Ahamed v Kenya National Highways Authority & 2 others; Lead Property Developers & 2 others (Third party) (Environment & Land Case 333 of 2013) [2024] KEELC 5130 (KLR) (10 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5130 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 333 OF 2013

JO MBOYA, J

JULY 10, 2024

BETWEEN

TARIQ NAZIR AHAMED ..... PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1ST DEFENDANT

ATTORNEY GENERAL ..... 2ND DEFENDANT

NATIONAL LAND COMMISSION ..... 3RD DEFENDANT

AND

LEAD PROPERTY DEVELOPERS ..... THIRD PARTY

STEPHEN KIPKEMEI KIPKETUT ..... THIRD PARTY

NAIROBI CITY COUNTY GOVERNMENT ..... THIRD PARTY

JUDGMENT

Introduction And Background:

1. The Plaintiff herein, who claims to be the registered and lawful proprietor of L.R No. Nairobi/Block 72/3079 [hereinafter referred to as the suit property] approached the court vide Plaint dated the 13th August 2013 and wherein same [Plaintiff] has sought for a plethora of reliefs.

2. Nevertheless, the Plaint under reference [details in terms of the preceding paragraph] was subsequently amended with leave of the court culminating into the amended Plaint dated the 23rd October 2019 and in respect of which the Plaintiff has sought for the following reliefs;

    a. Kes.1, 599, 000, 000/= only with interests at court rates from the date of filing of the suit.

b. General damages for breach of his rights as enshrined under Article 40 of *the Constitution* of Kenya, 2010.

c. Costs of the suit.

d. A declaration that the conduct of the Defendants was a blatant violation of the Plaintiff's rights to own property as enshrined under Article 40 of *the Constitution* of Kenya 2010.

3. Upon being served with the original plaint and summons to enter appearance, the 1st Defendant herein duly entered appearance and thereafter filed a statement of defence dated the 10th September 2013 and wherein the 1st Defendant contended inter-alia that the suit property, which is claimed by the Plaintiff herein is public land and which was reserved as a road reserve. In any event, the 1st Defendant further contended that the suit property falls within the transport corridor which was intended for the construction of the Trans- African highway.

4. Be that as it may, the 1st Defendant subsequently filed an amended statement of defence dated the 14th November 2019 and wherein same [1st Defendant] has reiterated the averments contained at the foot of the original statement of defence. For coherence, the 1st Defendant has disputed the Plaintiff's claim and/or entitlement to the suit property.

5. The 2nd Defendant duly entered appearance and proceeded to file a statement of defence and counterclaim dated the 22nd November 2013. For good measure, the counterclaim under reference has impleaded the following reliefs;

i. An order that the Defendant in the counterclaim do surrender to the chief land registrar the certificate of lease in respect of L.R No. Nairobi/Block 72/3079 held by him purporting to be in respect of the suit property for immediate cancelation.

ii. A declaration that the suit parcel namely L.R No. Nairobi/Block 72/3079 belongs to the Republic of Kenya under the custody of Kenya National highway Authority.

iii. An order of permanent injunction against the Defendant in the counterclaim from his continued use and/or ownership of any part or the whole of the suit parcel of land L.R No. Nairobi/Block 72/3079.

iv. Costs of the suit.

v. Any other relief the court deems fit to grant.

6. On behalf of the 3rd Defendant an appearance was duly entered and thereafter same [3rd Defendant] filed a statement of defence on the 5th February 2020 and in respect of which the 3rd Defendant has disputed the Plaintiff's claim pertaining to ownership of the suit property.

7. Suffice it to point out that the 1st Defendant herein thereafter filed an application seeking to take out and issue third party notice against the 1st third party. Instructively, the application under reference was allowed culminating into the 1st third party being joined into the proceedings as such.

8. Upon being joined into the proceedings the 1st third party entered appearance and thereafter filed a statement of defence dated the 13th September 2016 and in respect of which same [1st third party] contended that same lawfully bought the suit property from Stephen Kipkemei Kipkeput vide sale agreement dated 16th March 2007.

9. Other than the 1st third party, there is the 2nd third party who appears to have been joined into the proceedings by the 1st third party. Suffice it to point out that the 2nd third party also proceeded and

filed a statement of defence through the law firm of M/s Kale Maina & Bundotich Advocates and in respect of which the 2nd third party contended that the suit property was lawfully allocated unto him and thereafter same [2nd third party] duly complied with the terms of the letter of allotment culminating into the issuance of a certificate of lease.

10. Somehow, Nairobi City County Government was also joined into the subject matter and same became the 3rd third party. For good measure, upon her joinder, Nairobi City County Government duly appointed advocate and thereafter filed a statement of defence dated the 7th July 2017.

11. However, despite apparently having been joined by the Second Third Party, the statement of defence by and on behalf of the 3rd third party [Nairobi City County Government] seems to be responding to the Plaintiff's suit and in particular paragraph 18 thereof contends that the Plaintiff's suit is not only bad in law but legally untenable.

12. For completeness, the Plaintiff herein filed a Reply to defence and defence to counterclaim dated the 4th December 2013 and wherein same [Plaintiff] disputed the claims on behalf of the 2nd Defendant. Furthermore, the Plaintiff contended that the suit property was lawfully and legally alienated and thereafter the Plaintiff acquired lawful title thereto vide sale/purchase agreement.

13. Despite the fact that the suit herein was filed in the year 2013, same only came up for pretrial directions on the 6th July 2021 whereupon the advocates for the respective parties intimated to the court that same had duly filed the requisite list and bundle of documents, list of witnesses as well as witness statement. Furthermore, the parties thereafter confirmed that the suit was ready for hearing.

14. Arising from the foregoing, the court proceeded to and set down the matter for hearing. For coherence, the hearing of the matter commenced on the 21st October 2021, which is approximately 9 year[s] from the date of inception of the suit.

Evidence By The Parties'

a. Plaintiff's case

15. The Plaintiff's case revolves around the evidence of three witnesses namely Tariq Nazir Ahmed, Benson Meshak Okumu and Solomon Muge Mwangi, who testified as PW1, PW2 and PW3, respectively.

16. It was the testimony of PW1 [Tariq Nazir Ahemed] that same is the Plaintiff in respect of the instant matter. Furthermore, the witness averred that by virtue of being the Plaintiff, same [witness] is conversant with and knowledgeable of the facts of the instant matter.

17. Additionally, the witness averred that same has since recorded a witness statement dated the 5th April 2018 and which witness statement the witness sought to adopt and rely on as his evidence in chief. Instructively, the witness statement dated the 5th April 2018 was thereafter adopted and constituted as the evidence in chief of the witness.

18. On the other hand, the witness adverted to a bundle of documents referenced in the witness statement and thereafter sought to tender and produce same [Documents] before the court. For good measure, the witness intimated that the documents in question are 37 in number.

19. Pursuant to and at the instance of the witness, the various documents alluded to at the foot of the witness statement were thereafter tendered and produced as Exhibits before the court. Notably, same were admitted and marked as Exhibits P1 to P36, save for document number 18 which was marked for identification as PMFI 37.

20. Other than the foregoing, the witness alluded to the amended Plaint dated the 23rd October 2019; and sought to adopt the contents thereof. Besides, the witness also implored the court to grant the reliefs highlighted thereunder.

21. On cross examination by learned counsel [Professor Albert Mumma Sc] for the 1st Defendant, the witness averred that same bought and or purchased the suit property from Lead Developers Ltd, namely, the 3rd third party herein. In this regard, the witness averred that same has since tendered and produced a copy of the sale agreement before the court.

22. It was the further testimony of the witness that subsequent to the execution of the sale agreement, the suit property was transferred to and registered in his name. To this end, the witness adverted to the transfer instrument dated the 21st July 2011 and which was registered on the 16th November 2011.

23. Whilst under further cross examination, the witness averred that the seller of the property [the 1st third party herein] warranted unto him that the property in question did not fall within a road reserve. For coherence, the witness averred that the warranty was included in the body of the sale agreement on the advice of his [witness] advocates. In any event, the witness stated that the warranty at the foot of the sale agreement is in existence and still continues to date.

24. On further cross examination, the witness averred that same [PW1] is aware of and conversant with the Ndungu Report. It was the testimony of the witness that the Ndungu commission which birthed the Ndungu report dealt with the irregular and illegal allocation of public land. However, the witness clarified that same is not aware of when the Ndungu Commission held its enquiry.

25. Upon being shown a copy of the Ndungu report, the witness pointed out that the report in question has various annexes. In any event, the witness averred that the report under reference has been filed by and on behalf of the 1st Defendant.

26. Furthermore, the witness averred that same is also privy to the various gazette notices which have been filed on behalf of the 1st Defendant. Besides, the witness stated that the document at page 196 of the 1st Defendant's list and bundle of document is a gazette notice which was published on the 6th June 2003.

27. On the other hand, the witness pointed out that the gazette notice[s] under reference alludes to inter-alia notices pertaining to encroachment onto various road reserves, including the Southern by-pass.

28. Whilst under further cross examination, the witness averred that the document at page 22 of the 1st Defendant's list and bundle of documents is a letter dated the 17th March 2011. In any event, the witness added that the letter in question references the sale of L.R No. Nairobi/Block 72/3079. For good measure, the witness added that the property under reference is the one that was ultimately sold unto him.

29. It was the further testimony of the witness that the letter under reference is indicated to be on the letter head of M/s Robson Harris & Co Advocates who are said to be acting for the purchaser of the suit property. In any event, the witness averred that the letter under reference was seeking confirmation on whether the suit property lies within the proximity of any road reserve.

30. Additionally, the witness averred that the letter from M/s Robson Harris & Co Advocates was thereafter responded to by the 1st Defendant herein in terms of a letter dated the 21st March 2011. Instructively, the witness pointed out that the letter dated the 21st March 2011 was written on the letter head of the 1st Defendant and same intimated that the parcel of land in question lies/falls within the road reserve/railway reserve as indicated on PDP No. 4228859 of 5th June 1985.

31. On the other hand, it was the testimony of the witness that prior to purchasing the suit property, same retained a firm of advocates who carried out and undertook due diligence as pertains to the suit property. Furthermore, the witness added that following the due diligence that was undertaken, it was confirmed that the land in question did not fall within a road reserve.

32. It was the further testimony of the witness that after purchasing the suit property, same [witness] commenced to develop the suit property and in this regard, same commenced construction thereon in the year 2012. Nevertheless, the witness averred that before commencing the construction same [Witness] entered into a building agreement. However, the witness added that the building agreement was entered into between Idgrata Development Ltd and the contractor. To this end, the witness adverted to the document at page 9 of his list and bundle of documents.

33. Whilst under further cross examination, the witness averred that even though the building contract/ agreement was entered into between Idgrata Developers Ltd and the contractor, the suit [matter] before the court has been filed by himself and the claims thereunder relates to payments in his favour. For good measure, the witness averred that it is himself who is claiming payment of Kes.225, 000, 000/ = only on account of claims from the contractor.

34. It was the further testimony of the witness that Idgrata Developers Ltd, which his company also engaged a firm of architect[s], namely, Cadplan Ltd to undertake architectural designs and drawings. In this regard, the witness averred that same is also claiming the sum of Kes.35, 000, 000/= only which was paid to the said consultant[s].

35. Nevertheless, whilst under further cross examination, the witness averred that even though same is the one claiming the sum of kes.35,000,000 only, the contract underpinning the said payment was entered into between Idgrata Developers Ltd and the architectural firm.

36. It was the further evidence of the witness that same sought for and obtained approval for development on the suit property. In this regard, the witness pointed out that the development approval was issued on the 1st October 2012. Furthermore, the witness added that the development approval was subject to various conditions which were highlighted at the foot thereof. Besides, the witness clarified that the development approval was also given subject to the plot [Property] not forming part of the public property.

37. Other than the foregoing, the witness also testified that the building plans showed that the proposed development/building related to two and three bedroomed apartments. Besides, the witness also clarified that the plan in question confirms that the apartments which were to be erected thereon were 80 in number.

38. It was the further testimony of the witness that the building plan was also approved subject to various conditions. At any rate, the witness clarified that the conditions at the foot of the approval were duly complied with.

39. Additionally, the witness testified that same also sought for and obtained authorization to drill a borehole and that the authorization was issued on the 10th January 2013. Furthermore, the witness added that same also procured and obtained the requisite approvals from National Environment Management Authority.

40. Whilst under further cross examination, the witness averred that the construction on the suit property commenced in January 2013 and that by July 2013 the construction in question was 50% complete. Besides, the witness added that by July 2013 same [witness] had procured finishing materials worth Kes.150, 000, 000/= only.

41. Be that as it may, it was the testimony of the witness that officer[s] from the 1st Defendant went to the suit property and commenced demolition thereon on the 25th July 2013.

42. Other than the foregoing, it was the testimony of the witness that by the time the demolition took place same [Plaintiff] had already procured the material for finishes. In this regard, the witness adverted to the various pro-forma invoices contained between pages 73 to 78 of his [Plaintiff's] bundle of documents. However, the witness admitted that the pro-forma invoices do not denote that payments were made.

43. Notwithstanding the foregoing, the witness averred that same made payments towards and on account of the finishing materials whose details are stipulated at the foot of the pro-forma invoices.

44. Whilst under further cross examination, the witness averred that even though same made payments towards and on account of the finishing material[s], same has however not tendered or produced any evidence of such payments.

45. It was the further testimony of the witness that by July 2013 same had also received offers for sale of various units and in any event, same had proceeded to and sold some of the units in the apartment[s] which was under construction. For good measure, the witness pointed out that same has availed and placed before the court evidence of a sale agreement which was entered into between himself and Eunice Akinyi.

46. Be that as it may, whilst under further cross examination, the witness admitted that by the time the sale agreement at page 240 of his list and bundle of documents was being entered into, the apartment[s] which were under construction had been demolished.

47. It was the further testimony of the witness that same is conversant with the 3rd Defendant herein whom the witness pointed out is a constitutional commission vested with powers to undertake enquiries pertaining to and concerning allocation of public land.

48. Furthermore, the witness averred that the 3rd Defendant herein generated notices which touched on and/or affected inter-alia the suit property. Additionally, it was the testimony of the witness that subsequently the 3rd Defendant herein issued a gazette notice number 6862 of 17th July 2017 and wherein the 3rd Defendant determined/declared that the suit property is public land and hence the title thereto ought to be revoked.

49. While under further cross examination, the witness averred that upon the issuance of the impugned gazette notice same [witness] felt aggrieved and thereafter proceeded to and filed Judicial Review [JR] proceedings challenging the decision of the 3rd Defendant. For good measure, the witness averred that the decision of the 3rd Defendant, which sought to revoke the title of the suit property was thereafter stayed pending the hearing and determination of the instant suit.

50. It was the further testimony of the witness that later on the 3rd Defendant also published a corrigendum and wherein it was indicated that the 1st Defendant ought to compensate the Plaintiff for the demolition that was undertaken on the suit property.

51. Furthermore, it is the testimony of the witness that same has sought for compensation on various accounts including Kes.10, 000, 000/= Only, on account of advertising and marketing; Kes.225, 000, 000/= Only, on account of contractors claim as well as other claims amounting to Kes.1, 599, 000, 000/= only.

52. It was the further testimony of the witness that a pro-forma invoice is an invoice that gives quotation as pertains to the items that are sought to be imported. Nevertheless, the witness averred that same paid 50% of the ammount of monies that are stipulated at the foot of the pro-forma invoice.

53. Whilst under further cross examination, the witness however stated that despite making the said payments same [Witness] has no evidence before the court to show that such payments were ever made.

54. It was the further evidence of the witness that same has also tendered and produced before the court a project over view showing the design that was approved for construction. At any rate, the witness acknowledged that the project over view does not show that there was a four [4] bedroomed house that was approved for construction. Nevertheless, and whilst under further cross examination, the witness stated that the project over view which is alluded to is not the one that was finally approved.

55. On the other hand, it was the testimony of the witness that though same sold a number of apartments, same [witness] do not have any evidence to confirm the sale of the apartment. In any event, the witness added that the only evidence that same has placed before the court is the sale agreement between him and Eunice Akinyi.

56. On cross examination by learned counsel for the 3rd Defendant, the witness averred that same [Plaintiff] has sued the 3rd Defendant as pertains to the actions in respect of the suit property. In any event, the witness added that same is also seeking compensation as against the 3rd Defendant.

57. Whilst under further cross examination, the witness averred that he was not aware that the suit property was public land. In any event, the witness clarified that before same purchased the suit property, he [witness] instructed his transaction advocates to undertake due diligence over and in respect of the suit property.

58. On re-examination, by learned counsel for the Plaintiff, the witness reiterated that the suit property was bought from the 1st third party. Besides, the witness averred that the transaction was reduced into writing and the sale agreement was duly executed by all the parties.

59. It was the further testimony of the witness that there is a clause of the sale agreement pointing out that the suit property is not a public road. For good measure, the Witness added that the said Clause was included as a Warranty.

60. On further re-examination, the witness averred that the suit property does not fall within the road reserve. In any event, it was the testimony of the witness that the suit property falls more than 5 meters away from the road reserve.

61. Furthermore, the witness averred that same has tendered and produced various letters before the court which confirmed that the suit property does not encroach onto the southern bypass. In this regard, the witness adverted to the letter[s] dated the 14th July 2009 and 29th July 2010, respectively.

62. It was the further testimony of the witness that prior to purchasing the suit property same [Witness] engaged his advocates who undertook due diligence and confirmed that the suit property was lawfully acquired. In this regard, the witness averred that his title to and in respect of the suit property is lawful.

63. Whilst still under re-examination, the witness averred that Idgrata Developers Ltd is the one that entered into and signed the agreement with the contractor[s] and the architects. However, the witness added that the agreements in question were being signed by the company on his behalf.

64. It was the further testimony of the witness that though the 3rd Defendant had hitherto issued a recommendation that the title of the suit property be revoked, the 3rd Defendant undertook further review and thereafter published another gazette notice dated the 10th November 2017. In this regard, the witness clarified that the 2nd notice indicated that the revocation of the title of the suit property will be held in abeyance, or stayed pending the determination of the suit.

65. The second witness who testified on behalf of the Plaintiff was Benson Meshak Okumu. Same testified as PW2.

66. It was the testimony of the witness [PW2] that same is a licenced surveyor practising in the name of Boma Surveyors Company Ltd. Furthermore, the witness averred that same has practised as a licensed surveyor since the year 1991.

67. On the other hand, it was the testimony of the witness that same [PW2] is conversant with the facts of this matter insofar as same was retained and instructed by the Plaintiff to undertake an assignment in respect of the suit property.

68. Other than the foregoing, the witness averred that same has since recorded a witness statement dated the 5th April 2018 and which witness statement same sought to adopt and rely on. Instructively, the witness statement dated the 5th April 2018 was thereafter adopted and constituted as the evidence in chief of the witness.

69. Additionally, the witness averred that arising from his engagement, same proceeded to and prepared a survey report dated March 2014. In this respect, the witness sought to tender and produce the survey report as an exhibit before the court.

70. There being no objection to the production of the survey report, same was produced and marked as Exhibit P31.

71. On cross examination by learned counsel for the 1st Defendant, the witness averred that upon his instructions, same was given various terms of reference which were to guide his activities. Besides, it was the testimony of the witness that in the course of his engagement, same looked at pertinent documents touching on and concerning the allocation of the suit property.

72. Additionally, it was the testimony of the witness that same had occasion to look at the letter of allotment, the survey plan, the registry index map, the certificate of title and thereafter same confirmed that the allocation of the suit property was lawful.

73. While under further cross examination, the witness averred that same is knowledgeable and conversant with the provisions of the physical planning Act, now repealed, as well as the importance of a Part Development Plan [PDP].

74. Furthermore, it was the testimony of the witness that a PDP is a critical document insofar as same would show the ground position/location of the plot which is the subject of allotment. In any event, the witness averred that in respect of the subject matter there was a PDP.

75. Additionally, it was the evidence of the witness that the letter of allotment which birthed the suit property was issued on the 18th June 1999.

76. On further cross examination, the witness testified that the letter of allotment which was issued on the 18th June 1999 is part of the report which same has tendered and produced before the court. In any event, the witness added that the letter of allotment in question alluded to an unsurveyed plot.

77. Whilst under further cross examination, the witness pointed out that at the time of the issuance of the letter of allotment, the plot in question had not been surveyed. However, the witness testified that the plot was subsequently surveyed and a survey plan [FR] was prepared.

78. It was the further testimony of the witness that the letter of allotment which same saw and has referenced; was issued in favour of Baimet Contractors. Besides, the witness pointed out that the plot in question is said to be located at Lang'ata.

79. Upon being referred to page 8 of exhibit P31, the witness pointed out that the survey record does not allude to the reference Number for the PDP. In any event, the witness averred that the PDP No. is not shown/reflected in the survey records.

80. Furthermore, the witness averred that same has attached a copy of the PDP in his report before the court. Nevertheless, upon being prodded further the witness conceded and acknowledged that his report [exhibit P31] does not include a PDP.

81. Other than the foregoing, it was the testimony of the witness [PW2] that the suit property was not part of the public utility plots. In any event, the witness added that the development approvals were indeed issued to and in favour of the Plaintiff.

82. Furthermore, the witness also testified that the issuance of the development approval by the county government denote[s] that there was no dispute.

83. Upon being referred to the document at page 278 of the 1st Defendant bundle of document, the witness stated that the document thereunder is s structural plan. Furthermore, it was the testimony of the witness that a structural plan is in respect of the general area.

84. Whilst still under cross examination by learned counsel for the 1st Defendant, the witness averred that the suit plot and trans African highway are separated by a five-meter corridor. For good measure, the witness added that the suit property has not encroached onto the highway.

85. On cross examination by learned counsel for the 2nd Defendant, the witness averred that the letter of allotment which same has alluded to does not have a reference number. In any event, the witness averred that same is not conversant with the consequences of lack of a reference number on a letter of allotment.

86. Whilst under further cross examination, the witness averred that same relied on the documents which were availed unto him and furthermore, same did not attempt to cross check and/or ascertain the aspect pertaining to the reference number.

87. On cross examination by learned counsel for the 1st third party, the witness averred that the suit property is located next to the proposed Trans Africa Highway. Besides, the witness averred that after the proposed trans African highway, there is the proposed railway reserve.

88. Furthermore and while still under cross examination, the witness averred that the suit property is located to the left of the proposed trans African highway.

89. On cross examination by learned counsel for the 2nd third party, the witness averred that same was tasked to investigate the location of the suit property vis a viz the trans African highway. In particular, the witness clarified that his assignment was to determine whether the suit property encroached onto the southern bypass.

90. It was the further testimony of the witness that the letter of allotment in respect of the subject matter related to unsurveyed plot. However, the witness clarified that the plot was subsequently surveyed culminating into the preparation of a survey plan.

91. The 3rd witness who testified on behalf of the Plaintiff was Solomon Muge Mwangi. Same testified as PW3.

92. It was the testimony of the witness [PW3] that same is a registered valuer. Besides, same intimated that he was engaged and instructed by the Plaintiff to undertake valuation of the suit property and thereafter to prepare a valuation report.

93. Additionally, it was the testimony of the witness that same has since proceeded to and recorded a witness statement dated the 16th December 2022. In this regard, the witness sought to adopt and rely on the witness statement as his evidence in chief. Instructively, the witness statement dated the 16th December 2022 was thereafter adopted and constituted as the evidence in chief of the witness.

94. On the other hand, the witness also adverted to the valuation report dated the 30th June 2016 and thereafter sought to tender and produce same as an Exhibit. Suffice it to point out that the valuation report under reference was duly tendered and produced as Exhibit P38.

95. On cross examination by learned counsel for the 1st Defendant, the witness averred that same undertook the valuation of the suit property with a view to ascertaining the value of the land. In any event, the witness added that the purpose for the valuation was to enable the Plaintiff to seek for compensation.

96. Whilst under further cross examination, the witness averred that the purpose of the valuation would not influence and/or affect the outcome of the valuation or better still the value of the property.

97. It was the further testimony of the witness that by the time same [Witness] undertook the valuation of the property, the development that had been erected thereon had been demolished. Nevertheless, the witness stated that same was able to undertake the valuation culminating into the valuation report.

98. Other than the foregoing, it was the testimony of the witness that prior to undertaking the valuation same [witness] did not carryout a search over the suit property. In any event, the witness added that same has indicated in his valuation report that he was unable to procure and/or obtain a search.

99. On further cross examination, the witness averred that ownership of the property in question would be a relevant factor in determining the question of the value of the property. However, the witness added that same was able to undertake the valuation of the suit property and thereafter returned a value of Kes.300,000,000 [Three Hundred Million] Only.

100. Whilst under further cross examination, the witness averred that in the course of the valuation same deployed and used the market approach. In any event, the witness added that same compared the value of the suit property with other plots situate/located in the same neighbourhood. However, the witness averred that same has not included the details of the comparable properties in the body of the valuation report.

101. On cross examination by learned counsel for the 2nd Defendant, the witness averred that same carried out and undertook the valuation in the year 2016. Furthermore, the witness added that by the time same undertook the valuation of the Property, the road [southern bypass] had not been put on the land.

102. It was the further testimony of the witness that by the time same was undertaking the valuation, the demolition of the development of the suit property was still on going.

103. On cross examination by learned counsel for the Third Defendant the witness averred that same was retained to undertake valuation for purposes of compensation.

104. On re-examination by learned counsel for the Plaintiff, the witness averred that same did not carryout a search over the suit property because same [witness] had been availed a copy of the requisite certificate of title. In any event, the witness added that the absence of an official search does not change the value of the land.

105. On further re-examination, the witness averred that his mandate and or scope of duty was to determine the value of the suit property. Nevertheless, the witness stated that by the time same was undertaking the valuation on the suit property the demolition was still ongoing.

106. Finally, the witness averred that the absence of approvals [building approvals] would not change the outcome in the valuation report. In particular, the witness averred the valuation was in respect of the value of the land.

107. With the foregoing testimony, the Plaintiff's case was duly closed.

b. The 1st defendant's case:

108. The 1st Defendant's case is premised on the evidence of two [2] witnesses namely Alfred Mwanzia and Milka Muendo, who testified as DW1 and DW2, respectively.

109. It was the testimony of the witness [DW1] that same is currently the Deputy Director of Physical Planning, working in the Ministry of lands, public works, housing and urban development. Furthermore, the witness averred that by virtue of his portfolio same is conversant with the facts pertaining to inter-alia the preparation of a Part Development Plan [PDP] and the processes attendant to its approval.

110. Furthermore, the witness averred that same has also recorded a witness statement in respect of the instant matter. For good measure, the witness adverted to the witness statement dated the 21st December 2016 and which same [witness] sought to adopt and rely on as his evidence in chief.

111. Suffice it to point out that the witness statement dated the 21st December 2016 was thereafter adopted and constituted as the evidence in chief of the witness.

112. On cross examination by learned counsel for the Plaintiff, the witness averred that same has referred to a structure plan in his witness statement. In any event, the witness added that the structure plan which same [Witness] has referenced forms part of the documents before the court.

113. Upon being referred to document number 17 A in the 1st Defendant's bundle of documents, the witness confirmed that same is the structure plan that same [witness] has referenced in his witness statement. Besides, the witness averred that the structure plan shows the existence of a road and railway reserve. It was the further testimony that the structure plan shows that the road is to the north whereas the railway line is to the south.

114. Besides, the witness also testified that the structure plan also shows the corridor and that the same [corridor] is running parallel to each other. Furthermore, the witness averred that the structure plan was prepared by the ministry of land.

115. Nevertheless, whilst under further cross examination the witness changed version and stated that the structure plan was prepared by the ministry of public works. In any event, it was the evidence of the witness that the structure plan shows the existence and position of the proposed trans Africa highway as well as a road reserve.

116. Additionally, the witness averred that the structure plan relates to a future plan and same does not mean that the development has occurred. On the other hand, it was the testimony of the witness that the structure plan does not capture any details of the land. However, the witness testified that same [witness] has supplied to the court the details pertaining to the land in question. For good measure, the witness averred that the suit property falls within the transport corridor.

117. Whilst under further cross examination by learned counsel for the Plaintiff the witness averred that the areas marked for development also runs parallel to the highway/road reserve. In any event, it was the testimony of the witness that there is a buffer zone between the highway and the areas marked for development.

118. Other than the foregoing, the witness testified that the buffer zone is 50 meters. On further cross examination, the witness averred that the director of physical planning was obligated to advice the commissioner of land. For good measure it was the testimony of the witness that the advice would be in terms of a preparation of a Part Development Plan [PDP].

119. On further cross examination, the witness averred that the mere presence of a PDP does not show that the land was properly allocated. In particular, the witness added that a PDP must be subjected to checking and approval by the director of physical planning. Furthermore, the witness averred that after the PDP has been approved by the director of physical planning same is escalated to the commissioner of lands, who would be at liberty to issue a letter of allotment.

120. On the other hand, it was the testimony of the witness that a survey plan [S/R] is ordinarily prepared by the director of survey. In any event, the witness averred that same has seen a copy of the survey plan [FR] which has been rubber stamped by the director of survey. Besides, the witness added that the suit property is duly reflected and contained in the survey plan.

121. Be that as it may and whilst under further cross examination, the witness averred that the trans Africa highway is also captured and reflected in in the survey plan [FR]. In any event, the witness added that the highway as shown on the FR map shows that there is 60 meters reserve.

122. It was the further testimony of the witness that the parcel of land herein falls within the buffer zone. However, the witness added that from the structure plan same [witness] cannot point out the suit property.

123. It was the further testimony of the witness that the structure plan does not reveal the existence of the suit property. Whilst under further cross examination by learned counsel for the Plaintiff, the witness averred that in the course of alienating a road, there is need to prepare a PDP. In this regard, the witness averred that no PDP was ever prepared as pertains to the suit property.

124. Additionally, it was the evidence of the witness that the road was not reduced to a PDP. In any event, it was the testimony of the witness that the only document supporting the road herein is the structure plan. However, the witness added that the structure plan was never approved/signed by the commissioner of land.

125. Be that as it may, it was the testimony of the witness that the structure plan before the court is not complete without the signature of the commissioner of land.

126. Other than the foregoing, it was the testimony of the witness that it was the commissioner of land who used to allocate public land. Besides, the witness added that the commissioner of land would be able to ascertain/confirm that the land in question is available for allocation or otherwise.

127. It was the further testimony of the witness that the structure plan was and has been in force from 1985. Nevertheless, the witness pointed out that the road in question had already been allocated and reserved and hence the ground could not be varied.

128. Upon being referred to the document at page 5 of the 2nd third party's bundle of documents, the witness averred that the document in question is not a PDP. For good measure, the witness thereafter itemized various reasons why the document at page 5 does not constitute a PDP. Instructively, the

witness clarified that for a PDP to be authentic same must be prepared by the directorate of physical planning, be subjected to approval, be assigned a plan reference number and thereafter same [PDP] must also be approved by the commissioner of lands or the minister in charge of land.

129. Furthermore, it was the testimony of the witness that the document at page 5 of the 2nd third party's bundle of document does not meet and/or satisfy the requisite parameters to warrant what is being described as PDP. To this end, the witness averred that the document at page 5 and which has been alluded to is incomplete.

130. On the other hand, it was the testimony of the witness that the document at page 71 of the 1st Defendant's bundle of documents is a design for the road. However, the witness pointed out that the said document [designed for the road] does not show the position of the suit property.

131. On cross examination by learned counsel for the 2nd third party, the witness pointed out that his testimony before the court revolves around the structure plan which has been tendered and produced before the court. However, the witness clarified that same [witness] has never gone to the site. Furthermore, the witness averred that same is not aware whether trans Africa highway is now what comprises and/or is referred to as southern bypass.

132. It was the further testimony of the witness that on the structure plan same [witness] can see a parcel of land referenced as plot number 414.

133. Whilst under further cross examination, the witness averred that the document at page 51 of the 1st Defendant's bundle of document shows that there was a problem with the design, in particular, the witness avers that the letter at page 51 of the 1st Defendant's bundle of documents also shows that the land in question was reserved for several purposes.

134. It was the further testimony of the witness that the land in question is indicated to have been reserved for Mombasa Road slum upgrading development. Nevertheless, the witness clarified that the land in question is contained in the structure plan.

135. It was the further testimony of the witness that the structure plan shows that the suit property falls on the road reserve. At any rate, the Witness added that the parcel of land in question sits on the road reserve.

136. Additionally, it was the testimony of the witness that the land would also be sitting on the railway reserve.

137. On cross examination by learned counsel for the 1st third party, the witness averred that a PDP is ordinarily prepared by the directorate of physical planning and thereafter same [PDP] ought to be approved. Besides, the witness also added that the structure plan also ought to be approved by the commissioner of land.

138. It was the further testimony of the witness that the approval of the PDP and the structure plan by the commissioner of lands would make the document to have legal force.

139. Whilst under further cross examination the witness averred that the structure plan before the court was not approved. However, it was the testimony of the witness that despite the fact that the structure plan was not approved same would still be used.

140. On the other hand, it is the testimony of the witness that the documents at page 14 of the 1st third party's bundle of documents is a letter written by one, Engineer Mwinzi. For good measure, the witness added that the designation of Engineer Mwinzi is indicated to be the chief road engineer. Besides, the witness pointed out that the letter under reference refers to the suit property.

141. It was the further testimony of the witness that the letter in question indicates that the suit property does not encroach onto the road reserve. In any event, the witness testified that the chief roads engineer would certainly be knowledgeable of whether or not the land in question [suit property] sits on the road reserve.

142. On the other hand, it was the testimony of the witness that the document at page 22 of the 1st third party's bundle of documents is a letter from Kenya railways. Besides, the witness averred that the letter pointed out and/or underscored that the suit property does not encroach on the railway reserve.

143. On re-examination by learned counsel for the 1st Defendant, the witness averred that the document at page 55 of the 1st Defendant's bundle of documents clearly shows that the suit property sits/falls on the portion which was reserved as a slum upgrading project.

144. Besides, it was the testimony of the witness that the area covered by the document at page 55 in the 1st Defendant's bundle of documents also sits on the southern bypass.

145. On further re-examination, the witness averred that the letter at page 22 of the 1st third party's bundle of documents does not authoritatively confirm that the suit property doesn't =encroach to the road reserve.

146. It was the further testimony of the witness that the structure plan was signed and approved on the 5th June 1985. Furthermore, the witness added that at the time when the structure plan was signed and approved the applicable planning Act was Land Planning Act, Chapter 303 Laws of Kenya [now repealed].

147. Whilst under further re-examination, it was the testimony of the witness that the provisions of the Planning Act, Chapter 303 Laws of Kenya [now repealed provided that the director of physical planning was mandated to advice the commissioner of lands on matters pertaining to planning.

148. In any event, the witness added that the structure plan has remained in use for purposes of guiding development in the area.

149. Other than the foregoing, it was the testimony of the witness that a PDP is a critical document in the alienation of public land. In any event, the witness averred that a PDP would require to be subjected to approval by the director of physical planning.

150. Additionally, it was the further testimony of the witness that the suit property was not properly alienated. For good measure, the witness averred that to ascertain whether the suit property was properly alienated, one would need to check the record at the office of the director of physical planning.

151. On further re-examination, the witness averred that the suit property falls within the road reserve. On the other hand, it was the testimony of the witness that the survey plan [FR] does not contain the necessary ingredient that were captured in the structure plan. In any event, the witness added that the FR [survey plan] which has been tendered before the court does not show whether same [FR] was approved. In this regard, the witness averred that the FR before the court is incomplete.

152. It was the further testimony that the survey plan [FR] was similarly not authenticated. In this regard, the witness averred that the FR [survey plan] is lacking in several features including the requisite approval by the director of survey.

153. Finally, the witness averred that the land in question had already been reserved for Mombasa Road slum upgrading program and hence same [suit property] was not available for allocation.

154. The second witness who testified on behalf of the 1st Defendant was Milka Muendo. Same testified as DW2.

155. It was the testimony of the witness [DW2] that same is a licensed surveyor by profession. Furthermore, the witness averred that currently same [witness] is working with the 1st Defendant hereof. In this regard, the witness averred that same is therefore conversant with and knowledgeable of the facts of the matter.

156. Additionally, the witness averred that same has since recorded a witness statement dated the 17th October 2019 and, in this regard, the witness sought to adopt and rely on the contents of the said witness statement.

157. Suffice it to point out that the witness statement dated the 17th October 2019, was thereafter adopted and constituted as the evidence in chief of the witness.

158. Furthermore, the witness also adverted to the witness statement of Thomas Achoki and thereafter sought to adopt and rely on the said witness statement. Suffice it to point out that the witness statement of Thomas Achoki was similarly adopted and constituted as the evidence in chief of the witness.

159. Other than the foregoing, the witness adverted to the list and bundle of documents dated the 1st October 2020 and thereafter implored the court to adopt same [documents] as exhibits on behalf of the 1st Defendant.

160. There being no objection to the production of the documents under reference same [documents] were admitted and marked as exhibits D1 to D27, respectively on behalf of the 1st Defendant.

161. Furthermore, the witness also alluded to the supplementary list and bundle of document dated the 4th February 2019. In this regard, the witness sought to tender and produce the said documents as exhibits. Instructively, the documents under reference were thereafter admitted and marked as Exhibits 28-30, respectively on behalf of the 1st Defendant.

162. On cross examination by learned counsel for the 1st third party, the witness averred that same has perused and examined the various documents alluded to at the foot of the bundle of document filed on behalf of the 1st third party. Nevertheless, the witness reiterated that the suit property lies within the road reserve. In any event, the witness clarified that the suit property lies on the road reserve of southern bypass.

163. Whilst under further cross examination, the witness pointed out that the 1st Defendant herein falls under the Ministry of roads. Besides, the witness averred that the Ministry of roads would be privy to and conversant with what constitutes a road reserve.

164. Upon being referred to the document at page 24 of the 1st third party's list and bundle of document, the witness averred that the document in question is a letter authored by the Chief Engineer Roads. Besides, the witness clarified that the letter under reference touches on and concerns the suit property.

165. It was the further testimony of the witness that the contents of the letter by the Chief Engineer Roads suggest[s] that the suit property does not encroach onto the southern bypass.

166. On further cross examination, the witness also averred that the document at page 32 of the 1st third party's list and bundle of documents is also a letter. For good measure, the witness averred that the letter in question emanates from the Managing Director of the railway's corporation.

167. Other than the foregoing, it was the testimony of the witness that the letter at page 32 [details supra] also relates to the suit property. In any event, the witness testified that the contents of the letter indicate that the suit property does not encroach onto the railway reserve.

168. Upon being referred to the document at page 22 of the 1st Defendant's list and bundle of documents, the witness averred that the documents under reference is a letter from M/s Robson Harris & Company Advocates. However, the witness pointed out that from the face of the said letter it is not apparent who was the purchaser being alluded to thereunder.

169. Whilst under further cross examination, the witness averred that same is conversant with a PDP. In any event, the witness added that a PDP would speak to and confirm the ground location of a particular property. Furthermore, the witness added that the PDP shows that the suit property lies on the road reserve.

170. On cross examination by learned counsel for the Plaintiff, the witness averred that the document at page 18 of the 1st Defendant's bundle of documents is the preliminary design of the road. Furthermore, the witness averred that the preliminary design shows that the suit property abuts the residential estate. Besides, the witness also added that the suit property also abuts the road reserve as well as the railway reserve.

171. Whilst under further cross examination, the witness averred that the road reserve and the railway reserve are nearly parallel. However, it was the further testimony of the witness that there is a point where the road reserve marges with the railway reserve.

172. Additionally and while under further cross examination, the witness averred that same is aware of the survey plan that was prepared. In any event, and upon being shown the survey plan [F/R] the witness averred that the survey plan is dated 7th June 2001.

173. However, it was the testimony of the witness that the survey plan [FR] was prepared long after the road was already designed.

174. Whilst under further cross examination, it was the testimony of the witness that the road has since been completed but the suit property has not been touched. Nevertheless, it was the testimony of the witness that there is an interchange that is yet to be constructed and/or built.

175. It was the further testimony of the witness that though the structure plan was not approved by the commissioner of land, nevertheless the structure plan was certified by the director of physical planning. Besides, the witness also added that the director of physical planning also confirmed that the structure plan was not approved by the commissioner of land.

176. Other than the foregoing, the witness averred that the suit property was fraudulently acquired. Whilst under further cross examination, the witness averred that the Plaintiff herein was made aware that the suit property fell and/or sit[s] on a road reserve.

177. On cross examination by learned counsel for the 2nd third party, the witness averred that land can be reserved for public use by way of a structure plan. Furthermore, it was the testimony of the witness that the suit property falls and/or lies within the transport corridor.

178. On further cross examination, it was the testimony of the witness that the transport corridor is evident and shown in exhibit D29.

179. It was the further testimony of the witness that the suit property also encroaches on the railway reserve. In any event, the witness averred that the evidence of such encroachment is discernible from the structure plan.

180. On re-examination by learned counsel for the 1st Defendant, the witness averred that there was a plan to build an interchange around the area where the suit property is located. However, the witness added that the interchange has not been constructed.

181. On the other hand, it was the testimony of the witness that the road was build on the railway reserve. However, the witness added that the suit property has encroached onto the road reserve.

182. With the foregoing testimony, the 1st Defendant's case was closed.

c. 2nd Defendant's case:

183. The 2nd Defendant's case gravitates around the evidence of one witness, namely George Gichere Gitonga. Same testified as DW3.

184. It was the testimony of the witness [DW3] that same is a Land Registrar currently attached to the office of the chief land registrar [court section]. Furthermore, the witness averred that by virtue of his office same is conversant with the facts of the instant matter.

185. Additionally, the witness averred that same has since recorded a witness statement dated the 13th October 2023 and thereafter sought to adopt and rely on the contents of the said witness statement. Suffice it to point out that the witness statement dated the 13th October 2023 was thereafter adopted and constituted as the evidence in chief of the witness.

186. On the other hand, the witness averred that same is privy to and conversant with the statement of defence and counterclaim filed by the honourable Attorney General. In this regard, the witness adverted to the statement of defence and counterclaim dated the 22nd November 2013 and which the witness sought to adopt and rely on.

187. On cross examination, by learned counsel for the 1st Defendant, the witness averred that the document at page 24 of the 1st Defendant's bundle of documents relates to the Ndungu report on the irregular and illegal acquisition of public land. Furthermore, the witness added that the report in question highlighted various properties which were illegally and irregularly acquired. In any event, the witness averred that the suit plot is one of the plots alluded to and captured in the said report.

188. It was the further testimony of the witness that the Plaintiff herein was aware of the contents of the Ndungu report and in particular the fact that the suit property was blacklisted. In any event, the witness averred that the Plaintiff herein is not a bona-fide purchaser for value or at all.

189. Whilst under cross examination, the witness averred that the suit property was public land and hence the allocation thereof was illegal.

190. On cross examination by learned counsel for the Plaintiff, the witness averred that same perused the record at the office of the chief land registrar and discovered that Mr. Stephen Kipkemei Kipkebut was indeed an allottee. However, the witness pointed out that same has not brought before the court a copy of the letter of allotment in favour of the said allottee. Furthermore, the witness added that same has not also brought before the court a copy of the lease that was registered in favour of the said Mr. Stephen Kipkemei Kipkebut.

191. It was the testimony of the witness that before public land can be allocated, the director of physical planning must prepare a Part Development Plan [PDP]. At any rate, the witness averred that the chief

land registrar is not involved in the process of preparation of the PDP. To the contrary, the witness clarified that the office of the chief land registrar is only concerned with registration.

192. Upon being referred to the survey plan, the witness averred that same indicates that it was duly authenticated. For good measure, the witness testified that the survey plan has a signature affixed thereon. In any event, it was the testimony of the witness that the survey plan was registered on the 7th June 2001.

193. Whilst under further cross examination, the witness averred that the survey plan captures and reflects the position of the highway. In any event, the witness added that the highway is shown to be 5 meters away from the suit property.

194. On further cross examination, the witness averred that the suit property has indeed encroached onto the southern bypass. Other than the foregoing, it was the testimony of the witness that the title of the suit property was contained in the gazette notice published on the 17th July 2017. Furthermore, the witness added that it was shown that the suit property was public utility.

195. It was the further testimony of the witness that the suit property was captured in the Ndungu report and that same [Suit Property] is reflected at page 39 of the Plaintiff's bundle of documents. However, upon being prodded further, the witness retracted his evidence and stated that the suit property was not included in the Ndungu report.

196. On cross examination by learned counsel for the 2nd third party, the witness averred that the ministry of lands was not party to the demolition on the suit property. However, the witness added that the suit property was declared to be public utility plot.

197. Whilst under further cross examination, the witness averred that the declaration that the suit property was public utility plot was made by National Land Commission [3rd Defendant herein].

198. Upon being referred to the document at page 52 of the 1st Defendant's bundle of documents, the witness averred that the said documents confirms that the suit property was and remains a public utility plot.

199. On re-examination by learned counsel for the 2nd Defendant, the witness averred that the survey plan before the court only has a signature. For good measure, the witness clarified that there is no approval that has been shown on the face of the survey plan.

200. It was the further testimony of the witness that a PDP would confirm the availability of the land for purposes of alienation and allocation. Whilst under further re-examination, the witness averred that the suit property is part of the gazette notice pertaining to illegal allocation of public land.

201. With the foregoing testimony, the 2nd Defendant's case was duly closed.

d. 3rd Defendant's case:

202. Though the 3rd Defendant duly entered appearance and filed a statement of defence same [3rd Defendant] did not file a list of witnesses and/or witness statement. Besides, it suffices to point out that learned counsel for the 3rd Defendant intimated to the court that same would not be calling any witness on behalf of the 3rd Defendant.

203. Suffice to point out, learned counsel for the 3rd Defendant [National Land Commission] proceeded to and closed the 3rd Defendant's case albeit without tendering any evidence or at all.

e. 1st Third party'case:

204. The 1st third party called one witness namely, Dr. George Onyango. Same testified as third-party witness 1 [TPW 1].

205. It was the evidence of the witness that same is a director of the 1st third party, namely, Lead Properties Ltd. In this regard, the witness added that by virtue of being a director of the 1st third party same [witness] is therefore conversant with the facts of the instant matter.

206. Furthermore, the witness averred that same has since recorded a witness statement in respect of the instant matter. For coherence, the witness pointed out that the witness statement is dated the 23rd April 2018, and which witness statement the witness sought to adopt and rely on as his evidence in chief.

207. Suffice to point out that the witness statement dated the 23rd April 2018; was thereafter adopted and constituted as the evidence in chief of the witness.

208. Other than the foregoing, the witness also alluded to the list and bundle of documents filed by the 1st third party dated the 13th September 2016, containing 8 documents and which the witness sought to adopt and produce before the court.

209. Even though learned counsel for the 2nd Defendant took out an objection pertaining to certain documents, the Court rendered a ruling and whereupon the objection was dismissed. Consequently, the documents at the foot of the list of documents filed by and on behalf of the 1st third party were thereafter admitted and constituted as exhibits TP Exhibits 1 to TPW 8, respectively.

210. It was the further testimony of the witness that the same has also brought to court a copy of the certificate of lease which was issued in favour of the 1st third party. However, the witness clarified that the certificate of lease in question is not one of the documents captured at the foot of the list and bundle of documents filed before the court.

211. Be that as it may, the witness sought to tender and produce the certificate of lease as an exhibit before the court. Suffice it to point out that the request by the witness was conceded to by the advocates for the adverse parties and thereafter the certificate of lease was produced and marked as exhibit TP Exhibit 9.

212. On cross examination by learned counsel for the 3rd third party, the witness averred that the 1st third party bought the property from the 2nd third party, namely, Mr. Stephen Kipkemei Kipkebut. In any event, the witness added that prior to the purchase of the suit property, the 1st third party undertook due diligence to ascertain the validity of the title which was issued in favour of the 2nd third party.

213. It was the further testimony of the witness that in the course of undertaking the due diligence the 1st third party came across various letters including exhibit TP Exhibit 6 which is a letter from Kenya railways. Instructively, the witness averred that the letter under reference pointed out that the land in question does not fall within the road reserve.

214. However, whilst under further cross examination, the witness admitted that exhibit TP Exhibit 6 [letter from Kenya railways] was indeed written long after the 1st third party had acquired title to the suit property.

215. Upon being referred to page 23 of the 1st third party's bundle of documents the witness also averred that the said document is a letter from the office of Kenya National Highways Authority [the 1st Defendant]. Furthermore, the witness added that the letter in question confirmed that the suit

property does not encroach onto the southern bypass. In any event, it was the testimony of the witness that the letter under reference stated that the suit property is about 5 meters from the road reserve.

216. On cross examination by learned counsel for the 1st Defendant, the witness averred that prior to and before purchase of the suit property, the 1st third party indeed undertook due diligence to ascertain the validity of the title of the vendor.

217. It was the further testimony of the witness that thereafter the 1st third party entered into a sale agreement which was reduced into writing. Furthermore, the witness averred that the sale agreement was executed by both the purchaser [1st third party] and the vendor [2nd third party].

218. It was the further testimony of the witness that thereafter the 1st third party was issued with a certificate of lease.

219. Whilst under further cross examination, the witness avers that even though same has tendered and produced various letters before the court, the letters in question all relate to the period after the 1st third party had purchased the suit property. For good measure, the witness acknowledged that same has not brought to court any letter or document to demonstrate that due diligence was undertaken prior to the issuance of the certificate of title in favour of the 1st third party.

220. On cross examination by learned counsel for the 2nd Defendant, the witness indicated that same is a director of the 1st third party. Furthermore, the witness thereafter enumerated the other directors of the 1st third party including Mr. Stephen Kipkemei Kipkebut [2nd third party herein].

221. While under further cross examination, the witness averred that the 1st third party undertook due diligence prior to and before purchasing the suit property. Nevertheless, the witness conceded that same has not tendered any evidence to demonstrate that due diligence was ever taken.

222. It was the further testimony of the witness that the letter of allotment shows that the property was allocated to Baimet Contractors; and not to Mr. Stephen Kipkemei Kipkebut, who is the one who sold the Land in question.

223. On cross examination by learned counsel for the 3rd Defendant, the witness averred that due diligence was undertaken on behalf of the 1st third party by her [1st third party's] transaction advocates.

224. With the foregoing testimony, the 1st third party's case was duly closed.

f. 2nd Third party's case:

225. The 2nd third party's case is premised on the evidence of one witness, namely Stephen Kipkemei Kipkebut. Same testified as TPW 2.

226. It was the testimony of the witness [TPW2] that same is a business person currently involved in construction industry. Furthermore, the witness averred that same is conversant with the facts of the instant matter.

227. Additionally, the witness averred that same has since recorded a witness statement dated the 18th October 2018 and which witness statement the witness sought to adopt and rely on. Instructively, the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

228. On the other hand, the witness also adverted to the list and bundle of documents dated the 29th April 2019, containing 15 documents. For good measure, the witness sought to tender and produce the various documents thereunder. Suffice it to point out that the various documents alluded to at the foot of the list and bundle of documents were thereafter tendered and produced before the court as TP Exhibits 1 to 15, on behalf of the 2nd third party.

229. Furthermore, the witness adverted to the statement of defence dated the 18th October 2018; and thereafter sought to rely on the contents thereof.

230. On cross examination, by learned counsel for the 1st defendant, the witness averred that same was allocated the suit property. Besides, the witness averred that same was also issued with a letter of allotment. However, the witness clarified that the letter of allotment was addressed to Baimet Contractors.

231. Whilst under further cross examination, the witness averred that Baimet Contractors is his [witness] business name. Furthermore, the witness clarified that the letter of allotment was issued in 1996.

232. While under further cross examination, the witness averred that the letter of allotment does not capture the plan number on the face thereof. At any rate, the witness added that the letter of allotment has a plan attached thereto.

233. It was the further testimony of the witness that the letter of allotment relates to plot C; and that the said Plot C is also captured on the face of the plan.

234. On further cross examination, the witness averred that the plan attached to the letter of allotment refers to a 12-meter road reserve. However, the witness added that the 12-meter road reserve appears between plots D & E.

235. On the other hand, it was the testimony of the witness that the 12-meter road reserve does not go beyond plot C. For good measure, it was the testimony of the witness that the 12-meter road reserve stops at plot C.

236. It was the further testimony of the witness that the letter of allotment which was issued alluded to various special conditions. Pertinently, the witness added that one of the special conditions related to a letter of acceptance and payments of the stand premium within 30 days.

237. On further cross examination, the witness averred that same duly accepted the letter of allotment. In this regard, the witness adverted to a letter dated the 2nd November 2002, written on behalf of Baimet Contractors.

238. It was the further testimony of the witness that same forwarded a banker's cheque towards and in respect of the statutory levies on the 2nd November 2002. However, the witness admitted that the payments under reference were made outside the 30 days duration.

239. On cross examination by learned counsel for the 2nd Defendant, the witness averred that same cannot recall when Baimet Contractors was registered. Nevertheless, the witness herein stated that same [witness] was previously a District commissioner.

240. It was the evidence of the witness that same discovered that the suit property was available for allocation and thereafter same wrote an application letter seeking to be allocated the plot. However, the witness admitted and conceeded that same has not availed a copy of the application letter to court.

241. It was the further testimony of the witness that same thereafter sold the land to the 1st third party. At any rate, the witness stated that by the time same sold the land to the 1st third party same [witness] was not a director of the said 1st third party.

242. Whilst under further cross examination, the witness averred that the suit property was not allocated personally unto him. For good measure, the witness reiterated that the land was allocated in favour of the business name.

243. Other than the foregoing, it was the testimony of the witness that same [witness] was issued with a lease on the 7th March 2003 and that thereafter the lease was registered on the 7th November 2003.

244. On further cross examination, the witness averred that the land in question was not public land.

245. On re-examination, by learned counsel for the 2nd third party, the witness averred that the land in question does not fall within the road reserve. In any event, the witness added that the 12-meter road reserve does not run through Plot C.

246. Whilst under further re-examination, the witness averred that Baimet Contractors is a business name that was registered by himself. In any event, the witness testified that the business name and himself are one and the same.

247. With the foregoing testimony, the 2nd third party's case was duly closed.

g. 3rd Third party's case:

248. The 3rd third party's case is similarly premised and anchored on the testimony of one witness namely, Isaac Nyoike. Same testified as TPW3.

249. It was the testimony of the witness that same [witness] is currently the chief valuer -Nairobi city county government. Furthermore, the witness averred that same has worked with County Government of Nairobi for 20 years. However, the witness clarified that same previously worked with the city council of Nairobi [which was the predecessor of the county government].

250. It was the further testimony of the witness that same has since filed a witness statement dated the 19th October 2018. Furthermore, the witness thereafter sought to adopt and rely on the contents of the said witness statement.

251. Suffice it to point out that the witness statement dated the 19th October 2018 was thereafter adopted and constituted as the evidence in chief of the witness.

252. Other than the foregoing, the witness also adverted to the statement of defence dated the 7th July 2017 and thereafter sought to adopt and rely on the contents thereof.

253. Additionally, it was the testimony of the witness that the 3rd third party also filed a list and bundle of documents dated the 12 October 2018. In this regard, the witness sought to tender and produce before the court the various documents at the foot of the said list and bundle of documents. Instructively, the documents under reference were thereafter produced and marked TP Exhibits 1 and 2, on behalf of the 3rd third party.

254. On cross examination by learned counsel for the 1st third party, the witness averred that the document referenced at paragraphs 4 and 7 of his witness statement is a copy of the official search dated the 11th March 2006. For coherence, the witness pointed out that the registered owner at the foot of the certificate of official search is one, Mr. Stephen Kipkemei Kipkebut.

255. Upon being referred to document number 2 in the list and bundle of documents on behalf of the 3rd third party, the witness averred that same is the lease which was issued in favour of Mr. Stephen Kipkemei Kipkebut.

256. On further cross examination, the witness averred that the purpose reflected at the foot of clause 5 of the lease shows that the property was to be used for residential only. In any event, the witness averred that same has no evidence relating to change of user.

257. On cross examination by learned counsel for the Plaintiff, the witness averred that the registered owner of the suit property in the year 2006 was one Mr. Stephen Kipkemei Kipkebut.

258. On cross examination by learned counsel for the 2nd Defendant the witness averred that the document at page 248 of the consolidated bundle of document is a letter addressed to the Plaintiff herein. For good measure, the witness added that the letter in question came from Nairobi city county government.

259. It was the further testimony of the witness that the Plaintiff herein applied for development approval and that a notification of approval was duly issued. Furthermore, the witness averred that the notification of approval was duly paid for. In any event, it was the testimony of the witness that the document at page 257 of the consolidated bundle of document is the approval.

260. Whilst under further cross examination, the witness averred that the developers who sought for development permission and which was ultimately issued was Idrissa Ltd.

261. Upon being referred to the document at page 252 of the consolidated bundle, the witness averred that the document in question is a receipt for structural building plans. At any rate, the witness averred that the building plans were duly approved.

262. Whilst still under cross examination by learned counsel for the 2nd Defendant, the witness averred that the payments towards and in respect of the building plans were duly received and receipted. However, the witness acknowledged that the payments appear to have been made and received long after the approval.

263. With the foregoing testimony, the 3rd third party's case was duly closed.

Parties'submissions:

264. Upon the close of the hearing, the advocates for the various parties namely, the Plaintiff, the Defendants and the third parties, covenanted to file and exchange written submissions. In this regard, the court proceeded to and circumscribed the timelines for filing and exchange of the written submissions.

265. Pursuant to and in line with the directions of the court, the Plaintiff proceeded to and filed two [2] sets of written submissions. For good measure, the Plaintiff filed the maiden submissions dated the 22nd March 2024 and wherein same has identified and highlighted five [5] issues for consideration, namely whether the suit property encroaches on the road reserve; whether the suit property was lawfully alienated to the 2nd third party; whether the Plaintiff lawfully acquired the suit property from her predecessor in title; whether the 1st Defendant was justified in demolishing the Plaintiff's property and whether the Plaintiff is entitled to the claim for the Sum of kes.1, 599, 000, 000/= as compensation for his property.

266. On the other hand, the Plaintiff also filed rejoinder submissions dated the 3rd June 2024 and in respect of which the Plaintiff herein responded to the issues alluded to and contained in the body of the submissions by and on behalf of the Defendants.

267. The 1st Defendant herein filed written submissions dated the 12 April 2024 and in respect of which same has highlighted four [4] issues for consideration namely, whether the suit property falls within public land that was reserved as a transport corridor in the Nairobi south structure plan number 42/28/85/9; whether the Plaintiff conducted proper due diligence or at all, to ascertain that the suit property was not public land before purporting to purchase the same; whether the suit property, being public land was irregularly and illegally allotted to the 2nd third party and whether the Plaintiff is entitled to special damages to kes.1, 599, 000, 000/=Only.

268. The 2nd Defendant filed written submissions dated the 17th May 2024 and in respect of which same has highlighted and amplified three [3] issues for consideration, namely, whether the Plaintiff acquired a good title; whether the Plaintiff proved his special damages claim and whether the Defendant's counterclaim was proved.

269. Suffice it to point out that the 3rd Defendant also filed written submissions dated the 22nd May 2024 and wherein same canvassed four [4] issues, namely whether the Plaintiff has locus to file the suit that is before this court; whether the suit land was available for allocation; whether the Plaintiff is entitled to the prayers sought; and whether the Plaintiff has a cause of action against the 3rd Defendant.

270. Other than the principal parties, [whose details have been highlighted in the preceding paragraphs], the various third parties herein also filed written submissions. Pertinently, the 1st third party filed written submissions dated the 23rd April 2024, whereas the 2nd third party filed written submissions dated the 27th May 2024; and the 3rd third party filed written submissions dated the 29th April 2024.

271. Notably, the various submissions [details in terms of the preceding paragraphs] form part of the record of the court. Furthermore, the court has had an occasion to peruse same and even though the contents of the submissions have not been rehashed and/ or reproduced in the body of the Judgment, it is worthy to underscore that same have been taken into account.

272. Additionally, it would be remis of this court not to acknowledge and appreciate the in-depth [comprehensive] research undertaken by the advocates for the principal/primary parties and which research is evident in the comprehensive written submissions filed.

273. On the contrary, learned counsel for the 2nd third party and the 3rd third parties have curiously treated the court to two [2] folios of submissions each which are in any event devoid of any case law.

274. Be that as it may and in my humble view, the 2nd third party herein is the root of the entire dispute and thus ought to have indeed placed before the court comprehensive submissions to underpin, inter-alia, the validity of the allotment of the suit property in favour of the M/s Baimet Contractors, which was said to be a business name, as opposed to a Company.

Issues For Determination:

275. Having reviewed the pleadings, the evidence [oral and documentary] and the various written submissions filed by and on behalf of the various parties and whose details have been highlighted herein before, the following issues do crystalize [emerge] and are thus worthy of determination;

    i. Whether what now constitutes/comprises of the suit property was legally allocated to the 2nd Third party and whether the said 2nd Third party accrued any legal rights and/or interests thereto.

    ii. Whether the Plaintiff herein accrued and/or acquired lawful and legal rights to and in respect of the suit property or otherwise.

    iii. Whether the suit property fell on and/or falls within the road reserve or otherwise.

    iv. Whether the Plaintiff is entitled to the reliefs sought or any thereof.

    v. Whether the counterclaim by the 2nd Defendant has been proved to the requisite standard and whether the reliefs sought thereunder are tenable.

Analysis And Determination

Issue Number 1 Whether what now constitutes/comprises the suit property was legally allocated to the 2nd third party and whether the said 2nd third party accrued any legal rights and/or interests thereto.

276. It was the evidence of the 2nd third party [Stephen Kipkemei Kipkebut] that same was lawfully allocated unsurveyed residential plot C Lang'ata nairobi vide letter of allotment dated the 18th June 1999. Furthermore, the said witness contended that subsequently the plot under reference was surveyed culminating into the assignment of the number namely L.R No. Nairobi/Block 72/3079, whose details were thereafter utilized towards and in respect of the lease dated the 7th March 2003.

277. Suffice it to point out that what constitutes the suit property traces its root to the letter of allotment dated the 18th June 1999 and which the 2nd third party contended to have been lawfully issued to and in his favour.

278. Taking into account that the legality and propriety of certificate of lease and by extension the suit property is traceable to the letter of allotment under reference, the starting point to resolving the validity of the suit property is therefore the impugned letter of allotment. In this regard, i therefore propose to address the legality and propriety of the letter of allotment with a view to authenticating whether the process that was followed complied with inter-alia the Government *Land Act*, Chapter 280 Laws of Kenya [now repealed] [GLA] and the Physical Planning Act, Chapter 286 [now repelled].

279. First and foremost, though the 2nd third party contended at the foot of his witness statement dated 18th October 2018 that same was lawfully allocated what now comprises of the suit property by the commissioner of lands, the truth of the matter is that the letter of allotment was not issued to and in favour of the 2nd third party. To the contrary, it is important to point out and underscore that the letter of allotment dated the 18th June 1999 was indeed issued to and in favour of Baimet Contractors, P.O Box 426 Ngong Hills.

280. At any rate, it is worthy to recall that during cross examination by learned counsel for the 2nd Defendant, the 2nd third party conceded and acknowledged that the letter of allotment was issued in favour of Baimet Contractors. Furthermore, the 2nd third party stated that the letter of allotment was issued to and in favour of the business name.

281. To put the evidence of the 2nd third party into perspective and to appreciate the details of the allottee, it suffices to reproduce the evidence of Stephen Kipkemei Kipkebut whilst under cross examination by learned counsel for the 2nd Defendant.

282. Same stated as hereunder;

> " The allottee of the plot was Baimet Contractors. The letter of acceptance was generated by M/s Baimet Contractors. The land was not allocated to me personally. The letter of allotment was made to and in favor of the business name. However, I do confirm that the business name and me are one person".

283. Other than the foregoing, the 2nd third party [Stephen Kipkemei Kipkebut] whilst under cross examination by his counsel stated thus;

> " I do state that Baimet Contractors is a business name that was registered by myself and hence the same [Baimet Contractors] is one and the same with me. I wish to clarify that the said Baimet Contractors is my trade name".

284. While under further re-examination, the 2nd third party stated thus;

> " Further, I wish to add that even though the letter of allotment was issued in the name of Baimet Contractors same was essentially to me".

285. From the testimony, [whose details are highlighted in the preceding paragraph], there is no gainsaying that the impugned letter of allotment was not issued to and in favour of the 2nd third party. Indeed, the position that the letter was not issued to the 2nd third party is clearly acknowledged and admitted by the 2nd third party.

286. On the other hand, what becomes apparent and this is vindicated by the letter of allotment dated the 18th June 1999; is to the effect that same was issued in favour of Baimet Contractors. At any rate, it is not lost on this court that Baimet Contractors is said to have been a business name associated with the 2nd third party.

287. The question that does arise and which the court must grapple with in the first instance relates to whether an allotment of land [which constitutes an offer to an allottee] can issue and/or be issued to a non-entity; or a body not known to Law.

288. To my mind, it is settled law that an allotment of land can only be issued to a legal person whether natural or juristic. In this regard, other than a natural person [human being], the only other body that can accrue a letter of allotment in its/her own name would be a duly incorporated company [which is a person known to law] or such other body duly registered and imbued with legal capacity.

289. To the contrary, a business name like M/s Baimet Contractors in whose favour the letter of allotment is said to have been issued, cannot accrue such allotment. Simply put, a business name is not a legal/ juristic entity, in the eyes of the law.

290. Having come to the foregoing position, the incidental question that arises is whether any allotment of land to a non-entity, can suffice for purposes of attracting lawful rights and/or interests and/or otherwise.

291. However and without belabouring the point, it is my considered view that the letter of allotment which was [sic] issued in a business name is itself a nullity and thus cannot be fulcrum [foundation] upon which any legal process is premised.

292. To buttress the foregoing exposition, it suffices to cite and reference the holding in the case of John Mukora Wachihi versus Minister for Lands & 6 others [2013] eKLR where the court dealt with a similar scenario. For coherence, the court stated and held thus;-

> " Consequently, as the petitioners in Petition Nos. 83, 85, 86, 88 and 89 of 2010 have no title to the respective properties they claim ownership of, they cannot allege violation of their rights under section 75 of the former constitution or Article 40 of *the Constitution* of Kenya 2010. Indeed, given the fact that the letters of allotment are, in some cases, issued to business names, which are not legal entities and which, as averred by the 6th respondent, have no

capacity to hold property, questions do arise with regard to the propriety of the alleged allocations in the first instance. These, however, are not issues that fall for determination in this matter. Suffice to say that as they do not hold titles to the respective properties that they claim ownership of, the petitioners in Petition Nos. 83, 85, 86, 88 and 89 of 2010 cannot maintain a claim for violation of constitutional rights against the respondents."

293. Secondly, it is now trite and established law that prior to and or before the commissioner of lands [now defunct] could issue a letter of allotment, there was a requirement that a PDP would have to be prepared, checked and approved by the director of physical planning and thereafter be escalated to the commissioner of land for final approval, before the commissioner of lands would venture forward and issue a letter of allotment.

294. Suffice it to point out that the PDP is a critical document in the alienation of public land, insofar as same [PDP] would confirm the availability or otherwise, of the plot or piece of land, that it is intended to be alienated and/or allocated.

295. Additionally, it is worth recalling that after a PDP has been duly prepared by the directorate of physical planning same would be subjected to the requisite checking and approval and ultimately the PDP would be assigned a plan number, which authenticates the veracity of the PDP.

296. Further and at any rate, it is important to underscore that whilst allocating land or issuing the letter of allotment, the commissioner of land [now defunct] would be enjoined to indicate and reflect the plan number on the face of the letter of allotment.

297. Pertinently, the presence of the plan number in the letter of allotment would signify and confirm that indeed the plot or portion of land which is the subject of intended allocation or alienation, has indeed been confirmed to be available for such allocation.

298. Back to the letter of allotment which was tendered and produced before the court and which I have elsewhere held was issued to a non-entity and it is apparent that the requisite plan number was not reflected on the face of the letter of allotment.

299. Other than the foregoing, the 2nd third party had contended that the letter of allotment in question was attached and/or accompanied with a PDP, but during cross examination DW1, namely Alfred Mwanzia pointed out that same [Witness] had an occasion to look at the letter of allotment and same stated that the document in question did not constitute a PDP.

300. For ease of reference, it suffices to reproduce the pertinent aspects of the evidence of DW1 whilst under cross examination by learned counsel for the Plaintiff.

301. Same stated as hereunder;

> " Referred to the document at page 5 of the 2nd third party's bundle of documents and the witness states that same is not a PDP. It is not a PDP because;
>
> i. It does not have the requisite features of a PDP.
>
> ii. It does not have a plan reference number which would be referenced in the letter of allotment.
>
> iii. The document does not show who prepared the same.
>
> iv. The document should also have been certified by the directed of planning.
>
> v. The same should also have been approved by the minister then.

vi. The same should also have heard an approved development plan number.

vii. The details in question would appear in the legend section of the document.

302. Whilst under further cross examination by learned counsel for the Plaintiff DW1 stated thus;

> " The document shown to me is incomplete"

303. In my humble view, the testimony/evidence of DW1 and which testimony is substantially corroborated by PW2 drives me to the conclusion that the letter of allotment was not accompanied with a duly approved and authenticated PDP.

304. Whilst speaking to the issue of a PDP, PW2 Benson Meshack Okumu stated thus whilst under cross examination by learned counsel for the 1st Defendant;

> " It is true that at the survey record office, I could not find the reference for the PDP. Referred to 4.3 and the witness states that same relates to an allocation on the basis of the PDP. The PDP plan number is not shown in the survey record office"

305. Furthermore, it was the testimony of PW2 as hereunder;

> " I can confirm that there was a PDP. I saw the PDP. I attached the same to my report before the court. Referred to page 7 of exhibit P31 which is the report and the witness admits that the report filed does not allude to the presence of a PDP. I omitted the PDP and the same does not form part of my report before the court"

306. To my mind, even the Plaintiff's own witness [PW2], a seasoned licensed surveyor confirms that same did not come across an approved PDP plan bearing the duly approved PDP number.

307. Arising from the foregoing, it is my finding and holding that the letter of allotment dated the 18th June 1999, was similarly generated and issued prior to the preparation, authentication and approval of the requisite Part Development Plan [PDP]..

308. In this regard, the question that thus follows is whether or not a letter of allotment which is issued prior to the requisite PDP being prepared can suffice and hold sway in the eyes of the law.

309. In my humble view, it is the duly approved PDP that would pave the way to the issuance of a letter of allotment and hence in the absence of a such PDP, no legitimate letter of allotment can issue and/or be granted.

310. Pertinently, the significance of a PDP in the allotment or alienation of public land has since received judicial affirmation by none other than the Supreme Court of Kenya [the apex court] in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court stated and observed as hereunder;

> 104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in Nelson Kazungu Chai & 9 others v Pwani University [2014] eKLR as follows:"
>
> > ...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a

Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees.

> 131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of African Line Transport Co Ltd v Attorney General, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed..."

105. This process is restated in African Line Transport Co Ltd v Attorney General, Mombasa, HCCC No 276 of 2003 [2007] eKLR where it was held that planning comes first, then surveying. A letter of allotment is invariably accompanied by a PDP with a definite number, which would then be taken to the Department of Survey for surveying. Thereafter, it is then referred to the Director of Surveys for authentication and approval. It is after that process that a land reference number is issued in respect of the plot.

106. We note that the suit property was allocated to HE Daniel T Arap Moi who was not a party to the suit. The 2nd to 6th respondents on the other hand at the trial court in the replying affidavit of Gordon Odeka Ochieng in response to ELC Petition 12 of 2017 stated that certain documents that were required to support the allocation of the suit property to HE Daniel T Arap Moi were missing. These were, "the letter of application addressed to the Commissioner of Lands seeking to be allocated the suit land; and a Part Development Plan (PDP) showing the suit property in relation to the neighbouring parcels of land."

311. Thirdly, there is no gainsaying that even where the letter of allotment is lawfully issued in accordance with the prescription of the law, [which is not the case herein] the allotee thereof is obligated to comply with and/or adhere to the special terms/conditions highlighted at the foot of the letter of allotment.

312. Suffice it to point out that the letter of allotment which was [sic] issued to the 2nd third party and which forms the basis of the suit property herein contained a stipulation that the [sic] allottee was obligated to accept the terms and to pay the statutory levies alluded to thereunder within 30 days. Furthermore, the letter of allotment under reference also forewarned the allottee that in the event of failure to comply with the terms thereof same [letter of allotment] shall be deemed to have lapsed.

313. To the extent that the letter of allotment contained timelines, it behooved the allottee thereof whether same be the 2nd third party [which is not the case] to comply with the terms thereof.

314. However, it is worth recalling that the 2nd third party who contended that same was the beneficiary of the letter of allotment testified that a letter of acceptance was generated on the 2nd November

2002. Besides, the 2nd third party also pointed out that same also made payments towards the letter of allotment on the 2nd November 2002.

315. Be that as it may, whilst under cross examination by learned counsel for the 1st Defendant [Prof. Albert Muma SC], the 2nd third party stated thus;

> " I paid the statutory levies on the 2nd November 2002. The payments were made long after the lapse of 30 days period. I am the one who made the payments in terms of the banker's cheque before the court".

316. Notably, the 2nd third party, who contends to be the allottee but which is not the case, acknowledges that the payments in respect of [sic] the letter of allotment were indeed made well outside the statutory timelines.

317. To this end, the question that does arise is whether or not the letter of allotment whose terms were not comply with timeously and/or punctually, could be acted upon long after the lapse of the timeline.

318. Put differently, what is the legal consequence of a letter of allotment that is not acted upon and/or dealt with within the timeline.

319. To answer the foregoing question, I shall cite and reference two [2] decisions, whose holding are succinct and apt.

320. To start with, this court has had an occasion to speak to the legal consequence attendant to a letter of allotment which is not timeously acted upon. In the case of Joseph Kamau Muhoro V Attorney General & Another [2021] eKLR; this court held as hereunder;

> 34. Besides, I also hold the humble opinion that having not formally accepted the Letter of Allotment, [in writing as required], the Letter of Allotment, on which the Plaintiff/Applicant has premised his claim, was rendered void and non-existent.
>
> 35. In support of the foregoing holdings, it is important to take cognizance of the Decision in the case of Dr. Syedna Mohammed Burhannuddin Saheb & 2 others vs Benja Properties & 2 others [2007] eKLR;
>
> " In any event, the letter of allotment relied upon by the Defendant had itself expired, and was therefore invalid. I do not accept Mr. Kirundi, Counsel for Defendant's argument, that the expired letter, when acted upon, had been "revived" through conduct. The letter had expired. It was dead. There was nothing to "revive".

321. Furthermore, the Supreme court of Kenya [the apex court] dealt with the same question/issue in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court held as hereunder;

> 60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In *Peter Wariire Kanyiri v Chrispus Washumbe & 2 others, Environment and Land Court Case No 603 of 2017*; [2022] eKLR, Kemei, J held as follows:

"[15]. In the case at hand, in the absence of any title registered in the name of the plaintiff, the court is unable to hold that the plaintiff is the registered proprietor of the land. This is because the letter of allotment lapsed within 30 days and the same is of no legal consequences" [Emphasis added].

61. While we agree with the general tenor of the learned Judge's foregoing pronouncement, we remain uncomfortable with his inference that the allotment letter was of no legal consequence solely because it had lapsed after 30 days. We must reiterate the fact that an allotment letter in and by itself, is incapable of conferring a transferable title to an allottee. Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.

62. Back to the facts of this case, the allotment letter issued to Renton Company Limited was subject to payment of stand premium of Kshs 2,400,000.00, annual rent of Kshs 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.

322. Flowing from the foregoing position, there is no gainsaying that by the time payments were [sic] being made on the basis of the letter of allotment dated the 18th June 1999, same [letter of allotment] was long dead and incapable of revival or at all.

323. Notwithstanding the foregoing, there is yet one other aspect that is worth mention and followed with a short discussion. For coherence, this aspect relates to the total amount that was alluded to and captured at the foot of the letter of allotment under reference. Instructively, the letter of allotment had indicated that the allottee was obliged to pay the sum of kes.200, 430/= only.

324. Assuming that the allottee was keen to act upon the letter of allotment, one would have expected the allottee to pay the stipulated amount and not otherwise. However, it is worthy to recall that the banker's cheque which the 2nd third party alluded to was for the sum of Kes.198, 000/= and not otherwise.

325. The question that arises is how the lease instrument [sic] dated the 7th March 2003 and the ultimate certificate of lease, could have been issued in favour of the 2nd third party, yet even the statutory Levies alluded to and highlighted at the foot of [sic] the Letter of allotment had not been fully paid.

326. To my mind, something doesn't seem to add up. Notably, it is evident that the process attendant to the issuance of the lease and subsequent certificate of lease were also undertaken in vacuum,

327. Finally, it is trite and established law that a lease and certificate of lease can only issue and be granted after a valid letter of allotment has hitherto been issued in favour of the designated allottee and not otherwise.[See the holding of the Court of Appeal in the case of Dr. Joseph N.K Arap Ngok versus Justice Moijo Olekeiuwa [1997]eklr]

328. However, in respect of the instant matter a lease instrument was generated and issued in favour of the 2nd third party and thereafter a certificate was also issued in his name. Nevertheless, there is no gainsaying that the 2nd third party herein was never issued with a letter of allotment.

329. Other than the foregoing, it is worth recalling that even though the 2nd third party had indicated that Baimet Contractors was his trade name and that same [2nd third party] is one and the same with the

business name, it is imperative to underscore that no certificate of registration of [sic] the business name was tendered before the court or at all.

330. Simply put, there was no evidence placed before the court to even connect the 2nd third party to M/s Baimet Contractors. In any event, even if such evidence was tendered, the fact remains that no letter of allotment was issued in favour of the 2nd third party which could premise and/or anchor the subsequent lease and certificate of lease.

331. In a nutshell, my answer to issue number one [1] is fourfold. Firstly, the 2nd third party was neither allocated nor issued with any letter of allotment.

332. Secondly, the letter of allotment dated the 18th June 1999 and which was issued in favour of M/s Baimet Contractors [business name] was a nullity ab initio insofar as same was issued in favour of a non-entity, namely, something not known to law.

333. Thirdly, the impugned letter of allotment was generated and issued [sic] by the commissioner of land albeit without a duly approved and authenticated PDP. In this regard, the allocation was undertaken in vacuum.

334. Fourthly, the terms of the letter of allotment, which were time bound, were never acted upon and/or complied with timeously. Consequently, the letter of allotment died and became redundant long before [sic] the purported payments were made.

335. Based on the foregoing, it is my finding that the purported allocation and/or alienation in favour of the 2nd third party was taken in vain and thus fits within the parameters of the doctrine of Ex-nihilo-nihil-fit [out of nothing comes nothing. [See Caroget Investment Ltd v Aster Holdings Ltd & Another [2019]eKLR].

Issue Number 2 Whether the Plaintiff herein accrued and/or acquired lawful and legal rights to and in respect of the suit property or otherwise.

336. The Plaintiff herein contends that same [Plaintiff] is a bona fide purchaser for value of the suit property and in this regard, the Plaintiff contends that same thus acquired lawful and legitimate title to and in respect of the suit property.

337. Furthermore, it is the Plaintiff's case that same bought and/or purchased the suit property from Lead Properties Developers Ltd [the 1st third party]. Besides, it is the Plaintiff's position that prior to and or before entering into a sale agreement with the 1st third party, same [Plaintiff] took due diligence to ascertain the validity and propriety of the suit property.

338. Pertinently, PW1 tendered evidence that before same could purchase the suit property, same retained and engaged his transaction advocates who undertook due diligence and indeed ascertained that the suit property was not public property. In particular, PW1 adverted to assorted letters inter-alia the letter dated 14th July 2009, 27th July 2010, 6th September 2011, 7th September 2011 and 29th August 2011, respectively.

339. According to PW1, the totality of the letters under reference, denote that the suit property was not encroaching onto either the road reserve or the railway reserve. In any event, the witness posited that the contents of the letters highlighted in the preceding paragraphs clearly confirms that the suit property was not public land.

340. Simply put, it was the position of PW1 that same [Plaintiff] bought and acquired the suit property legally and lawfully and that as a result of the foregoing same [Plaintiff] is a bona fide purchaser for

value and thus her rights to and interests over the suit property merits protection under the law and particularly, in accordance with the Provision[s] of Article 40 of *the Constitution*,2010.

341. For good measure, PW1 is on record as stating thus whilst under re-examination by his learned counsel for the First Defendant.

342. Same stated as hereunder;

> 'Upon being satisfied with the due diligence, I went ahead and purchased the property. Thereafter, I acquired the land and I was issued with the title deed. The title is the confirmation of ownership of land".

343. From the excerpts reproduced in the preceding paragraphs, what I hear the Plaintiff through PW1, to be highlighting is to the effect that same is a bona fide purchaser for value.

344. To the extent that the Plaintiff's contends that same is a bona fide purchaser for value, it was incumbent upon the Plaintiff to establish and satisfy certain known ingredients which underpin a claim for bona fide purchase for value.

345. To this end, it is important to cite and reference the Court of Appeal decision in the case of Mwangi James Njehia versus Janetta Wanjiku Mwangi & another [2021] eKLR, where the court held as hereunder;

> 37. In *Lawrence P. Mukiri Mungai, Attorney of Francis Muroki Mwaura v. Attorney General & 4 Others, Nairobi Civil Appeal No. 146 of 2014* this Court cited with approval the case of Katende v. Haridar & Company Ltd (2008) 2 EA 173, where the Court of Appeal in Uganda held that:-
>
> > "For the purposes of this appeal, 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 as was held in the case of Hannington Njuki v William Nyanzi High Court civil suit number 434 of 1996, must prove that:
> >
> > 1. he holds a certificate of title;
> > 2. he purchased the property in good faith;
> > 3. he had no knowledge of the fraud;
> > 4. he purchased for valuable consideration;
> > 5. the vendors had apparent valid title;
> > 6. he purchased without notice of any fraud; and
> > 7. he was not party to the fraud."
>
> We nonetheless wish to state that the law, including case law is not static and the above requirements which were crafted over twenty years ago cannot be said to have been cast in stone. We hold the view that (5) above will need to be revisited and the word "apparent" be done away with altogether.
>
> 38. We say so because in the recent past and even presently, fraudsters have upped their game and we have come across several cases where Title deeds manufactured in the

backstreets have, with collusion of officers in land registries, been transplanted at the Lands Office and intending buyers have been duped to believe that such documents are genuine and on that basis they have "purchased' properties which later turn out to belong to other people when the correct documents mysteriously reappear on the register or the genuine owner show up after seeing strangers on their properties waving other instruments of title.

It is the prevalence of these incidents that have necessitated the current overhaul and computerization of the registration systems at the Land Registry in Nairobi.

346. Likewise, the ingredients underpinning a claim for bona fide purchaser for value were also highlighted and amplified by the Supreme Court of Kenya in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment), where the court stated as hereunder;

90.The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:

> " One 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."

91. The Court of Appeal in Uganda in Katende v Haridar & Company Ltd [2008] 2 EA 173, defined a bona fide purchaser for value as follows:

> "For the purposes of this appeal, 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:
>
> 1. he holds a certificate of title;
> 2. he purchased the property in good faith;
> 3. he had no knowledge of the fraud;
> 4. he purchased for valuable consideration;
> 5. the vendors had apparent valid title;
> 6. he purchased without notice of any fraud; and
> 7. he was not party to the fraud."

92. On the same issue, the Court of Appeal in Samuel Kamere v 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..."

347. Nourished by the holdings in the case law [supra], it is imperative to underscore that prior to and before a claimant can succeed on the basis of the principle of a bona fide purchaser for value without notice, the claimant [the Plaintiff], is obligated to demonstrate that his/her predecessor in title possessed a valid and legal title to the property in question.

348. Put differently, it was incumbent upon the Plaintiff herein either singularly or collectively with his predecessor in title, to demonstrate to the court that the root of the title underpinning the claim for bona fide purchase was lawful, valid and thus legitimate.

349. Nevertheless, whilst dealing with issue number one [1] herein before, this court has since found and held that the title to the suit property which was issued to and in favour of the 2nd third party and which title was thereafter passed over to the 1st third party and ultimately to the Plaintiff, was void and thus vitiated to the root.

350. In my humble view, if the title in favour of the 2nd third party was procured and obtained in vacuum and was thus a nullity, then there is no gainsaying that whatever sprouted and/ or arose therefrom, is similarly a nullity.

351. Expressed differently, a title which is itself illegal and void cannot birth a valid and legal title merely on the basis of subsequent transactions, either vide sale or otherwise. Instructively, where a certificate of title is void, same is incapable of being sanitized and/ or cleansed, whatsoever.

352. Consequently and as pertains to whether or not the Plaintiff accrued legitimate title to the suit property, my answer is in the negative.

353. To buttress the foregoing exposition of the law, I find succour in the dictum in the case of Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169 Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse." [See also the holding of the Court of Appeal in the case of Omega Enterprises Limited versus Kenya Tourist Development Corporation [1998]eklr].

354. Other than the fact that the claim for bona fide purchaser for value cannot hold sway once the root of the title underpinning the claim is found to be illegal, there is also the other aspect pertaining to the fact that the title of the suit property was captured in the Ndungu Commission Report relating to irregular and illegal allocation of public land.

355. As pertains to the fact that the title of the suit property was captured and highlighted in the Ndungu Report, it is imperative to take into account of the evidence DW3, namely, George Gichere Gitonga.

356. Whilst under cross examination by learned counsel for the 1st Defendant, DW3 stated as hereunder;

> " The Plaintiff was aware of the Ndungu Report and the blacklisting of the various plots. I wish to state that the Plaintiff herein is not a bona fide purchaser".

357. Whilst under re-examination by learned counsel for the 2nd Defendant DW3 stated thus;

> " The suit property is duly captured as number 113 as one of the illegal properties. I wish to add that the suit property is also part of the gazette notice on illegal allocation of land".

358. Whereas the gazettement of the suit property as one of the illegal allocations was carried out and published in the gazette notice in the year 2017, the Ndungu report came out and has been within the knowledge of all and sundry, the Plaintiff not excepted for more than 20 years.

359. To my mind, the Plaintiff herein cannot contend that same is truly and legitimately a purchaser for value as pertains to the suit property on the face of the various improprieties and illegalities which have been enumerated elsewhere herein before.

360. Arising from the foregoing, my answer to issue number two [2] is to the effect that the Plaintiff herein is not a bona fide purchaser for value in respect of the suit property herein. In this regard, this court is not disposed to issue such a declaration.

Issue Number 3 Whether the suit property fell and/or falls within the road reserve or otherwise.

361. Other than the position that was taken by this court pertaining to the illegality which informed and/or inflicted the letter of allotment, there is also a debate as to whether or not the suit property fell within a road reserve and was thus not available for allocation or alienation.

362. It is the contention by and on behalf of the 1st Defendant and which contention is corroborated by the 2nd Defendant that what constitutes the suit property fell within the transport corridor and hence same was not available for allocation.

363. To this end, DW1 and DW2 respectively referenced the structure plan which captured the position of the trans African highway as well as the road and railway reserve attendant thereto. Furthermore, the two witnesses adverted to the position that the structure plan was prepared in the year 1985 and that same captures the area comprising of the suit property.

364. Additionally, the Witnesses [DW1 and DW2] respectively, also tendered Evidence that even though the Structure Plan did not receive the approval of the Commissioner of Land [now defunct], same [Structure Plan] was approved and certified by the Director Physical Planning.

365. Furthermore, the named Witnesses also averred that the Structure Plan has been in use and that same [Structure Plan] has not been reviewed, varied and/ or otherwise, superseded, whatsoever. In this regard, it was stated that the Land affected by the Structure Plan could not be allocated by the Commissioner of Land, or at all.

366. Whilst under cross examination by learned counsel for the Plaintiff, DW1 stated thus;

> " From the structure plan one can see the road and the railway line. I can see that the map shows the proposed area for the road and the railway line. The structure plan shows that the road is to the north and the railway line is to the south. The plan shows the development area and the development area is shaded. The plan shows the corridor and the same are learning parallel to each other. The structure plan was prepared by the ministry of public works".

367. While still under cross examination by learned counsel for the Plaintiff, DW1 stated thus;

> " I wish to add that the suit property falls within the transport corridor".

368. Additionally, whilst still under cross examination by learned counsel for the Plaintiff DW1 ventured forward and stated thus;

> " The structure plan was in force from the year 1985. I wish to state that the road had already been allocated and hence the ground could not be varied".

369. My understanding of the testimony under reference is to the effect that the suit property or what comprises the suit property fell within the transport corridor and that same [suit property] could not be termed as unalienated government land in terms of Section 2 of the Government *Land Act*, Chapter 280, [now repealed] capable of being alienated vide letter of allotment or otherwise.

370. Pertinently, it is worthy to underscore that the office of the commissioner of land was only mandated to alienate and/or allocate unalienated government land subject to the provisions of Section 3, 7 and 9 of the GLA [now repelled]. At any rate, the process pertaining to the allocation or alienation of plots situate within the town[s] the suit plot, not excepted, was clearly highlighted by the Court of Appeal in the Case of *Tarabana Company Limited versus Singh Sehmi and 7 others [Civil Appeal 463 of 2019*] [2021]KECA76 (KLR). [See paragraphs 37, 38, 39 and 40 thereof].

371. On the contrary, once land was alienated or reserved for public use, such land became alienated and would thus not be available for [sic] allocation or alienation.

372. As pertains to what constitutes alienated public land and which would thus not be available for allocation or otherwise, it is imperative to take cognizance of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court held thus;

> 50. For us to determine the legal status and validity of the title, we must inquire into the root title of the suit property.
>
> iii.Alienated or un-alienated government land
>
> 51. Article 62 of *the Constitution* defines 'public land' to include:62 (1)(a)land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date; [Emphasis Added].
>
> 52. The Government Lands Act (repealed), which was the Act in force at the effective date defined 'unalienated government land' in section 2 as follows;
>
> > "unalienated Government land" means Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. [Emphasis Added].section 3 of the Physical Planning Act, cap 286 defines unalienated land in similar terms.
>
> 53. This court in *Kiluwa Limited & another v Business Liaison Company Limited & 3 others, (Petition 14 of 2017*); [2021] KESC 37 (KLR) had this to say about un-alienated government land:"(55)A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article62of *the Constitution* and the Government Lands Act (repealed). This notwithstanding the fact that, the expression "Public Land" only came to the fore with the promulgation of the 2010 Constitution. What article 62 of *the Constitution* does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under

the province of "public tenure". The retired constitution used the term "government" instead of "public" to define such lands".

373. In my humble view, the moment the land in question, which comprises the suit property was captured in the structure plan as forming part of the trans African highway road and railway reserve, in the manner adverted to in the evidence of DW1, same ceased to be unalienated government land and hence was outside the purview of the Commissioner of Lands [now defunct].

374. Simply put, the designation of the land in question [suit property] as a transport corridor rendered same a public utility and thus same stood alienated. [See the holding of the supreme court in the case of Dina Management Limited v County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment) at paragraph 101 thereof].

375. In short, my answer to issue number three [3] is twofold. Firstly, the suit property herein was duly captured and reflected in the structure plan to be falling within the transport corridor and thus same was not available for allocation in the first place.

376. Secondly, to the extent that the suit property fell within the transport corridor, taking into account the contents of the Structure Plan; and was thus designated as public utility, same suit property was therefore outside what comprises of unalienated government land.

ISSUE NUMBER 4 Whether the Plaintiff is entitled to the reliefs sought or any thereof.

377. The Plaintiff herein sought for various reliefs at the foot of the amended plaint dated the 23rd October 2019. Pertinently, the Plaintiff has sought for compensation in the sum of kes.1, 599, 000, 000/= together with interests at court rates from the date of filing of the suit.

378. The claim pertaining to compensation has thereafter been broken down into various facets and it is therefore appropriate to consider same [claim] in their individualized manner.

379. Firstly, the Plaintiff herein has sought to be compensated for the value of the land namely L.R No. Nairobi/Block 72/3079. To this end, the Plaintiff called Solomon Muge Mwangi, who testified as PW3. Furthermore, the said witness tendered and adduced before the court the valuation report dated the 30th June 2016.

380. It is imperative to point out that indeed the Plaintiff herein would be entitled to compensation for the loss of the land which same bought and which forms the basis of the suit beforehand. However, the question that merits consideration is who should shoulder the compensation in favour of the Plaintiff.

381. It is not lost on this court that the Plaintiff bought the suit property from the 1st third party, who in any event, gave a warranty that the suit property was not public land. However, it is worth recalling that this court has since found and held that the suit property was captured and defined vide the structure plan as falling within the transport corridor.

382. Furthermore, the court ventured forward and found that insofar the suit property fell within the transport corridor, same [suit property] was therefore public utility and thus stood alienate by way of reservation. Consequently and on the basis of such reservation, same [the suit Property] ought not have been alienated in the first place. [See the holding of the Court of Appeal in the case of Benja Properties Limited versus S.S Syedna Burhannudin Saheb [2015] eklr].

383. Arising from the foregoing, it then means that the warranty which was given to and in favour of the Plaintiff by the 1st third party, was/is erroneous. In this regard, it suffices to observe that the 1st third party therefore is in breach of the sale agreement, to the extent that the warranty in question was erroneous and invalid.

384. Be that as it may, the critical question that merits consideration is whether this court can decree compensation as against the 1st third party. Nevertheless, and to my mind, it is imperative to point out that there is no suit as against the 1st third party by the Plaintiff herein and thus no relief can issue as against the 1st third party, at the instance of the Plaintiff.

385. As concerns the propriety of the claim for compensation as against the 1st Defendant herein, it is my humble view that such a claim is misconceived and legally untenable. For good measure, the 1st Defendant cannot be held to compensate the Plaintiff as pertains to the value of the suit property yet the suit property is public land and any endeavour to do so, using Public Funds, would be contrary to and in contravention of the Provision[s] of Article 201 of *the Constitution*, 2010.

386. The second facet of the claim by the Plaintiff relates to costs of construction which was undertaken on the suit property and which the Plaintiff has quantified in the sum of kes.225, 000, 000/= only. In this respect, what becomes apparent is that though the Plaintiff has laid a claim for the costs of construction same [Plaintiff] has however failed to tender and/or produce to court any credible evidence to underpin the said claim.

387. Instructively, it is not lost on this court that whilst under cross examination by learned counsel for the 1st Defendant, PW1 conceded that the contract for the impugned construction was entered into between Idgrata Developers Ltd and the contractor. Suffice it to point out that Idgrata Development Company, by virtue of being a juristic person, is separate and distinct from the Plaintiff. In this regard, the Plaintiff in his personal capacity cannot be heard to stake a claim to recover costs and expenses, if any, which were incurred by a company associated with himself. [See Omondi v National Bank of Kenya & Another [2001] EA 177; and Arthi Highway Developers Limited versus West End Butchery Limited and 7 Others [2015] eklr].

388. The third aspect of the Plaintiff's claim touches on and concern finishes imported from China and which the Plaintiff contended were to be used towards finishing the apartments on the suit property, prior to the offensive demolition of same [apartments] by the First Defendant herein.

389. Be that as it may, it is worth recalling that the only evidence which was tendered and placed before the court to anchor the claim for recompense on account of finishes imported from China were the pro-forma invoices and no more. Notably, pro-forma invoices are merely invoices and same do not evidence or signify payment or at all.

390. Notwithstanding the foregoing, there is no gainsaying that the Plaintiff [PW1] also did not tender and/ or produce before the Court any Evidence of the Bill of Lading [being the Shipping Document], which would have confirmed that [sic] the finishes alluded to, ever arrived at the port of Mombasa, or otherwise.

391. Furthermore, it is imperative to reiterate that whilst under cross examination by learned Counsel Professor Albert Mumma [SC]; for the 1st Defendant, PW1 conceded that same had neither tendered nor produced any evidence of payments [read, receipts] pertaining to and concerning the imported finishes.

392. To my mind, the claim touching on and concerning the finishes imported from China is a claim for special damages and hence it behooved the Plaintiff not only to plead and particularize same; but it was equally incumbent upon the Plaintiff to specifically prove such a claim. [See Provincial Insurance Company of East Africa Ltd v Mordekai Mwanga Nandwa Civil Appeal No. 179 of 1995 [UR, DAVID BAGINE vs MARTIN BUNDI [1997] eKLR; and Capital Fish Kenya Ltd v Kenya Power & Lighting & Company Ltd [2016]eKLR].

393. The fourth facet of the compensation that has been sought by the Plaintiff relates to consultancy fees and fees due to the consultants. In this regard, the Plaintiff has sought for kes.35, 000, 000/= only. Nevertheless, the consultancy fees appears to be predicated upon the fees if any, that was paid to the various consultant[s] inter-alia the Quantity surveyor and architect.

394. Be that as it may, evidence abound that the contracts that were entered into with the consultant[s] were entered into and executed between Idgrata Developers Ltd and the various consultancy Firms. Instructively, PW1 confirmed that the contracts were not entered into between himself and the consultancy.

395. To the extent that the contracts with the Quantity surveyor and the architect were entered into and executed between Idgrata Developers Ltd and the various consultant[s] [a fact which was admitted by PW1] it suffices to underscore that the payments, if any were made by the company and not the Plaintiff. In this regard, the Plaintiff, who did not make the said payments cannot be heard to seek recompense on the basis of what was paid by the Company; which is separate and distinct from himself.

396. Consequently and in the premises, it is my finding and holding that irrespective of the nexus and affinity between the Plaintiff and Idgrata Developers Ltd, the Plaintiff herein remains separate and distinct from the said company [See Salmond v Salmond [1897] AC; Omondi v National Bank of Kenya Ltd [2001]eKLR].

397. As pertains to the claim concerning loss profits for 80 apartments, which were being erected on the suit property, prior to the demolition by and at the instance of the 1st Defendant, what I beg to state is that the Plaintiff did not place before the court any plausible and/or credible evidence whatsoever.

398. Furthermore, it is worth recalling that the only evidence which PW1 adverted to and placed before the court was the sale agreement that was entered into between the Plaintiff as vendor and Eunice Akinyi as purchaser of a particular apartment. However, it is pertinent to point out that whilst under cross examination by learned Counsel for the 1st Defendant, PW1 indicated that the impugned sale agreement is indicated to have been entered into on the 29th July 2013, yet the apartment [building under reference] was demolished on the 25th July 2013.

399. Quite clearly, the sale agreement at page 240 of the Plaintiff bundle of document could not legally have been entered into and executed long after the apartment [subject matter] intended to be sold had been demolished.

400. In my humble view, the production and utilization of the impugned sale agreement [page 240 of the consolidated bundle] appears to have been tailor-made to dupe and mislead the court into making an award in favour of the Plaintiff, under the pretext that same [Plaintiff] suffered Loss of Income.

401. Other than the sale agreement [whose import and tenor] has been addressed in the preceding paragraph, it is also worth pointing out that the Plaintiff has also laid a claim for loss of profits pertaining to 64 units of four [4] bedroomed apartments. Nevertheless, it is clear in my mind that whilst under cross examination, PW1 conceded that the building design and over- view Plan which was guiding the constructions did not advert to or include any such bedroomed units at all.

402. To the contrary, it was the evidence of the Witness [PW1] that the the Building Plan [over-view Plan] which was drawn and approved showed and alluded to Three [3] Bedroomed apartments and not otherwise.

403. In short, my answer to the claim founded on lost profits for the 80 apartment is to the effect that no plausible and/or cogent evidence has been tendered before the court. Suffice it to point out that such a claim also falls within the cluster [cadre] of special damages and hence the necessity to specifically

prove same. [See the Court of Appeal decision in Virani T/A Kisumu Beach Resort versus Phoenix of East Africa Assurance Company Limited[2004] eklr]

404. First forward, the Plaintiff has also laid a claim for recompense on the basis of what is termed as claims from the contractor[s]. In this regard, the Plaintiff has claimed the sum of Kes.225, 000, 000/=. Nevertheless, it is imperative to underscore that the Plaintiff herein did not enter into and/or execute any contract and/or agreement towards the construction of the suit apartments. Consequently, the Plaintiff is prohibited from raising a claim to that effect. [See the doctrine of Privity of Contract].

405. On the other hand, it is not lost on the Court that the Plaintiff himself conceded and acknowledged that same [Plaintiff] has not placed before the Court any evidence to vindicate the claim from the Contractor[s] or otherwise. Surely, it does not suffice for the Plaintiff herein to pick and throw on the face of the Court figure[s], albeit without any endeavour to prove same.

406. Finally, the Plaintiff has raised a claim pertaining to and concerning costs of advertising/marketing. To this extent, the Plaintiff appear to be intent on recovering what was said to have been spent on account of advertisement and marketing of [sic] the apartment[s].

407. As pertains to the claim relating to the costs of advertising and marketing, my answer is twofold. Firstly, no evidence was tendered and/or produced pertaining to the nature and manner in which the advertisement [if any] was undertaken. It is not clear whether the advertisement and marketing was vide print or electronic media; or was by way of handbills. Simply put, it behooved the Plaintiff to walk unto to the court some scintilla of evidence to vindicate.

408. Secondly, even assuming that the Plaintiff was able to bring forth evidence on advertisement and marketing, it would still be incumbent upon the Plaintiff to go an extra mile and place before the court documentary evidence, inter-alia, receipts, demonstrating that the expenses were incurred and paid.

409. Notwithstanding the foregoing, it is worth recalling and pointing out that the Plaintiff, who testified as PW1 himself admitted and stated as hereunder;

> "I have claimed the costs of advertising and marketing in the sum of kes.10, 000, 000/=. I have not produced any document to show how the costs was incurred".

410. To my mind, the answer whose details has been captured in the preceding paragraph is crystal clear and beyond peradventure. For coherence, PW1 was conceding and acknowledging that same has placed no evidence before the court to underpin the claim on account of costs of advertisement and marketing.

411. In a nutshell, my answer as pertains to issue number four is twofold. Firstly, the Plaintiff herein would have been entitled to compensation of the basis of the market value of the land in the sum of Kes.300, 000, 000/= only, being the value returned at the foot of the Valuation Report by PW3 and which Report was not controverted or at at all

412. However, the said compensation could only accrue as against the 1st third party, same being the Party who sold to and in favour of the Plaintiff, the Suit Property. Nevertheless, I beg to point out that such an award could only issue and/ or be granted subject to there being a suitable claim as against the Vendor and not otherwise.

413. For the avoidance of doubt, it is my finding that the Court cannot purport to make any such award because there is not claim that has been laid as against the vendor. In any event, the vendor is only before the Court as a Third Party, brought on board by dint of the provisions of Order 1 Rule 15 of the Civil Procedure Rules,2010, whose legal contours are legally circumscribed.

414. Secondly, the rest of the claims by and on behalf of the Plaintiff have neither been established nor proven either in the manner required or at all. For good measure, it suffices to underscore that the burden of proof was cast upon the Plaintiff. [See Section 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya]. [See also the holding in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Muriithi [2014] eklr].

Issue Number 5 Whether the counterclaim by the 2nd Defendant has been proved to the requisite standard and whether the reliefs sought thereunder are tenable.

415. Other than the Plaintiff who had sought for a plethora of reliefs at the foot of the amended Plaint, whose details have been highlighted and canvassed in the preceding paragraphs; the 2nd Defendant also filed a counterclaim.

416. Pertinently, the 2nd Defendant contended that the certificate of title/lease held by the Plaintiff herein is unlawful, illegal and thus invalid. Furthermore, the 2nd Defendant contended that the suit property forms part of public land which had hitherto been reserved as road/railway reserve.

417. Other than the foregoing, the 2nd Defendant also contended that insofar as the suit property had already been reserved for public use and coupled with the fact that same fell within the transport corridor, the allocation, alienation, acquisition and ultimate issuance of the certificate of title thereto was vitiated.

418. Based on the foregoing position, the 2nd Defendant, which is an independent office created and established by dint of Article 156 of *the Constitution* 2010; thus implored the court to cancel and revoke the impugned certificate of title currently being held by the Plaintiff.

419. In addition, the 2nd Defendant also implored the court to decree that the suit property which forms part of the road reserve should be vested in the 1st Defendant, which is a statutory body created and established under the *Kenya Roads Act*, 2007.

420. Suffice it to point out that whilst discussing issue number one and number three, elsewhere herein before, this court made pertinent findings pertaining to the legality of the letter of allotment dated the 18th June 1999; as well as the fact the suit property fell within the transport corridor by dint of the structure plan which was prepared by the ministry of public works in 1985; and which Structure Plan, has never been revoked and/ or reviewed.

421. Premised on the findings [details at the foot of the analysis in respect of issues number 1 and 3] there is no gainsaying that the evidence on record suffice it to find and hold that the counterclaim on behalf of the 2nd Defendant has been duly established and proved.

422. To my mind, the suit property ought not to have been allocated or alienated in the first place. However, to the fact that same was illegally alienated, it behooves this court to restore the suit property to the status quo ante and in particular, to decree that same shall forever remain public land designated as part of the transport corridor serving the southern bypass and thus incapable of allocation or alienation, whatsoever.

423. By extension, it thus means that the certificate of title which is currently held by the Plaintiff is illegal, unlawful and invalid. Consequently, same falls within the ambit of the provisions of Section 26 [1] [b] of the *Land Registration Act*, 2012. Instructively, under the said Provision[s] it is immaterial whether the holder of the Title/ Certificate of Lease sought to be impugned was party to or privy to the illegality or otherwise.

424. Before departing from the issue herein, it is important and imperative to underscore that this court, as well as other Courts of Law, are obligated to vindicate and protect only such titles whose acquisition and procurement was formal, procedural and legal and not otherwise. [See the Decision of the Court of Appeal in Munyu Maina versus Hiram Gathiha Maina [2013] eklr]. [See also the finding of the High Court in the case of Kuria Greens Limited versus Attorney General[2012]eklr].

425. Likewise, I beg to restate and reiterate the holding of the Court of Appeal in the case of *Wambui v Mwangi & 3 others (Civil Appeal 465 of 2019*) [2021] KECA 144 (KLR) (19 November 2021) (Judgment), where the court held as hereunder;

> 64. The jurisprudence relied upon by the appellant and which we find prudent not to replicate are as already highlighted above. We have given due consideration to them in light of the record as assessed herein by us. Our take on the same is that the jurisprudential thread running through all of them is that no court of law should sanction and pass as valid any title to property founded on: fraud; deceitfulness; a contrived decree; illegality; nullity; irregularity, unprocedurality or otherwise a product of a corrupt scheme.

426. Furthermore, similar emphasis was highlighted by the Court of appeal in the case of Funzi Development Ltd & others v County Council of Kwale, Mombasa Civil Appeal No 252 of 2005 [2014] Eklr; where the Court stated and held thus:

> "...a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or gives its seal of approval to an illegal or irregularly obtained title."

427. Sadly, the certificate of title/lease held by the Plaintiff herein does not fall within the circumscription amplified in the decisions [supra] and to this end, same [Certificate of Title] does not merit protection under the Law.

Conclusion:

428. Having analysed and considered the various thematic issues [details highlighted in the body of the Judgment], it is crystal clear that the Plaintiff herein has failed to prove his claim as against the Defendants herein.

429. Nevertheless, it is worthy to point out that had the Plaintiff impleaded the 1st third party as one of the Defendants and subject to necessary prayers for compensation on account of the market value of the land, this court would no doubt have granted such a prayer. For good measure, indeed the 1st third party owed the Plaintiff a duty of frank and honest disclosure pertaining to the background attendant to the acquisition of the suit property.

430. On the other hand, it must have become apparent and evident that the certificate of title held by the Plaintiff and in respect of the suit property is clearly invalid and thus incapable of vindication by dint of Article 40[6] of *the Constitution* 2010.

431. Additionally, it is also important to point out that though the 1st Defendant took out and issued third party notice against the 1st third party, there was clearly no reasonable cause of action disclosed as against the 1st third party, taking into account that the Plaintiff's claim was predicated on the demolition of the Apartment[s].

432. On the other hand, I must also point out that upon being joined as a third party, the 1st third party herein herself, took out and issued third party notice against the 2nd third party notably in pursuance of the Provisions of Order 1 Rule 15[4] of the Civil Procedure Rules, 2010.

433. Nevertheless, the Claim by and on behalf of the First Third Party as against the Second Third Party could only succeed on account of indemnity or contribution, if and only if, the First Third Party had been found liable in favour of the First Defendant [which is not the case].

434. Furthermore, the Second Third Party also impleaded and brought on board the Third Third Party into the suit herein. Nevertheless, to the extent that no claim has been proved against the Second Party herein, there is no basis for indemnity or contribution that can be passed over to the said third Party.

Final Disposition:

435. Flowing from the conclusions [details in terms of the preceding paragraphs], I am now disposed to and do hereby make the following Final orders;

i. The Plaintiff's suit be and is hereby dismissed.

ii. Costs of the suit be and are hereby awarded to the Defendants

iii. The counterclaim by the 2nd Defendant be and is hereby allowed in the following terms;

a. The Defendant to the counterclaim [who is the Plaintiff in the Main Suit] be and is hereby ordered to surrender the certificate of title/certificate of lease in respect L.R No Nairobi/Block 72/3079 to the chief land registrar for immediate cancelation and/or revocation.

b. A declaration be and is hereby issued that L.R No Nairobi/Block 72/3079 constitutes and forms public utility [road reserve and hence same falls under the custody of Kenya National Highways Authority], which is the body established vide the *Kenya Roads Act*, 2007, to superintend and/or take charge the road reserve like the one beforehand.

c. For the avoidance of doubt, an order of permanent injunction be and is hereby issued against the Defendant to the counterclaim, her agents, servants, employees and/or anyone claiming under her from entering upon, remaining on and/or otherwise dealing with [sic] L.R No Nairobi/Block 72/3079.

d. Cost of the counterclaim shall be borne by the Defendant to the counterclaim.

iv. The 1st Defendant's claim against the 1st Third party at the foot of the third-party notice be and is hereby dismissed.

v. The 1st Third party claim vide third party notice against the 2nd third party be and is hereby Dismissed.

vi. The 2nd third party claim as against the 3rd third party, be and is similarly Dismissed.

vii. The Third parties herein shall each bear own costs of the proceedings.

viii. Any other reliefs not expressly granted are hereby declined.

ix. [Orbiter]: Nevertheless, the Plaintiff shall be at liberty to pursue whatever, reliefs, if any; against the 1st third party, subject to the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

436. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF JULY 2024.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson/ Brian: court Assistant.

Ms. Asli Osman for the Plaintiff/Defendant to the counterclaim

Prof. Albert Muma SC and Mr. Elvis Obok for the 1st Defendant

Mr. Motari [principal litigation counsel] for the 2nd Defendant.

Ms. Cicilia Masinde for the 3rd Defendant.

Mr. Paul Mungla for the 1st Third party

Mr. Bundotich for the 2nd Third party

Mr. Nyakoe for the 3rd Third party

53| Page