. That the 1<sup>st</sup> plaintiff's transfer of the suit property to the 2<sup>nd</sup> plaintiff was an illegal attempt to convolute issues and create confusion in respect to the suit property in a vain attempt to disposes the 13<sup>th</sup> defendant as the rightful owners and the salon action is null and void ab initio.

43. They aver that the 1<sup>st</sup>-12<sup>th</sup> defendants have not trespassed on the suit parcel of land and their occupation is legal and justified having stemmed from the issuance of the letter of allotment by the interested party. Further in reference to the plaint, the 13<sup>th</sup> Defendant avers that the 1<sup>st</sup> to 12<sup>th</sup> are its members and the



parcel of land now in their occupation was allocated to them with the knowledge of the interested party herein, the county government of Nairobi in 1992.

44. The 13<sup>th</sup> defendant avers that it did have and still has the capacity to allocate since the suit parcel of land was allocated to it by the interested party. The 13<sup>th</sup> Defendant confirmed that it was allocated the suit Parcel of Land by the Interested Party.
45. The 13<sup>th</sup> defendant prays that the claim in the further amended plaint be dismissed with costs.

### **Counterclaim**

46. The Plaintiff in the counter claim asserts that it is the registered and bona fide allottee of the parcel of land known as L.R No. 209/11391 situated along Kangundo road in Nairobi having been allocated the same by the 2<sup>nd</sup> 3<sup>rd</sup> Defendant to the counter claim in the year 1992. Sometimes in the year 2008 the 1<sup>st</sup> Defendant to the counter claim wrongfully entered the suit Parcel of land in the counter claim and partially took possession of the same and has thereby trespassed and is still trespassing therein.
47. The Plaintiff in the Counterclaim contended that it came to learn that the 1<sup>st</sup> Defendant in the Counterclaim had illegally and through fraudulent means obtained a purported title deed LR No: 209/11391(IR NO:76726). That sometimes on 23/03/2021 and while this suit was still ongoing, the 1<sup>st</sup> defendant illegally and with malicious intent transferred the suit property to the 2<sup>nd</sup> defendant. By reasons of the matter aforesaid the Plaintiff in the counter claim has been deprived of the use and enjoyment of the said parcel of land and has thereby suffered loss and damage. The Plaintiff in the counter claim further states that having been allocated the parcel of land herein by the 3<sup>rd</sup> Defendant to the counter claim, then the conduct of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the counter claim and that of its agents is illegal and unacceptable.
48. Reasons wherefore, the 13<sup>th</sup> Defendant prays that judgment be entered against the Defendants on the counterclaim as prayed.

### **Plaintiffs' Reply To The 13<sup>th</sup> Defendant's Defence**

49. The plaintiffs deny the allegations in the 13<sup>th</sup> defendant's defence. The plaintiffs aver that their suit/claim against the 13<sup>th</sup> defendant is good and valid and that any claim/counterclaim by the defendant may raise shall be a non-starter, frivolous and an abuse of the court process and the same shall be defended at the defendant's risk as to costs thereto.

### **Defence to the Counterclaim**

50. The plaintiffs (1<sup>st</sup> and 2<sup>nd</sup> defendants by amended counterclaim) deny all allegations made in the amended counterclaim. They deny that the 13<sup>th</sup> defendant is the registered and bona fide allottee of the parcel of land L.R NO. 209/11391, allocated by the 3<sup>rd</sup> defendant in 1992. They reaffirm their purchase of the entire property from KAM and their registration as the rightful owners. The plaintiffs argue that the reliefs sought by the 13<sup>th</sup> Defendant have no legal or factual basis and should be dismissed with costs. They pray for the dismissal of the 13<sup>th</sup> defendant's statement of defence and counterclaim, with costs awarded to them, and judgment entered in their favor.

### **2<sup>nd</sup> Interested Party**

51. The 2<sup>nd</sup> Interested Party denies each and every allegation in the amended plaint. She denied that the 1<sup>st</sup> plaintiff is the bona fide owner of the suit property and asserts that she is an allotted of Plot No. 102 within LR No. 209/11391.



52. The 2<sup>nd</sup> interested party was allotted the said Plot by the 13<sup>th</sup> Defendant by virtue of being a member of its (Bahati) Welfare Association. The 2<sup>nd</sup> interested party assert that the 13<sup>th</sup> Defendant was in the business of acquiring land and sharing it to its members upon subdivision and it was the owner of land parcel L.R NO.209/11391 measuring approximately 1.20 hectares as early as 1992 through allotment by the then Nairobi City Council. She stated that she has been in occupation of the said plot and she has put up developments. She further states that she has been paying land rates and land rent to the Nairobi City Council now known as Nairobi County Government. the 2<sup>nd</sup> interested party contends that she is the legal owner of Plot No. 102 within land parcel L.R NO. 209/11391 and that she developed her plot in the year 1999.
53. The 2<sup>nd</sup> interested party states that the 13<sup>th</sup> Defendant had the right to sale and transfer to members of Bahati Development Company plots in L.R. NO.209/11391 since the same was allocated to them by Nairobi City Council.
54. The 2<sup>nd</sup> Interested party prays that the plaintiffs' suit be dismissed with costs.

### **Plaintiffs' Reply To The Interested Party's Defence**

55. The plaintiff denies the allegations made in the Interested Party's Defence. The plaintiff avers that his suit/ claim against the defendants and Interested Party is good and valid and that any claim/ counterclaim by the defendants and the Interested party may raise shall be a non-starter, frivolous and an abuse of the court process and the same shall be defended at the defendant's risk as to costs thereto, the plaintiff prays the Interested Party's statement of defence be dismissed with costs to the plaintiff and judgment be entered in favour of the plaintiff herein.

### **Defendants' Evidence: -**

56. DW1 – Joseph Wambua Nzioka testified that he is an accountant with States Department of Research. He adopted his witness statement dated 24/06/2022 together with a list of documents dated 26/02/2018 and another dated 12/07/2018. He produced them as his evidence in chief and marked them as exhibits 1-10. He testified that he also filed a counterclaim with prayers against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs as per further amended defence dated 4/06/2022. He stated that he is claiming the parcel plot number 209/11391/92 of which he purchased for Kshs. 90,000 from Bahati development company. He was issued with receipts upon payment. He has constructed a one storey building. He added that he finished construction in 2001. He has lived there to date since 2001.
57. During cross-examination, DW1 admitted to purchasing the property from Bahati Development Company without a formal sale agreement. He relied on a letter of allotment, which indicated an LR number for the property, but did not conduct a search to verify the owner's identity. Despite lacking proper approvals, he proceeded with property development, including applying for utilities like water and electricity. However, he failed to produce documents supporting these applications or demonstrating ownership verification. DW1 claimed continuous possession since 1997 and construction since 1999 but could not provide evidence such as building plans or survey records.
58. In re-examination, he emphasized that the allotment letter specified residential use for the property, and he visited the vacant land before conducting a search. He also mentioned receiving formalization cards from the Nairobi City Council but acknowledged that Bahati Development officials did not issue beacon certificates, supporting his claims primarily through testimony rather than documentation.
59. DW2 – Patrick Magu Kamau testified that he is a businessman and he is the 2<sup>nd</sup> defendant. He also testified that he has the authority from 11 defendants to testify on their behalf. The authority is on page



- 13 of the 2<sup>nd</sup> – 12<sup>th</sup> defendants’ bundle. He adopted his witness statement dated 10/08/2022 together with a list of documents and produced them as his evidence in chief. The documents were marked as exhibits 1-8. He testified that he learned that there is a case in 2017 prior to that he was not aware and that is why he applied to be enjoined to protect his interest. On the ground he has constructed a five-storey building and others do with different storey buildings. He constructed in 2012. He has indicated when each person to position. Since 1997 to 2017, no one stop them from living there. They bought the various plots from Bahati development company. The welfare Association had a problem with registration then they changed to a development company.
60. During cross-examination, DW2 testified that he acquired the property in 2012 from Bahati Development Company, relying on a letter of allotment indicating the property as LR no. 209/11391. He did not pursue the title deed and failed to obtain official search results from the City Council. Despite lacking proper approvals, he proceeded with construction in 2012 without knowledge of the property’s commercial designation. He claimed continuous possession since 2011, with a five-storey building housing multiple tenants, yet he did not conduct a survey or acquire official maps.
61. In re-examination, he reiterated the authenticity of the allotment letter, citing informal confirmation from Bahati officials and formalization cards from the City Council. He emphasized uninterrupted possession and lack of eviction attempts, remaining satisfied with the formalization cards despite the absence of a title deed.
62. With that evidence, the 2<sup>nd</sup> – 12<sup>th</sup> Defendants closed their case.
63. DW3 – Jacob Mwangi Mungai testified that he is in real estate and he is one of the directors of the 13<sup>th</sup> defendant. He adopted his witness statement dated 19/02/2021 together with a list of documents dated 14/06/2022 and produced them as his evidence in chief. The documents were marked as exhibits 1-8.
64. During cross-examination, DW3, a director of Bahati Development Company, acknowledged that the letter of allotment was issued to an unregistered association. The property was allotted to a non-existent entity in 1992, raising questions about its legitimacy. Despite being aware of the LR number, they did not verify the association’s registration status. They sold plots without formal approvals and learned about the title deed and ongoing lawsuit in 2017. The absence of formal agreements with the Nairobi City Council was noted, emphasizing the 2<sup>nd</sup> – 12<sup>th</sup> Defendants’ occupation of suit property which had not been allocated to them.
65. In re-examination, DW3 clarified that he believed they did not need the commissioner of land’s consent to sell and were informed about the area’s jua kali designation at the time of allotment.
66. With that evidence, the 13<sup>th</sup> Defendant closed its case.
67. DW4 – Petronilla Nthambi Lonzi adopted her witness statement dated 18/11/2022 together with a list of documents dated 18/11/2022 and supplementary list of documents dated 6/01/2023. She produced them as her evidence in chief. She testified that in 1996 the suit property was advertised for sale and she was given the allotment letter in 2000 from City Hall. With regard to plot 102/11391, she took possession and she has developed and constructed a two-storey building and has been paying her land rates.
68. During cross-examination, DW4 testified that she purchased the property in 1996 without a sale agreement but with an allotment letter from Bahati Development Company. Despite seeing the LR number, she did not conduct a background search and relied solely on the allotment letter for the oral



agreement. She began construction in 2000 based on approvals from Bahati Development Company, not directly from the Nairobi City Council.

69. In re-examination, she emphasized that the allotment from the council obviated the need for further action on her part. Despite starting construction without direct council approval, she has been paying land rates since 2010 and learned about the case in June 2022.
70. With that evidence, the 2<sup>nd</sup> Interested Party closed her case.
71. After hearing, parties closed their respective cases and the Court gave directions of filing of written submissions on 29/01/2024.

**Submissions: -**

72. The Court gave directions on filing of written submissions on 29/01/2024, which the Plaintiffs and the Defendants did, and I have considered them. The Plaintiffs' submissions are dated 20/02/2024 and filed on the even date, the 1<sup>st</sup> Defendant's submissions are dated 8/03/2024 and were filed on the even date, the 2<sup>nd</sup> – 12<sup>th</sup> Defendants' submissions are dated 22/03/2024 and filed on the even date, the 13<sup>th</sup> Defendant's submissions are dated 18/03/2024 and filed on 25/03/2024 and the 2<sup>nd</sup> Interested Party's submissions are dated 25/03/2024 and filed on 27/03/2024. The 1<sup>st</sup> Interest party's submissions are dated 20/03/2024 and filed on 22/03/2024.

**Issues For Determination: -**

73. The Court has now carefully read and considered the pleadings, the submissions filed by both parties together with the evidence adduced by the Plaintiffs and the Defendant and I find the issues for determination are as follows.
  - i. Who between the Plaintiffs and the 13<sup>th</sup> Defendant is the beneficial owner of L.R. No. 209/11391?
  - ii. Whether the registration of the title to the Plaintiffs was fraudulent.
  - iii. Whether the Defendants are bona fide purchasers for value without notice.
  - iv. Whether the Plaintiffs are entitled to the orders sought.
  - v. Whether the Defendants is entitled to the orders sought in their counterclaims.
  - vi. Who should bear the costs of this suit and the counterclaim?

**Analysis And Determination**

**Who between the Plaintiffs and the 13<sup>th</sup> Defendant is the lawful owner of the suit property?**

74. The bone of contention in this matter mainly revolves around two parties who are claiming to be the lawful owners of property known as LR No. 209/11391 situated along Kangundo Road, Nairobi. It is trite law 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 Section 26 (1) of the [Land Registration Act](#)). It also trite law and pursuant to the provisions of Section 107 of the [Evidence Act](#) that that he who alleges must prove.
75. The Plaintiffs and the 13<sup>th</sup> Defendant both claim to own the same land. The Plaintiffs contend that they purchased the suit property from the Kenya Association of Manufacturers (hereinafter referred to as "KAM") on 18/11/1999 whereas the 13<sup>th</sup> Defendant claims to have been issued with a letter of



allotment dated 14/02/1992. The task of this court is to determine which of the two parties holds the legitimate title to the suit land and whether the entries in the register of the suit land in the Lands registry actually reflect the genuine entries for the suit land.

76. The Plaintiffs assert that the 1<sup>st</sup> Plaintiff purchased the suit property from KAM vide a sale agreement dated 18/11/1999. Their claim of ownership stems from a title issued under the repealed RTA to KAM on 25/05/1998. The suit property was thereafter transferred to the 1<sup>st</sup> plaintiff for Kshs. 1,650,000.00 and the same was registered under presentation no. 1153 on 27/12/2000. There is evidence that the 1<sup>st</sup> Plaintiff paid a deposit of Kshs. 650,000.00 upon execution of the sale agreement. This was confirmed by the letter dated 01/11/1999 from KAM addressed to the 1<sup>st</sup> plaintiff and receipt no. 25713 dated 11/11/1999. The Plaintiff however failed to demonstrate that they paid the balance of the purchase price. The plaintiffs also produced a property rates payment request number LR 101-026551 dated 28/01/2021 (at page 64) wherein it showed that the owner as per the 1<sup>st</sup> Interested Party's records was KAM. The demand notice dated 28/01/2021 at page 65 also demonstrates that the owner of Plot No. 209/11391 was KAM. These documents demonstrated that according to the 1<sup>st</sup> Interested Party, the ratable owner of the suit property was KAM.
77. I note that the 1<sup>st</sup> defendant submitted that the plaintiffs failed to produce evidence of payment of the balance of Kshs. 1,485,000/- because payment of the balance was never made. They further submitted that since the plaintiffs knew that the issue of purchase of the suit property was highly contested, nothing would have been easier than to retrieve the payment records allegedly done by the 1<sup>st</sup> plaintiff, Thome Dynamics which is a company owned by the 2<sup>nd</sup> plaintiff and another director who is still alive or if the said balance was paid by cash, the witnesses present during the payment would have been called to testify. Instead, the plaintiffs have remained silent on when the full purchase price was paid to KAM, if at all it was paid.
78. The question that arises here is whether the document produced by the Plaintiffs can pass the test of legality. Section 3(3) of the [Law of Contract Act](#) provides that;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—

- (a) the contract upon which the suit is founded— (i) is in writing; (ii) is signed by all the parties thereto; and (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”

79. I have had a look at the sale agreement dated 18/11/1999. The agreement entered between the 1<sup>st</sup> Plaintiff company and KAM is in writing. The same is signed by two directors of each by both parties however, the signatures of each party are not attested. This issue was raised during the hearing of this matter. On the issue of attestation, I am guided by the provisions of Section 37 of the [Companies Act](#) Cap 486 Laws of Kenya which gives the following options for execution of documents by a company at the material time;

“ 37.

- (2) A document is validly executed by a company if it is signed on behalf of the company—
- (a) by two authorized signatories; or
- (b) by a director of the company in the presence of a witness who attests the signature.



(3) A document in favour of a purchaser is effectively executed by a company if it purports to be signed in accordance with subsection (2)”

80. The sale agreement in this case was signed by two directors on behalf of the 1<sup>st</sup> plaintiff company on the one part and two directors of KAM on the other part. It is my considered view that the sale agreement was duly executed by both parties, that is the 1<sup>st</sup> Plaintiff and KAM and therefore it is my finding that the Plaintiffs have met the test set out in section 3 (3) of the Law of Contract Act. To this end, the sale agreement is valid and thus enforceable in law.
81. The 1<sup>st</sup> Defendant submitted that as per pw4 the chief Valuer, KAM was still the retable owner of the suit property in 2021 according to the demand for rates which were due for 16 years. The witness in cross-examination admitted that in the year 2005 the said Kenya Association of Manufacturers was still the owner of the suit property. However, according to the 2<sup>nd</sup> plaintiff transfer of the suit property from the said KAM to the 1<sup>st</sup> plaintiff was effected on 27/12/2000. The plaintiff's own documents namely the demand rates dated 28/1/2021 do not support the plaintiff's position that a transfer was executed in favour of Thome Dynamics, the 1<sup>st</sup> plaintiff herein. In the same breath, the 1st defendant invited the Court to make the glaring observation that the plaintiffs avoided at all costs to produce a copy of the green card in as much as the 2nd plaintiff holds a certificate of lease for the suit property to demonstrate the previous owners and the subsequent dates when changes in ownership have occurred. In light of the evidence of pw4, it remains doubtful as to whether the suit property, if at all it was owned by KAM, to have ever been transferred to the 1st plaintiff. It is the 1st defendant's submission that the suit property was not legally and lawfully sold and/or transferred from KAM to the 1<sup>st</sup> plaintiff on 27/1/2000 or on any other date.
82. The Chief Valuer working with the 1<sup>st</sup> Interested Party gave evidence on 29/01/2024 that as per their records, the ratable owner of the suit property is KAM. That even as at 2005, the owners of the suit property were KAM. He also testified that for one to be a ratable owner they must be registered. One cannot tell an owner of a property by using rating records but through as search. Once the transfer happens at Ministry of Lands, a new owner has to inform Nairobi City Council to amend the records. I believe that was not done by the Plaintiffs. There is no evidence before me to demonstrate the same. Mr. Nyoike narrated that when an owner fails to pay rates, they issue reminders and notices. These reminders and notices are issued by the finance and legal departments. I believe the reason why the notices and invoices were issued in the name of KAM is because the Plaintiffs had not updated the 1<sup>st</sup> Interested Party of the change in ownership. This evidence by the Chief Valuer supports the Plaintiffs claim that they purchased the suit property from KAM seeing that they were the original registered owners of the suit property. The validity of KAM's title has not been challenged. I do not agree with the submissions of the 1<sup>st</sup> Defendant's counsel that the failure to involve KAM is fatal to the plaintiffs' case. KAM's title is not under challenge in this matter. All the defendants accuse the Plaintiffs of being registered as the owner of the suit property fraudulently. None of them have accused KAM of any fraudulent dealings in their pleadings. Parties are bound by their pleadings. When one's title is being challenged, one is required to establish a root of title and demonstrate an unbroken chain in ownership. The Plaintiffs' case is that they purchased the suit property from KAM. KAM's title has not been challenged. Therefore, I do not agree that KAM should have been involved in the suit. In fact, records of the 1<sup>st</sup> Interested Party demonstrate the strength of KAM's ownership and/or title.
83. In light of the above, I am inclined to find that the Plaintiffs have produced sufficient evidence to establish that the subsequent transfer to the 1<sup>st</sup> Plaintiff is also valid and are therefore the rightful and lawful owners of the suit property.



84. On the other hand, the 13<sup>th</sup> Defendant's claim to ownership of the suit property stems from a letter of allotment ref. no. CP&ARCH/001195 dated 14/02/1992. The same was issued to Bahati Development Welfare Association by the Nairobi City Council.
85. All the Defendants' claims to the suit property are anchored on the letter of allotment dated 14/02/1992 issued to the 13<sup>th</sup> Defendant. Legally, a letter of allotment is an intention by the Government to allocate land. It is not a title. Therefore, a letter of allotment cannot be used to defeat title of a person who has been registered as the proprietor land. A letter of allotment does not confer a proprietary right but only a right to receive property or to be allocated on complying with the terms and conditions stated therein. The right to be allocated the property is a contractual right and must be determined in accordance with the ordinary rules of contract. This was articulated by the court in the cases of Lilian Waithera Gachuhi vs. David Shikuku Mzee [2005] eKLR and Philma Farm Produce & Supplies & 4 others vs. The Attorney General & 6 others (2012) eKLR.
86. It was a condition of the letter of allotment that the allottee was to accept the terms within 30 days from 14/02/1992. From the record, the 13<sup>th</sup> Defendant gave a written acceptance vide a letter dated 03/05/1992 as seen on page 7 of the 13<sup>th</sup> Defendant's bundle. This Court noted some discrepancy regarding the size of the suit property. On the letter of allotment dated 14/02/1992, it is indicated as 1.20 ha whereas in the grant issued to KAM, it is indicated as 1.3000 ha. The receipts relied on by the 13<sup>th</sup> defendant to prove payment of the premium from 1992-1996 was issued on 17/05/1996 indicating that the 13<sup>th</sup> Defendant did not meet the conditions of the allotment.
87. The letter of allotment dated 14/02/1992 that all the Defendants rely on heavily to prove ownership read as follows: "if acceptance and payment is not received within 30 days from the date hereof the offer herein contained will be considered to have lapsed without further reference to yourself."
88. The aforementioned 30 days lapsed as at 27/03/1992. Therefore, the offer to Bahati Development Welfare Association lapsed as at 27/03/1992 and so the 13<sup>th</sup> Defendant cannot rely on the letter of allotment as proof of ownership.
89. Additionally, it is emergent that a litigant basing their interest in land on the foundation of an allotment letter must provide the following proof: First, the allotment letter from the Commissioner of Lands; Secondly, and attached to the allotment letter, a part development plan; Thirdly, proof that they complied with the conditions set out in the allotment letter, primarily that the stand premium and ground rent were paid, within the specified timeline. It would also help a litigant's case, although this may not be mandatory based on the stage of the transaction, to have a certified beacon certificate. None of these grounds were met by the 13<sup>th</sup> Defendant. These are critical issues/steps that were articulated in the cases of Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR).
90. It is my considered view that the offer to Bahati Development Welfare Association lapsed on 27/03/1992 and therefore they did not have the authority to subdivide the suit property and sell the plots to any person as they purported to do as they were not the registered owners of the suit property. Moreover, considering that this letter of allotment dated 14/02/1992 was the document in which the 13<sup>th</sup> Defendant has founded its claim to the suit property, it follows that the 13<sup>th</sup> Defendant is not the rightful and lawful owner of the suit property.
91. The other issue that came up during trial is about the non-existent Bahati Development Welfare Association. On 14/02/1992, the secretary/Town clerk on behalf of the Nairobi City Council, issued a letter of allotment Ref No. CP&ARCH/001195 to an allottee named M/s Bahati Development Welfare Association, P.O Box 61062 Nairobi. The suit property was described in the letter of allotment



as LR No. 209/11391 along Kangundo Road – Nairobi. The director of the 13<sup>th</sup> Defendant (DW3) admitted in trial that Bahati Development Welfare Association was not registered. That the property was allotted to a non-existent association. There is equally no evidence before me to prove registration of Bahati Development Welfare Association. There is no member register produced. No such entity has ever existed in law.

92. The 1<sup>st</sup> – 12<sup>th</sup> Defendants have alleged that they claim ownership through the 13<sup>th</sup> Defendant and particularly through Bahati Development Company Limited. Documents have been adduced by the 1<sup>st</sup> – 12<sup>th</sup> Defendants showing that Bahati Development Company Ltd was selling plots comprised in the suit property. Evidence demonstrates that Bahati Development Company Limited was incorporated on 15/11/1996 as seen on page 19 of the 13<sup>th</sup> Defendant’s bundle. Receipts for payment of premiums and transfer fees have been issued in favor of Bahati Development Company Limited by the City Council of Nairobi as seen on page 20. The formalization cards of plots within the suit property were issued under a scheme referred to as, Bahati Development Company Limited. No evidence was produced to demonstrate that Bahati Development Welfare Association was the same as Bahati Development Company.
93. The Plaintiffs’ counsel submitted that under the law, a non-existent entity cannot hold title to property. They relied on the holding by the Court of Appeal in the case of Charles Karaithe Kiarie & 2 others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others [2013] eKLR. Further, it was counsel’s submissions that in law, Bahati Development Company Limited has a distinctly different personality and must be distinguished from Bahati Development Welfare Association or any other entity. Considering that the letter of allotment alluded to hereinbefore is dated 14/02/1992, whereas Bahati Development Company Limited was incorporated in 1996, yet it has carried itself as the owner of the suit property to the extent of selling portions to third parties despite not being the purported allottee, it was important that a coherent explanation be put forth to explain the same. None was forthcoming from the 13<sup>th</sup> Defendant. In the absence of a coherent explanation in that regard, then the purported ownership of the suit property by the 13<sup>th</sup> Defendant bears all hall marks of fraud. I am in agreement with these sentiments made by the Plaintiffs’ counsel.
94. My finding is that the unregistered association, Bahati Development Welfare Association was not a legal entity with capacity to hold land in its own name since it did not exist in law. For this reason, the issuance of a letter of allotment to an unregistered society was tainted with illegalities and irregularities and was null and void ab initio for allotting the suit property to a non-existent entity.
95. The Court held that the sale agreement between the 1<sup>st</sup> Plaintiff and KAM was a valid agreement and KAM’s title has not been challenged. It is trite that where a Grant has been issued in respect to government land to a person, the said land cannot be available for allocation to another person or entity, unless the said Grant has been nullified by the court. The Grant that was issued to KAM in 1998 was governed by the Registration of Titles Act. Section 23 (1) of the said Act provides as follows:

“ 23.

- (1) 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 the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not



be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

96. In the end, it is my finding that the 1<sup>st</sup> Plaintiff is the registered owner of the suit property.

#### **Whether the registration of the title to the Plaintiffs was fraudulent**

97. The Grant that was issued to KAM in 1998 and subsequently transferred to the 1<sup>st</sup> Plaintiff can only be defeated on the ground of fraud or misrepresentation. This is the position that was taken by the Court of Appeal in the case of Dr. Joseph Arap Ngok vs. Justice Moiwo Ole Keiwua & 5 Others, Civil Application No. Nairobi 60 of 1997, where the Court held that:

“Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and the law takes precedence over all other alleged equitable rights of title. In fact, the Act is meant to give such sanctity of title, otherwise the whole process of registration of title and the entire system in relation to ownership of property in Kenya would be placed in jeopardy.”

98. In *Wambui vs Mwangi & others* (CA 465 of 2019) KECA 144 (KLR) 19<sup>th</sup> November 2021 (judgment), the court cited with approval the Black's Law Dictionary 9<sup>th</sup> Edition Page 131, on the definition of “fraud” as a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to their detriment. The court cited with approval *Railal Gordhanbhai Patel vs Lalji Makenji* (1957) E. A 314 and *Arithi Highway Developers Ltd vs West End Butchery Ltd and others* (2015) eKLR, that courts should not provide succor for any crook using forgery, deceit or any fraud to acquire a legal and valuable title deceitfully snatched from a legally registered innocent proprietor.

99. Section 26 of the *Land Registration Act*, 2012, also provides as follows: -

“26. Certificate of title to be held as conclusive evidence of proprietorship

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



2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

100. From the above, a title obtained through fraud or misrepresentation, for which the proprietor is proved to be a party, is liable to cancellation.
101. The 1<sup>st</sup> – 12<sup>th</sup> Defendants have accused the Plaintiffs of acquiring the title to the suit property fraudulently. They have enumerated particulars of fraud on the part of the Plaintiffs in the various counterclaims filed herein. Even if I was to assume that the title to the 1<sup>st</sup> Plaintiff was issued fraudulently, acceptance of the allocation by the 13<sup>th</sup> Defendant was a conditional offer within the time indicated in the letter of offer. Those terms were never complied with by the 13<sup>th</sup> Defendant. The Defendants cannot therefore rely on the said letter of allotment to claim the suit property.
102. What’s more, during trial, it came out that the letter of allotment dated 14/02/1992 and the undated lease between Bahati Development Company and Nairobi City County were fake. This was demonstrated by a letter dated 11/03/2022.
103. It has been reiterated that private property cannot be allotted. Evidence was given demonstrating that the suit property had been alienated and a grant was given to KAM on a lease of 99 years with effect from 1/05/1990. This was confirmed by the Land Registrar. He testified that from their records, the suit property was given I.R No. 76726 which corresponds to LR No. 209/11391.
104. The 1<sup>st</sup> defendant submitted that the plaintiffs herein have done little to demonstrate and/or prove the legality of how the title to the suit property was acquired. The 2<sup>nd</sup> plaintiff was at pains to explain when the suit property was paid for in full. It is his submission that the acquisition of the suit property by the 1<sup>st</sup> plaintiff was not legal or free from any encumbrances. The 1<sup>st</sup> plaintiff alleges to have purchased the suit property on 18/11/1999 long after the 13<sup>th</sup> defendant had been allocated the same property on 14/2/1992 by the 1<sup>st</sup> interested party. That the plaintiffs’ failure to conduct due diligence prior to the alleged purchase of the suit property does not extinguish the existence of the proprietary interests of the 13<sup>th</sup> defendant on the suit property, who sold plot no.92 comprised in the suit property to the 1<sup>st</sup> defendant herein.
105. DW3 conceded that the property was allotted to a non-existent association. Once again, witnesses led evidence that the letter of allotment dated 14/02/1992 and the undated lease between Bahati Development Company and Nairobi City County were fake. This was demonstrated by a letter dated 11/03/2022 authored by SG Mwangi, a director of lands wherein he stated that the lease was fake.
106. Chief Inspector Mike Miles Karimi and Chief Inspector Moses Kenga (PW3) both appeared before this court to give their testimonies. The testimonies they gave demonstrated that investigations had been carried out regarding the ownership of the suit property. It was revealed that the CEO and Chairman of KAM had been summoned by the land fraud office at DCI in early 2023. It was contended that a report dated 24/04/2020 and/or the file regarding this complaint had been forwarded to the ODPP. PW3 produced a letter dated 28/02/2022 (at page 66) which he authored. He confirmed that as part of his investigation, he wrote the letter seeking for receipts of rates payment, lease documents and allotment letter. It was revealed that a copy of the lease was obtained from Jacob Mungai (DW3). He testified the lease document between Nairobi City County and the 13<sup>th</sup> Defendant was said to be fake as per the records of the 1<sup>st</sup> Interested Part as well as the letter of allotment as it was also not genuine. A letter dated 25/01/2021 (page 51) was produced before the Court by PW2 to demonstrate this. He revealed that this investigation was not one-sided as while he undertook his



investigations, he received a complaint from some land owners who were restricted from developing the land which they had purchased from Bahati development company. He also realized that Bahati Development company purported to be operating from City Council yet this was a public office. He got documents from the 1<sup>st</sup> plaintiff and the buyers from Bahati development company. PW3 also testified that when they were about to finalize the investigation and the file was called to DCI headquarters.

107. The 3<sup>rd</sup> Expert witness, George Gitonga, a land registrar, gave evidence that the grant was registered in 1998 and the owner was registered in 1998. It was his testimony that they did not have any records prior to that. He added that it was not possible that this land existed as registered before 1998.
108. That being the case, all the evidence before me points to the issuance of the letter of allotment dated 14/02/1992 to Bahati Development Welfare Association being unprocedural, illegal, null and void. There is no question that the issuance of the letter of allotment to Bahati Development Welfare Association is fraudulent. I find that all the Defendants have failed to prove fraud on the part of registration in favour of the Plaintiffs. Therefore, the 1<sup>st</sup> Plaintiff's title is not liable to be cancelled under Section 26 (2) of the *Land Registration Act*, 2012. I am not convinced that the 1<sup>st</sup> Plaintiff's title was obtained unprocedurally, in collusion or through a corrupt scheme.

**Whether the 1<sup>st</sup> – 12<sup>th</sup> Defendants and the 2<sup>nd</sup> Interested Party are innocent purchasers for value without notice.**

109. To begin with, DW1 conceded that he did not have a sale agreement with the 13<sup>th</sup> Defendant for the purchase of Plot No. 92 comprised in the suit property. The 2<sup>nd</sup> Interested Party conceded that she purchased the suit property from the 13<sup>th</sup> Defendant vide an oral agreement.
110. DW1 testified that he is claiming the parcel plot number 209/11391/92 of which he purchased for Kshs. 90,000 from Bahati development company. He was issued with receipts upon payment. He did concede that he did not have a sale agreement. He also confirmed that he did not carry out a search to authenticate the owner of the suit property. He did not produce any search before this court. His due diligence was that he visited the plot and saw that it was vacant. He added that he was issued with formalization cards by the Nairobi City Council but the officials of Bahati development company have never issued beacon certificates.
111. The 1<sup>st</sup> Defendant submitted that the plaintiffs in paragraphs 73 and 79 of the submissions allude to the fact that the 1<sup>st</sup> defendant purchased plot no.92 without a written sale agreement. It is his submission that the transaction for sale of land by the 13<sup>th</sup> defendant to the 1<sup>st</sup> defendant was not vitiated by the absence of a written agreement between the parties. The 1<sup>st</sup> defendant produced receipts of payment made to the 13<sup>th</sup> defendant as payment for the purchase price of Kshs. 90,000/- towards purchase of plot no.92 comprised in the suit property. In this regard, he relied on the decision of the Court of Appeal in the case of Peter Mbiri Michuki V Samuel Mugo Michuki [2014] eKLR where the Court found that “Section 3 (7) of the *Law of Contract Act* makes exception to oral contracts for sale of land coupled with part performance. We find that Section 3 (3) of the *Law of Contract Act* came into effect in 2003 and does not apply to oral contracts for sale of land concluded before Section 3 (3) of the Act came into force.”
112. The 1<sup>st</sup> Defendant's counsel submitted that Section 3(3) of the *Law of Contract Act* came into force in 2003. That the 1<sup>st</sup> defendant herein as demonstrated through the receipts for payment of the purchase price produced as exhibits were issued from the year 1997 up to 1999. He submitted that the agreement for sale of the land parcel no.92 between the 1<sup>st</sup> defendant and the 13<sup>th</sup> defendant was entered into before the year 2003.



113. Further, he submitted that payment of the purchase price amounted to part performance of the contract on the part of the 1<sup>st</sup> defendant in purchase of plot no.92. In addition, the 1<sup>st</sup> defendant immediately occupied plot no.92 when he started making the payments for the purchase price of his plot. Therefore, it is our submission that the agreement for sale of land between the 1<sup>st</sup> defendant and the 13<sup>th</sup> defendant falls under the exception to the application of section 3(3) of the Law of Contract Act.
114. Be that as it may, one of the grounds that has to be met by a party claiming to be an innocent purchaser for value is that the party must prove that they acquired a valid and legal title. The 1<sup>st</sup> – 12<sup>th</sup> Defendants and the 2<sup>nd</sup> Interested Party's claim all stem from a letter of allotment dated 14/02/1992. This instrument of ownership that all the Defendants are relying on was invalid and illegal from the onset. Bahati Development Welfare Association is a non-existent entity which purported to hold the suit property. The validity of the document used for sale to the 1<sup>st</sup> – 12<sup>th</sup> Defendants was tainted with an illegality.
115. As was held in the case of *Macfoy vs United Africa Co. Ltd* (1967) 3 ALL ER 1169, a nullity is a nullity, and any proceeding founded on it is also wrong and incurably bad. The 13<sup>th</sup> Defendant purported to sub-divide the suit property and sell to the 1<sup>st</sup> – 12<sup>th</sup> Defendants on the basis of the letter of allotment illegally obtained in the first instance. The 13<sup>th</sup> Defendant could not enter into any binding legal agreement. It was a non-existent entity in the eyes of the law. The allotment was issued to Bahati Development Welfare Association and not Bahati Development Company Limited. Bahati Development Company Limited had no interest in the suit property in the first place. I am not sure how the 1<sup>st</sup> -12<sup>th</sup> Defendants and the 2<sup>nd</sup> Interested Party even entered into an agreement for the purchase of plots with an entity that was not a registered owner of the suit property.
116. The bar on bona fide purchaser for value has been set by the Supreme Court in *Dima Management Ltd vs County Government of Mombasa & 5 others* (Petition 8 (E010) of 2021) (2023) KESC 30 (KLR) 21 April 2023). The 1<sup>st</sup> – 12<sup>th</sup> Defendants and the 2<sup>nd</sup> Interested Party had to do more than merely conduct an official search. The Defendants' witnesses conceded to having failed to conduct a search. They had to ascertain the status of the land and that the 13<sup>th</sup> Defendant owned the suit property. On this ground alone, the Defendants have failed to prove that they acquired a valid and legal title to the suit property.
117. In *Beach Bay Holdings Ltd vs Ratin Relations Ltd & another* (2014) eKLR, the court cited with approval *Newborn vs Sesolid (Great Britain) Ltd* (1953) ALL ER 708, where the court said the making of a contract with a non-existent entity rendered the same a nullity.
118. Nothing stopped the 1<sup>st</sup> – 12<sup>th</sup> Defendants and the 2<sup>nd</sup> Interested Party from visiting the Registrar of Societies to ascertain the status of the 13<sup>th</sup> Defendant and establish whether DW3, Jacob Mwangi Mungai was among the bona fide officials or registered trustees capable of selling and transferring the suit property to them. No evidence was availed to show that the 1<sup>st</sup> – 12<sup>th</sup> Defendants and the 2<sup>nd</sup> Interested Party as alleged bona fide purchasers did more to establish the root of the title held by the 13<sup>th</sup> Defendant whom they allegedly believe was the lawful owner of the suit property. My finding is that they were not bona fide purchasers for value without notice.

**Whether the Plaintiffs proved their case to be entitled to the orders sought.**

119. The Plaintiffs have proved their case to the required standards to be entitled to some of the reliefs sought.



120. With regard to prayer (a), having held that the Plaintiffs have proved their case to the required standards as far as ownership is concerned, they are therefore entitled to prayer (a) in the Further Amended Plaint dated 10/06/2022 as the same is merited. Prayer (c) and (d) is on eviction and an order compelling the defendants to demolish/remove all the illegal developments on the suit property. It is also my considered view that prayers (c), (d) and (g) as prayed are merited.
121. Prayer (b) is on declaration that the 2<sup>nd</sup> Plaintiff is the registered, lawful and bona fide owner of the suit property. The Court held that the 1<sup>st</sup> Plaintiff is the registered owner of the suit property. This is because all the evidence before me only demonstrates the root of title of the 1<sup>st</sup> Plaintiff. It was being sufficiently established that the suit property was transferred to the 1<sup>st</sup> plaintiff for Kshs. 1,650,000.00 and the same was registered under presentation no. 1153 on 27/12/2000. There is evidence that the 1<sup>st</sup> Plaintiff paid a deposit of Kshs. 650,000.00 upon execution of the sale agreement. This was confirmed by the letter dated 01/11/1999 from KAM addressed to the 1<sup>st</sup> plaintiff and receipt no. 25713 dated 11/11/1999. The Plaintiffs however failed to demonstrate that they paid the balance of the purchase price. The plaintiffs also produced a property rates payment request number LR 101-026551 dated 28/01/2021 (at page 64) wherein it showed that the owner as per the 1<sup>st</sup> Interested Party's records was KAM. The demand notice dated 28/01/2021 at page 65 also demonstrates that the owner of Plot No. 209/11391 was KAM. It is only at page 73 of the Plaintiffs' bundle that Entry no. 3 appears indicating that the is a transfer to the 2<sup>nd</sup> Plaintiff registered under presentation no. 2311 on 23/03/2021. I have also noted that Entry no. 2 on page 73 does not indicate the amount that the 1<sup>st</sup> Plaintiff had paid unlike entry no. 2 at page 42. For this reason, I am not satisfied that the transfer to the 2<sup>nd</sup> Plaintiff was regular as the Plaintiffs did not provide sufficient evidence to support this claim. In my view, the Plaintiffs are not entitled to prayer (b) as prayed for. From the record before me, it is my finding that the Plaintiffs have only provided evidence proving that the 1<sup>st</sup> Plaintiff is the validly registered, lawful and bona fide owner of all that parcel of land known as L.R. No. 209/11391 situated along Kangundo Road in Nairobi.
122. Prayer (e) is on mesne profits. The Plaintiffs' submitted that an award of damages is discretionary and depends on the obtaining circumstances. The award of damages is assessed on a case-to-case basis. They submitted that an award of Kshs. 5,000,000.00 would be sufficient. Counsel relied on various cases in support of his submissions. On their part, it is the 1<sup>st</sup> Defendant's submission that the Plaintiffs did not lead any evidence during trial to substantiate the plaintiffs' allegation the value of the suit property and therefore the submissions of Kshs. 5,000,000 at paragraph 77 of the submissions remains unsubstantiated and without basis. On whether the Plaintiffs are entitles to mesne profits, mesne profits are special damages which must be specifically pleaded and proved. The plaintiffs did not specifically lead any evidence to prove mesne profits, therefore this limb of their claim fails. See *Karanja Mbugua & another v Marybin Holding Co. Ltd* [2014] eKLR.
123. All in all, I have perused the Court record and I am satisfied that the Plaintiffs have proved their case to the required standard and it would therefore mean that they are entitled to some of the reliefs sought in the Further Amended Plaint limited to Prayers (a), (c), (d), (f) and (g).

**Whether the Defendants are entitled to the orders sought in the counter-claim.**

124. The 1<sup>st</sup>, 2<sup>nd</sup> – 12<sup>th</sup> and 13<sup>th</sup> Defendants filed various counterclaims in opposition to the Plaintiffs' suit. They all sought for various prayers but mainly they all sought for the Plaintiffs' suit to be dismissed with costs. The 1<sup>st</sup> – 12<sup>th</sup> Defendants' claim stems from the 13<sup>th</sup> Defendant's letter of allotment dated 14/02/1992. The Court held that the unregistered association, Bahati Development Welfare Association was not a legal entity with capacity to hold land in its own name since it did not exist in



law. The Court also held that the issuance of a letter of allotment to an unregistered society was tainted with illegalities and irregularities and was null and void ab initio for allotting the suit property to a non-existent entity.

125. Bahati Development Welfare Association is a non-existent entity and could therefore, not hold the suit property in its name. The validity of the document used for sale of the plots comprised in the suit property to the 1<sup>st</sup> – 12<sup>th</sup> Defendants was tainted with illegality. The 13<sup>th</sup> Defendant could not enter into any binding legal agreement. It was a non-existent entity in the eyes of the law. Therefore, any transaction with the 13<sup>th</sup> Defendant was a nullity in law. Thus, it is my considered view that the 1<sup>st</sup> – 13<sup>th</sup> Defendants failed to prove their cases against the Plaintiffs.
126. I note that the 1<sup>st</sup> Defendant tried to introduce a new issue in his written submissions. The issue of adverse possession. It is well established that new issues cannot be raised in written submissions and any issues so raised, are best ignored. Further to that, I have deliberately failed to address myself on adverse possession as pleaded by the 2<sup>nd</sup> – 12<sup>th</sup> Defendants. I acknowledge that the 2<sup>nd</sup> – 12<sup>th</sup> Defendants sought and prayed for adverse possession in their pleadings but during the trial, the 2<sup>nd</sup> – 12<sup>th</sup> Defendants did not adduce and lay any basis to support the claim for adverse possession. In the result, it is my finding that adverse possession was not proved. Further, I took it that the 2<sup>nd</sup> – 12<sup>th</sup> Defendants abandoned the quest for adverse possession and will not make any consideration and/or findings on this prayer there being no basis upon which I can so do.
127. As a result of the foregoing, it is my finding that the 1<sup>st</sup> Defendant's amended counterclaim dated 24/06/2022 totally fails, the 2<sup>nd</sup> – 12<sup>th</sup> Defendants' Counterclaim dated 10/08/2022 totally fails and lastly, the 13<sup>th</sup> Defendant's amended counterclaim dated 14/06/2022 totally fail. The 1<sup>st</sup>, 2<sup>nd</sup> – 12<sup>th</sup> and 13<sup>th</sup> Defendants are not entitled to any of the reliefs that they have sought. It also follows that all the three Counterclaims lack merit and are hereby dismissed with costs.

#### **Who should bear the Costs of this Suit and the Counterclaim?**

128. It is trite law that costs follow the event. Section 27 of the *Civil Procedure Act* gives the Court discretion to grant costs. As the successful party is always entitled to costs except in exceptional circumstances, no exceptional circumstance exists in this suit, and thus the Court finds that the Plaintiffs being the successful litigants are entitled to the costs of the suit and the three counterclaims.

#### **Disposal orders**

129. Accordingly, having been satisfied that the Plaintiffs have proved their claim to the required standards, I enter judgment for the Plaintiffs against the Defendants herein in the following terms: -
- i. The 1<sup>st</sup> Defendant's further amended counterclaim dated 24/06/2022 fails and is hereby dismissed with costs to the Plaintiffs.
  - ii. The 2<sup>nd</sup> – 12<sup>th</sup> Defendants' counterclaim dated 10/08/2022 fails and is hereby dismissed with costs to the Plaintiffs.
  - iii. The 13<sup>th</sup> Defendant's amended counterclaim dated 14/06/2022 fails and is hereby dismissed with costs to the Plaintiffs.
  - iv. A permanent injunction is hereby issued restraining the defendants and/ or their agents from carrying out any further developments on all that parcel of land known as L.R. No. 209/11391 situated along Kangundo Road in the city of Nairobi.



- v. An order is hereby issued compelling the defendants and/ or their agents to demolish/ pull down/ remove all the illegal developments that they have undertaken on all that land known as L.R. No. 209/11391 situated along Kangundo Road in the city of Nairobi within the next six (6) months from the date of this judgment and in default eviction orders to issue.
- vi. The OCS Kayole Police Station to ensure compliance of the order (v).
- vii. The Plaintiffs are awarded the costs and interest of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF APRIL 2024.**

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**MOGENI J**

**JUDGE**

In the virtual presence of:

Ms. Wanjala for the Plaintiffs

Ms. Nzilani for 1<sup>st</sup> Defendant

Mr. Gatumuta for the 2<sup>nd</sup> – 12<sup>th</sup> Defendants

Mr. Ongeru for the 13<sup>th</sup> Defendant

Mr. Nyalandi holding brief for Mr. Koceyo for the 1<sup>st</sup> Interested Party

Ms Kinuthia for the 2<sup>nd</sup> Interested Party

None appearance for the 13<sup>th</sup> Defendant

Caroline Sagina: Court Assistant

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**MOGENI J**

**JUDGE**

