



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 348 OF 2008**

**CONSOLIDATED WITH ELC CASE NO. 1018 OF 2014**

**RIFT VALLEY MACHINERY SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**AGRO COMPLEX (K) LIMITED.....1<sup>ST</sup> DEFENDANT**

**PETER KIMANI KAMARU.....2<sup>ND</sup> DEFENDANT**

**JANE WAMBUI.....3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF COMPANIES.....4<sup>TH</sup> DEFENDANT**

**PRINCIPAL REGISTRAR OF TITLES.....5<sup>TH</sup> DEFENDANT**

**KINGS DEVELOPERS LIMITED.....6<sup>TH</sup> DEFENDANT**

**JOSHUA GITARI MWANGI.....7<sup>TH</sup> DEFENDANT**

**MUTUA MULI.....8<sup>TH</sup> DEFENDANT**

**GEORGE NGUGI.....9<sup>TH</sup> DEFENDANT**

**ANDREW JACOB ONYANGO ONDIEKI.....10<sup>TH</sup> DEFENDANT**

**CHARLES ODHIAMBO AYORO.....11<sup>TH</sup> DEFENDANT**

**ALFRED OMONDI MOLA.....12<sup>TH</sup> DEFENDANT**

**AGRO COMPLEX KENYA LIMITED.....1<sup>ST</sup> THIRD PARTY**

**CHRISTOPHER KALE CHETALAM.....2<sup>ND</sup> THIRD PARTY**

**ELISHA CHEBII CHESIYNA.....3<sup>RD</sup> THIRD PARTY**

**JUDGEMENT**

1. There are three claims to the parcel of land known as land reference number (L.R. No.) 22140 (“the Suit Property”). The first one is by the Plaintiff which claimed that it purchased the Suit Property from the 1<sup>st</sup> Third Party in 2002. The 2<sup>nd</sup> and 3<sup>rd</sup> Third Parties are directors of the 1<sup>st</sup> Third Party. The second claim to the Suit Property is by the 1<sup>st</sup> Defendant which bears a name very similar to that of the 1<sup>st</sup> Third Party. The 1<sup>st</sup> Defendant claimed that it was allocated the land and obtained a title over the Suit Property in 2007. The third claim is by the 6<sup>th</sup> Defendant which avers that it purchased parcel numbers 15110 to 15113 from the 7<sup>th</sup> to 12<sup>th</sup> Defendants and that it amalgamated these parcels of land to create L.R. No. 29609 and was registered as the proprietor of this parcel of land on 20/3/2013. The 6<sup>th</sup> Defendant claims that L.R. No. 29609 is the same as the Suit Property which the Plaintiff and the 1<sup>st</sup> Defendant also lay claim to.

2. In the Amended Plaintiff filed in court on 29/8/2017, the Plaintiff averred that the 1<sup>st</sup> Third Party was incorporated on 13/9/1986 and that on 27/2/1990 the Commissioner of Lands issued a letter of allotment to the 1<sup>st</sup> Third Party in respect of Embakasi Industrial Plots numbers 5, 6, 11 and 12. The letter was addressed to Agro Complex (K) Limited and not Agro Complex Kenya Limited. The 1<sup>st</sup> Third Party was issued a grant for 99 years over the Suit Property on 27/6/2001. The Plaintiff claimed that the 1<sup>st</sup> Third Party sold the Suit Property to the Plaintiff on 14/7/2001 for Kshs. 8,000,000/=. The Suit Property was registered in the Plaintiff's name on 4/10/2002 as I.R. No. 87670/2.
3. The 1<sup>st</sup> Defendant was incorporated on 19/5/1998 by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants together with Wilfred Mingi Waweru ("Mr. Mingi") who is now deceased. Sometime in 2006, the Plaintiff discovered the existence of the 1<sup>st</sup> Defendant and that it was purporting to be the owner of the Suit Property by challenging the transfer of the Suit Property from the 1<sup>st</sup> Third Party to the Plaintiff. At the time, the 1<sup>st</sup> Defendant produced a copy of the grant over the Suit Property issued to it on 30/10/2007 bearing a copy of the Plaintiff's deed plan. The Plaintiff further discovered that L.R. No. 22140 which is the Suit Property was registered under two separate files being I.R. No. 87670 in the Plaintiff's name and I.R. No. 108022 in the 1<sup>st</sup> Defendant's name.
4. Upon these discoveries, the Plaintiff erected a sign board on the Suit Property to warn any intended innocent purchasers that it owned the Suit Property. The 1<sup>st</sup> Defendant also stationed parallel security personnel on the Suit Property. On 11/7/2014, persons claiming to be agents of the 6<sup>th</sup> Defendant went to the suit land claiming they were the owners of the land and asked the Plaintiff to vacate the land. The matter was reported to the police for investigations. The Plaintiff obtained documents that showed that the 7<sup>th</sup> to 12<sup>th</sup> Defendants caused themselves to be registered as proprietors of portions of the Suit Property which they then sold to the 6<sup>th</sup> Defendant who consolidated those portions to create L.R. No. 29609 I.R. No. 142826.
5. The Plaintiff claimed that its own title instrument was first in registration. It faulted the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant for incorporating and registering the 1<sup>st</sup> Defendant with the name which is almost identical to the Plaintiff's name. The Plaintiff further faulted the 4<sup>th</sup> Defendant for registering the 1<sup>st</sup> Defendant. It also faulted the 5<sup>th</sup> Defendant for issuing a title over the Suit Property to the 1<sup>st</sup> Defendant and to the 6<sup>th</sup> Defendant with the full knowledge that the Plaintiff already had a title over the same land.
6. The Plaintiff sought various reliefs including a declaration that it is the true and *bona fide* owner of the Suit Property being L.R. No. 22140, Embakasi, Nairobi; a declaration that the 1<sup>st</sup> and 6<sup>th</sup> Defendants have no claim to the Suit Property and cancellation of the titles held by the 1<sup>st</sup> and 6<sup>th</sup> Defendants; an injunction to restrain the Defendants from dealing with the Suit Property; and an order directing the 4<sup>th</sup> Defendant to deregister 1<sup>st</sup> Defendant from the register of companies in Kenya. Alternatively, it sought an order to have the 1<sup>st</sup> Defendant change its name and cease operating under the banner, Agro Complex (K) Limited. It also sought general damages and costs.
7. In the Amended Defence and Counterclaim filed in court on 31/1/2018 the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant denied the Plaintiff's claim and averred that the letter of allotment was issued to the 1<sup>st</sup> Defendant following an application for allotment for the Suit Property which the late Mr. Mingi made in February 1990. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants averred that the 1<sup>st</sup> Third Party colluded with the Plaintiff and fraudulently transferred the Suit Property to the Plaintiff. They added that the Plaintiff and the 1<sup>st</sup> Third Party colluded with officials in the Companies Registry in seeking deregistration of the 1<sup>st</sup> Defendant to circumvent justice.
8. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants counterclaimed against the Plaintiff for a declaration that it is the true and *bona fide* owner of the Suit Property and that the Plaintiff has no claim to this land, cancellation of the title held by the Plaintiff together with general damages and costs.
9. The 4<sup>th</sup> and 5<sup>th</sup> Defendants in the amended defence filed in court on 10/4/2018 admitted that the Commissioner of Lands issued a letter of allotment to Agro Complex (K) Limited and not Agro Complex Kenya Limited and that this was a genuine mistake. They denied the Plaintiff's allegations and stated that the transfer to the Plaintiff done in 2002 was a forgery. They gave particulars of fraud against the Plaintiff to wit occasioning the transfer of the land to its name knowing it was a fraud, purporting to have bought the Suit Property knowing it was incorrect and procuring title documents through deceit and by misleading the office of the Commissioner of Lands. They averred that the title issued to the 6<sup>th</sup> Defendant could not have been procedurally issued since there was already another title registered in the Plaintiff's name in 2002.
10. The 4<sup>th</sup> and 5<sup>th</sup> Defendants took out a Third Party Notice on 27/6/2013 which led to a joinder of the Third Parties to the suit. The 4<sup>th</sup> and 5<sup>th</sup> Defendants sought full indemnity and contribution for any judgement that may be given in favour of the Plaintiff or the 1<sup>st</sup> or 6<sup>th</sup> Defendants together with the costs for defending the suit. The notice was based on the grounds that the Third Parties colluded with other parties and misled the 4<sup>th</sup> and 5<sup>th</sup> Defendants to issue the title over the Suit Property and that they presented themselves to the lands officials by purporting to be Agro Complex (K) Limited. Further, that they misled the 4<sup>th</sup> and 5<sup>th</sup> Defendants when they sought consent to transfer the Suit Property while knowing that it was a perpetration of fraud and an illegality. In addition, that the Third Parties entered into a transfer with the Plaintiff to transfer the Suit Property knowing well that they did not own the land.
11. In the Amended Defence and Counterclaim filed in court on 2/9/2017, the 6<sup>th</sup> Defendant denied the Plaintiff's claim and averred that it was the registered proprietor and had been in possession of the Suit Property known as L.R. No. 29609 (original number 15110 to 15113) grant number 142826 which resulted from the amalgamation of L.R. Nos. 15110 to 15113 that it purchased from the 7<sup>th</sup> to 12<sup>th</sup> Defendants between 11/4/2011 and 13/4/2012. The 6<sup>th</sup> Defendant averred that upon purchase and registration of the four parcels of land in its name, it took possession and secured the parcels of land by a barbed wire fence and stationed guards on the Suit Property. It applied for amalgamation of the four parcels of land and was issued a title over L.R. No. 29609 on 20/2/2013. The 6<sup>th</sup> Defendant stated that the Plaintiff's agents visited the Suit Property on 10/7/2014 and attempted to harass its guards as they threatened to demolish the 6<sup>th</sup> Defendant's perimeter wall around the Suit Property. The 6<sup>th</sup> Defendant reported the matter to the police.
12. The 6<sup>th</sup> Defendant claimed to be an innocent purchaser for value without notice of any defect and that it was therefore protected in law.

In the event that the court found that the Suit Property belonged to any person other than the 6<sup>th</sup> Defendant, the 6<sup>th</sup> Defendant sought to have the 5<sup>th</sup> Defendant made liable to compensate it for any loss due to want of performance of the 5<sup>th</sup> Defendant's statutory duties by failing to keep proper public records in respect of the Suit Property and causing parallel certificates of title to be superimposed on the 6<sup>th</sup> Defendant's title. The 6<sup>th</sup> Defendant urged the court to protect its proprietary rights over the Suit Property under Article 40 of the Constitution and the Land Registration Act.

13. The 6<sup>th</sup> Defendant sought a declaration that it is the registered proprietor of L.R. No. 29609 (original numbers 15110- 15113) grant number 142826 which the Plaintiff and the 1<sup>st</sup> Defendant refer to as L.R. No. 22140, and that L.R. No. 22140 does not exist. It sought a permanent injunction to restrain the Plaintiff and the 1<sup>st</sup> Defendant from dealing with the Suit Property and that the orders made by the court be enforced by the police. It also sought general damages for trespass and destruction of its property and an order directing the 5<sup>th</sup> Defendant to cancel the Plaintiff's and the 1<sup>st</sup> Defendant's titles over the Suit property.

14. In the alternative, the 2<sup>nd</sup> Defendant prayed for declaration that it was an innocent purchaser without notice of defect in the title over the Suit Property and an order directing the 5<sup>th</sup> Defendant to compensate it for the loss of the Suit Property in the event the court found that the Suit Property belonged to any other person other than the 6<sup>th</sup> Defendant.

15. The Third Parties filed their defence on 29/10/2013 in which they denied that they were liable to the 4<sup>th</sup> and 5<sup>th</sup> Defendants for indemnity or contribution. They stated that they incorporated the 1<sup>st</sup> Third Party and that it was duly registered on 30/9/1986 vide certificate number C32887 issued by the 4<sup>th</sup> Defendant. They averred that the 4<sup>th</sup> Defendant was under a statutory duty not to register companies having similar names or names that are deceptively similar to those already registered and that if such registration occurs through inadvertence or otherwise, the 4<sup>th</sup> Defendant was required under the Companies Act to direct the latter company to change its name within six weeks in default of which it committed a criminal offence.

16. The Third Parties averred that the 4<sup>th</sup> Defendant colluded with some individuals and fraudulently registered a company known as Agro Complex (K) Limited in May 1998 and issued it with certificate number C81005. The company bore the same name as the 1<sup>st</sup> Third Party, the only difference being that Kenya was written as a single K and not in full. The Third Parties urged that the registration of the 1<sup>st</sup> Defendant using a name deceptively similar to that of the 1<sup>st</sup> Third Party's name was a fraudulent scheme intended to deceive persons dealing with the 1<sup>st</sup> Defendant that it was the 1<sup>st</sup> Third Party and in particular deceive them that the 1<sup>st</sup> Defendant was the owner of the Suit Property.

17. The Third Parties averred that sometime in 1990, they applied to the President for allotment of four unsurveyed plot numbers 5, 6, 11 and 12 in Embakasi and a letter of allotment reference number 51776/X/107 dated 27/2/1990 was issued by the Commissioner of Lands to the 1<sup>st</sup> Third Party. They claimed that the letter was handed over to the 2<sup>nd</sup> Third Party as director of the 1<sup>st</sup> Third Party. The Third Parties claimed that the 1<sup>st</sup> Third Party engaged Susan Munyi and Company Advocates to accept the offer for allotment of the four plots by the government and pay the stand premium from the funds the law firm was holding in its client account on behalf of the 1<sup>st</sup> Third Party. Susan Munyi and Company Advocates accepted the offer for allotment and paid Kshs. 771,854/= at the lands office. They added that the four plots were surveyed and given L.R. No. 22410 under deed plan number 207399 and that a grant was issued to the 1<sup>st</sup> Third Party on 27/6/2001 being I. R. No. 87670.

18. They averred that the 5<sup>th</sup> Defendant was by law barred from issuing a second title to any other person over the same piece of land. The 1<sup>st</sup> Third Party stated that it sought and obtained the consent of the Commissioner of Lands to transfer the Suit Property to the Plaintiff. The 5<sup>th</sup> Defendant registered the transfer in favour of the Plaintiff on 1/10/2002 as I. R. No. 87670/2. The 1<sup>st</sup> Third Party averred that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants fraudulently colluded to produce a second grant number 108022 in respect of the same piece of land on 30/10/2007. The Third Parties contended that there were no grounds for the 4<sup>th</sup> and 5<sup>th</sup> Defendants to demand indemnity or contribution from them in respect of the negligence, collusion of fraud perpetuated by the 5<sup>th</sup> Defendant as the Third Parties are not responsible for maintaining records in the lands registry.

19. The Plaintiff also filed **ELC No. 1018 of 2014** on 31/7/2014 which was consolidated with this suit on 22/2/2017. The court has looked at the pleadings in that suit filed by the Plaintiff against the 6<sup>th</sup> to the 12<sup>th</sup> Defendants seeking cancellation of the registration of the 6<sup>th</sup> to 12<sup>th</sup> Defendants as the owners of the Suit Property and a declaration that the Plaintiff was the owner of the Suit Property. The 6<sup>th</sup> and 7<sup>th</sup> Defendants in **ELC No. 1018 of 2014** who became the 11<sup>th</sup> and 12<sup>th</sup> Defendants after the consolidation of the suits, filed a defence on 1/10/2014 denying the Plaintiff's claim. The 6<sup>th</sup> Defendant sued as the 1<sup>st</sup> Defendant in **ELC No. 1018 of 2014**, filed a defence denying the Plaintiff's claim to the suit land and counterclaimed various reliefs including a declaration that it was the owner of L.R. No. 29606 (original numbers 15110-15113); an order to evict the Plaintiff from the Suit Property; special damages in the sum of Kshs. 7,931,400/= against the Plaintiff for the demolition of the perimeter wall it had erected around the Suit Property; and alternatively, that the Plaintiff be compelled to restore the perimeter wall to the condition it was in before the demolition within the shortest period.

20. The Plaintiff called two witnesses to testify on its behalf. Susan Nduta Munyi, an Advocate of the High court of Kenya practicing as Susan Munyi and Company Advocates gave evidence. She stated that she never dealt with Mr. Mingi, Peter Kimani or Peter Kiboi Wahome during her practice as an advocate and that these people have never been her clients and she never made any payments to the lands office on behalf of Mr. Mingi. Consequently, the alleged termination of her services by Mr. Mingi was ineffective since Mr. Mingi was not her client. She confirmed that she acted for both Agro Complex (K) Limited and the 2<sup>nd</sup> Third Party. She produced copies of the two letters dated 27/8/1990 her firm sent to Agro Complex (K) Limited with regard to the transfer of L.R. No. 209/10801, Embakasi to Mzuri Properties Limited. She also annexed correspondence addressed to her by the Agricultural Finance Corporation and the Kenya Commercial Bank dated 27/8/1990 and 16/11/1992 respectively with respect to the 2<sup>nd</sup> Third Party and Agro Complex (K) Limited.

21. She stated that she was aware that the 2<sup>nd</sup> Third Party applied for allotment in Embakasi through Agro Complex (K) Limited and was allocated four unsurveyed industrial plot numbers 5, 6, 11 and 12. She stated that the 2<sup>nd</sup> Third Party instructed her to obtain a bankers cheque for Kshs. 771,854/= from the funds she held in the client account and forward this payment to the Commissioner of Lands as part payment of the stand premium required for the allocation of the four plots. She forwarded this sum vide her letter dated 3/4/1996. She clarified that her role in the transaction was only limited to forwarding the bankers cheque to the Commissioner of Lands as instructed by the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties and that she was not involved in the allocation of the suit land.

22. She was not involved in the registration of the 1<sup>st</sup> Third Party as a company. She did not have the registration documents from the 1<sup>st</sup> Third Party and did not do a search at the Companies Registry on this company. She confirmed that she was working for Agro Complex (K) Limited and was not aware of Agro Complex Kenya Limited. It surprised her that the 2<sup>nd</sup> Third Party was a director of the 1<sup>st</sup> Third Party and not the 1<sup>st</sup> Defendant because the company she acted for is the 1<sup>st</sup> Defendant. She confirmed that she did not receive the title after she forwarded the payment for the stand premium to the Commissioner of Lands. She did not know what transpired after she forwarded the payment. She did not have a receipt or any acknowledgement for the payment of Kshs. 771,854/=. She stated that the 2<sup>nd</sup> Third Party was known to her from 1986 when they were neighbours in Plainsview Estate in Nairobi.

23. Mr. Aram Mutema Mbui, the Plaintiff's managing director gave evidence. He stated that the 1<sup>st</sup> Third Party was incorporated in September 1986 with its directors and shareholders being the 2<sup>nd</sup> and 3<sup>rd</sup> Third Parties together with James Kisa. He stated that the Commissioner of Lands issued the allotment letter dated 27/2/1990 to the 1<sup>st</sup> Third Party in which he addressed the company as Agro Complex (K) Limited and not Agro Complex Kenya Limited. The grant was issued to the 1<sup>st</sup> Third Party on 27/6/2001 after it paid the requisite fees through Susan Munyi and Company Advocates and the plots were consolidated and became L.R. No. 22140 I. R. No. 87670. He stated that the 1<sup>st</sup> Third Party entered into an agreement for the sale of the Suit Property to the Plaintiff on 14/7/2001 and that the land transferred to the Plaintiff on 4/10/2002 and registered as L.R. No 87670/2. The Plaintiff took possession of the land, erected a fence around it and stationed guards on it.

24. He stated that twelve years after the 1<sup>st</sup> Third Party had been incorporated, the 1<sup>st</sup> Defendant which bears a name that is confusingly similar to that of the 1<sup>st</sup> Third Party was incorporated. He claimed that the Plaintiff learned of the existence of the 1<sup>st</sup> Defendant in 2006 through the letter dated 26/1/2006 addressed to the Attorney General, which the 1<sup>st</sup> Defendant copied to the Plaintiff. The 1<sup>st</sup> Defendant purported to be the owner of the Suit property in that letter and challenged the transfer of the Suit property to the Plaintiff. The copy of the grant which the 1<sup>st</sup> Defendant produced was issued on 30/10/2007 and bore grant number I.R. No 108022 in respect of the Suit Property. On conducting a search at the Companies Registry, the Plaintiff discovered that the 1<sup>st</sup> Defendant was incorporated as a company on 19/5/1998. The Plaintiff also learned that the Suit Property was registered under two separate files at the lands registry that is, as I. R No. 87670 in the Plaintiff's name and I.R. No. 108022 in the name of Agro Complex (K) Limited. The titles were issued on 18/12/2001 and 31/10/2007 respectively.

25. Mr. Mbui was emphatic that even though the letter of allotment over the Suit Property was addressed to Agro Complex (K) Limited, it was for all intents and purposes meant for Agro Complex Kenya Limited. He pointed out that the 1<sup>st</sup> Defendant was incorporated eight years later in 1998.

26. He claimed that the Plaintiff erected a sign board on the suit land to warn prospective purchasers that it owned the plot and had no intention of disposing it. The 1<sup>st</sup> Defendant stationed parallel security personnel on the land and caused the Plaintiff's sign board to be pulled down. The Plaintiff reported the incident at the Embakasi police station and the Criminal Investigations Department headquarters (CID). He claimed that the Plaintiff wrote letters to the 4<sup>th</sup> and 5<sup>th</sup> Defendants bringing to their attention the irregular incorporation of the 1<sup>st</sup> Defendant and its acquisition of a certificate of title over the Suit Property. Persons claiming to be agents of the 6<sup>th</sup> Defendant also went to the land on 11/7/2014 claiming that they owned the land and wanted the Plaintiff to vacate the Suit Property. The Plaintiff's director obtained a copy of the 6<sup>th</sup> Defendant's title which enabled him to obtain more documents from the lands office in Ardhi House. The documents he obtained showed that the 7<sup>th</sup> to 12 Defendants were unprocedurally registered as proprietors of portions of the land created from the subdivision of the Plaintiff's land which plots were sold to the 6<sup>th</sup> Defendant. He learnt that the 7<sup>th</sup> and 8<sup>th</sup> Defendants were registered as proprietors of L.R. No. 15112 on 22/12/2010 and transferred this land to the 6<sup>th</sup> Defendant on 11/4/2011. The 9<sup>th</sup> and 10<sup>th</sup> Defendants were registered as proprietors of L. R. No. 15113 on 22/12/2010 and transferred this parcel of land to Royal Importers and Exports Limited on 11/4/2011 who subsequently transferred it to the 6<sup>th</sup> Defendant on 13/4/2012. The 11<sup>th</sup> Defendant was registered as proprietor of L.R. No. 15111 on 22/12/2010 and transferred it to the 6<sup>th</sup> Defendant on 11/4/2011. The 12<sup>th</sup> Defendant was registered as proprietor of L.R. No. 15110 on 22/12/2010 and transferred the land to the 6<sup>th</sup> Defendant on 11/4/2011. The Commissioner of Lands approved the amalgamation of the four parcels of land on 9/11/2012 following which a certificate of title over L.R. No. 29609 I.R. No. 142826 was issued to the 6<sup>th</sup> Defendant.

27. Mr. Mbui maintained that the Plaintiff was the true owner of the Suit Property following the letter of allotment dated 27/2/1990 issued by the Commissioner of Lands to Agro Complex (K) Limited because the 1<sup>st</sup> Defendant had not been incorporated as at that date. It urged that title over the Suit Property was processed and issued to the 1<sup>st</sup> Third Party upon compliance with the requisite conditions. He stated that the Plaintiff purchased the land and had it transferred to its name on 4/10/2002. He maintained that the Plaintiff's registration was a first registration under Section 28 of the repealed Registration of Titles Act.

28. He believed that the Defendants had acted fraudulently with the aim of divesting the Plaintiff of its rightful ownership over the Suit Property and relied on the particulars of fraud pleaded in the amended plaint. He believed that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded with the 4<sup>th</sup> Defendants to have the 1<sup>st</sup> Defendant incorporated knowing well that a company with similar names already existed. He also believed that the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> Defendants colluded with the 5<sup>th</sup> Defendants to have another certificate of title in respect of the Suit Property issued to the 1<sup>st</sup> Defendant with the full knowledge that there was another certificate of title in existence in the Plaintiff's name. He added that the 5<sup>th</sup> Defendant was negligent, reckless and or malicious in dealing with the Suit Property yet it is the custodian of all the lands records. The Plaintiff claimed that as a result of the Defendants' fraudulent actions it had suffered loss and damage for which it claimed damages.

29. He produced copies of the letter of allotment dated 27/2/1990; the 1<sup>st</sup> Defendant's title; the letter by Susan Munyi advocates dated 3/4/1996 forwarding the cheque for Kshs. 771,854/= to the Commissioner of Lands; a copy of the sale agreement dated 14/7/2001 between the Plaintiff and the 1<sup>st</sup> Third Party; transfer dated 30/9/2002 from the 1<sup>st</sup> Third Party to the Plaintiff; consent from the Commissioner of Lands to transfer the Suit Property dated 22/1/2002; an unclear rent clearance certificate issued up to and including 31/12/2002; letter of consent addressed to Boniface Njiru Advocates dated 23/9/2002 for the transfer; rates clearance certificate issued by the City Council of Nairobi on 10/9/2002; the rates demand note of 3/9/2007 demanding payment of Kshs. 1,917,647.60; and the caveat emptor published by Waweru Gatonye and Company Advocates whose date is not visible.

30. He conceded that the sale agreement between the Plaintiff and the 1<sup>st</sup> Third Party referred to Agro Complex Limited and not Agro Complex Kenya Limited or Agro Complex (K) Limited. He stated that he first interacted with the 1<sup>st</sup> Third Party in 2001 and that he had never interacted with Agro Complex (K) Limited. He stated that the Plaintiff paid the consideration of Kshs. 8,000,000/= to Agro Complex Kenya Limited through Waweru Gatonye and Company Advocates via cheques. Then he changed his evidence and stated that he paid the sum of Kshs. 8,000,000/= to the directors of Agro Complex Kenya Limited but was not sure who he made the payments to. He confirmed that the 2<sup>nd</sup> and 3<sup>rd</sup> Third Parties executed the sale agreement dated 14/7/2001.

31. Mr. Mbui confirmed that he went to Alliance High School and the University of Nairobi with the 3<sup>rd</sup> Third Party and added that the 3<sup>rd</sup> Third Party was a director of Water in the Ministry of Water. He knew the 2<sup>nd</sup> Third Party who worked for the Central Bank of Kenya. The 2<sup>nd</sup> and 3<sup>rd</sup> Third Parties were his customers since they were farmers in Molo and he carried out business in Nakuru. He agreed with the Third Parties that the purchase price would be paid to the 3<sup>rd</sup> Third Party. The same law firm represented both the vendor and the purchaser in the sale transaction. He claimed that he learnt from agents that the suit land was on sale. He stated that between 2001 and 2014 the land was empty.

32. He stated that his lawyer did due diligence before the Plaintiff entered into the agreement for the sale of the suit land. He did not think they did a valuation of the suit land before purchasing it. He added that the names Agro Complex Kenya Limited and Agro Complex (K) Limited were used interchangeably in the sale transaction. He was emphatic that they did not demolish the 6<sup>th</sup> Defendant's wall and claimed that they had a guard stationed on the land who disappeared and has never been found. He did not have the approvals for the amalgamation of the four plots that created the Suit Property. He did not have the survey plans for the plots depicting the position prior to and after the amalgamation.

33. The 2<sup>nd</sup> Third Party gave evidence. He stated that he incorporated Agro Complex Kenya Limited with James Kisa on 13/9/1986 and they were issued certificate number 32887 for this company. The 1<sup>st</sup> Defendant was incorporated on 19/5/1998 under certificate number C81005. He believed the 4<sup>th</sup> Defendant was required by law to maintain a record of registered companies which would have prevented the registration of the 1<sup>st</sup> Defendant with a name similar to that of the 1<sup>st</sup> Third Party. He also believed that the 1<sup>st</sup> Defendant's name which was deceptively similar to that of the 1<sup>st</sup> Third Party should not have been registered. He stated that the 4<sup>th</sup> Defendant admitted the mistake and directed the 1<sup>st</sup> Defendant to change its name. He testified that the 1<sup>st</sup> Third Party applied to the President for allotment of four unsurveyed plot numbers 5, 6, 11 and 12 in Embakasi and the Commissioner of Lands issued a letter of allotment over these parcels of land to the 1<sup>st</sup> Third Party on 27/2/1990.

34. Mr. Chetalam stated that he engaged Susan Munyi and Company Advocates to accept the conditions of the allotment and effect payment of the stand premium on behalf of the 1<sup>st</sup> Third Party from funds held in the firm's client account. She stated that Susan Munyi and Company Advocates accepted the allotment and made payment of Kshs. 771,854/=. The four plots were consolidated and given L.R. No. 22140 under deed plan number 207399 and a grant for 99 years was issued to the 1<sup>st</sup> Third Party on 27/6/2001 and the title registered as I. R. No. 87670/1. He stated that the 1<sup>st</sup> Third Party entered into a sale agreement with the Plaintiff on 14/7/2001 and the transfer in favour of Plaintiff was registered on 4/10/2002 as I. R. No. 87670/2. The 1<sup>st</sup> Third Party obtained the consent of the Commissioner of Lands to transfer the land to the Plaintiff. The 2<sup>nd</sup> Third Party believed that the 1<sup>st</sup> to 3<sup>rd</sup> Defendants colluded with the 4<sup>th</sup> and 5<sup>th</sup> Defendants to register a similar company and issue a second grant over the same piece of land to the 1<sup>st</sup> Defendant on 30/10/2007.

35. On cross examination, he stated that they incorporated the 1<sup>st</sup> Third Party in 1986 and used it for about 20 years. The company had loans and had bank account from 1986 but he did not have the bank statements in court. He did not have audited accounts and confirmed that the company did not file tax returns for those twenty years. He claimed that he did not know that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants or the late Mr. Mingi. He confirmed that he knew Susan Nduta Munyi. She was their lawyer he stated that he incorporated the 1<sup>st</sup> Third Party. He later changed his evidence and said he could not remember whether she was the one who incorporated the company. He stated that Ms. Munyi did his transactions.

36. He stated that they did not apply for any particular land, they just applied for a plot which was allocated to them. They did not know which plots were available for allocation. He did not have a copy of the application for allocation of the suit land. He confirmed that he knew Peter Mbui of Rift Valley Machinery and that he looked for Mr. Mbui when he learnt that the Plaintiff was looking for land to purchase. He claimed that they did not do a valuation of the land since he was fairly conversant with land matters and land prices. He stated that they paid land rent for the property but did not have the receipts in court. He could not recall the amount they paid as land rent which he said was paid through Susan Munyi Advocates. He did not have the survey plans depicting the consolidation of the four plots which were amalgamated before the deed plan was issued. He claimed that they hired a surveyor called Harunani to amalgamate the plots. He did not have the copy of the letter they wrote to Harunani or evidence of payment of the amalgamation fees. He stated that the balance of the stand premium was paid around 1997 but did not have evidence of the payment.

37. On the postal address box number 55070 used in the letter of allotment, he stated that the address belonged to his friend Stanley Kigera Thuo with whom he had worked at the Central Bank of Kenya. He stated that Agro Complex (K) Limited referred to Agro Complex Kenya Limited.

38. The 2<sup>nd</sup> Defendant, Peter Kimani Kamaru who is one of the directors of the 1<sup>st</sup> Defendant gave evidence. He stated that his late brother, Mr. Mingi solely incorporated the 1<sup>st</sup> Defendant sometime in 1998 and added him and his sister as directors in the company. He claimed Mr. Mingi sought to reserve the company's name in 1989 having operated it as a business name before. He stated that when Mr. Mingi applied for allotment of the suit land between 1989 and 1990, he was informed that the application had to be made by a company. That prompted him to apply for allotment of the suit land using the name of Agro Complex (K) Limited which he had reserved in 1989. The Suit Property was allocated to Agro Complex (K) Limited in 1990. He stated that Mr. Mingi tried to sell the suit land using the letter of allotment granted by the government and when he did not succeed, Mr. Mingi decided that he would set up a factory on the Suit Property.

39. He stated that postal address number 55070 used in the letter of allotment belonged to Mr. Stanley Kisera Thuo who was Mr. Mingi's close friend and business associate and that Mr. Thuo was personally known to the 2<sup>nd</sup> Defendant. He explained that Mr. Mingi was going through financial difficulties and was unable to pay the land rent and rates for the Suit Property so that he could have the land registered in the 1<sup>st</sup> Defendant's name. He was aware that Mr. Mingi paid Kshs. 120,000/= in 1996 to the Ministry of Lands through Susan Munyi and Company Advocates for the registration of the title. He claimed that the registration of the title stalled further because they had not obtained the certificate of incorporation for the 1<sup>st</sup> Defendant.

40. He averred that in 2006 they discovered that a fraud was being perpetuated at the Lands Office and the Companies Registry by persons claiming to be directors of Agro Complex (K) Limited, who purported to have sold the land to the Plaintiff. They reported the matter to the police, Ministry of Lands and the Kenya Anti-Corruption Commission. He pointed out that the address for Agro Complex Limited given in the transfer document was box number 67847 while in the Plaintiff's correspondence it was box number 52080. The search results from the Companies Registry gave the address for Agro Complex as box number 30089 and 340 Molo. He relied on the search done at the Companies Registry which reflected him as a director of Agro Complex (K) Limited.

41. He produced copies of various documents including the letter of allotment issued to the 1<sup>st</sup> Defendant; confirmation of the allotment issued by the Ministry of Lands and Settlement; the 1<sup>st</sup> Defendant's PIN; and the certificate of incorporation confirming that the 1<sup>st</sup> Defendant was incorporated on 19/5/1998. He produced a copy of the title over the Suit Property issued to the 1<sup>st</sup> Defendant on 31/10/2007. He also produced copies of the Memorandum and Articles of Association for the 1<sup>st</sup> Defendant and details of the 1<sup>st</sup> Defendant's directors given by the Registrar of Companies. He produced copies of letters dated 25/6/1998 written by the late Mr. Mingi terminating the services of Susan Munyi and Company Advocates and the 1<sup>st</sup> Defendant's letter dated 21/7/2007 addressed to the Commissioner of Lands seeking to be issued with a title over the Suit Property. The letter mentioned the payment of Kshs. 771,854 made on 20/6/1996 vide receipt number D583381 and Kshs. 30,000/= paid on 23/1/2003. The letter enclosed a copy of receipt number F276252 and stated that this receipt was missing from the Lands Office file. He produced a copy of the letter dated 7/9/2009 addressed to the Attorney General by the Ministry of Lands which stated that the deed plan got misplaced and a certified copy was obtained from a Director of Surveys to facilitate the preparation of the new grant. The letter also confirmed that the original file was missing from the records at the land's office.

42. He produced copies of the letters written by the Kenya Anti-Corruption Commission and the Ministry of Lands which was addressed to the Registrar of Companies together with letters exchanged between Waweru Gatonye and Company Advocates and the 1<sup>st</sup> Defendant's advocates. He produced the rates demand notes sent by Nairobi City Council in respect of the Suit Property as well as the demands for land rent. The copy of the receipt issued by the Department of Lands on 23/1/2003 on account of payment of Kshs. 30,000/= that he produced indicated that the payment was in respect of industrial plot numbers 5, 6, 11 and 12. He produced evidence of payment of land rent in the sum of Kshs. 120,000/= on 25/7/2007. He produced copies of the Posta directory in respect of post box number 55070. He also produced a copy of letter dated 9/5/1999 written by the late Mr. Mingi seeking reservation of the name Agro Complex (K) Limited. He produced correspondence exchanged between the 1<sup>st</sup> Defendant and its advocates with the Registrar of Companies. The witness stated that Mr. Mingi died in 2008 after this suit had been filed.

43. He stated that Agro Complex (K) Limited was registered as a business name in 1989 and incorporated as a company in 1998. He claimed that they reserved the name from 1989 up to 1998. He stated that at the time they registered the company in 1998 there was no other company registered by the same name.

44. He confirmed that he knew Susan Munyi Advocate whom Mr. Mingi used to deal with and that there were payments made to Susan Munyi Advocate by the 1<sup>st</sup> Defendant. He stated that the address for Agro Complex (K) Limited was box number 52080. He conceded that the deed plan attached to the 1<sup>st</sup> Defendant's title was a certified copy. He stated that the lands officials asked them to surrender the title and that they went for it during the hearing of this case. He claimed that the Ministry of Lands officials lost the 1<sup>st</sup> Defendant's title which prompted Mr. Mingi to go to the office of the Commissioner of Lands. Another deed plan was prepared and a title was issued. He stated that Mr. Mingi made the first payment for the allotment of the land and believed that Mr. Mingi applied to consolidate the four plots mentioned in the letter of allotment. The witness clarified that the 1<sup>st</sup> Defendant's original documents were missing and that Mr. Mingi may have lost them before he died. The witness maintained that the intended allottee of the suit land was Mr. Mingi's business.

45. Priscillah Nyambura Njue gave evidence. She stated that her late brother Wilfred Mingi was allotted the Suit Property in 1990 through the help of a senior government official, the mayor of Kabarnet. She stated that her brother was not able to pay the allotment fees. Her husband approached Aram Mbui and requested him to purchase the land and showed him the beacons of the land. Mr. Mbui did not get back to them. Mr. Mingi later informed her that he was encountering problems registering the title over the Suit property in the 1<sup>st</sup> Defendants name and that there were persons who had registered a company similar to the one Mr. Mingi had reserved and purported to have sold the Suit Property to a third party. Mr. Mingi informed her that he conducted a search and found that a title had been issued and a search at the Companies Registry revealed that the owners of the other company were officials at the lands office. Mr. Mingi later told her that Mr. Mbui had obtained another title over the same piece of land and reported the matter to the CID. She stated that she knew Susan Munyi Advocate and that Mr. Mingi also knew Susan Munyi. She stated that Mr. Mingi started trading as Agro Complex (K) Limited in 1989 before the company was registered. She was emphatic that she was the one who took Mr. Mbui to the suit land and that they gave the title to Mr. Kahuhu of the Ministry of Lands for safe keeping. A land official brought the title to Mr. Kanjama in court.

46. Silas Kiogora Mburugu, a Principal Land Administration Officer at the Ministry of Lands was called by the 1<sup>st</sup> to 3<sup>rd</sup> Defendant to testify after the 4<sup>th</sup> and 5<sup>th</sup> Defendants indicated that they would not be calling him to give evidence despite filing his witness statement during pretrial. Mr. Mburugu stated that the suit land was allocated to Agro Complex (K) Limited on 27/2/1990 after which it was surveyed and given L.R. No 22410 with deed plan number 20399. He stated that the deed plan was misplaced at the Lands Office forcing them to seek a certified copy from Director of Surveys to facilitate the preparation of the grant. They called for the registration certificate for Agro Complex (K) Limited and a letter from the Registrar of Companies giving the names of the directors of the company allotted the suit land. He stated that a grant was processed for L.R. No. 22140 (I.R. No. 108022) in favour of Agro Complex (K) Limited which was registered on 30/10/2007.

47. He stated that another grant had been processed in the name of Agro Complex (K) Limited and executed by Sammy Mwaita on 27/6/2001 who was the Commissioner of Lands at the time. Upon issuance of the certificate of stamp duty on 13/12/2001, that grant got misplaced in the land registry. Mr. E. C. Chesiyana and C. K. Chetalam applied on 17/1/2002 for consent to transfer the plot claiming to be directors of Agro Complex (K) Limited. Approval was granted under reference number 107936/22 of January 2002. Mr. Chesiyana and Mr. Chetalam prepared a transfer of the land from Agro Complex Limited to Rift Valley Machinery Limited dated 30/9/2002. The transfer was registered on 14/10/2002. On 25/6/2002 one of the directors of Agro Complex (K) Limited wrote to the lands office informing them that Susan Munyi and Company Advocates had ceased acting for this company.

48. According to Mr. Mburugu, the grant for Agro Complex (K) Limited was hijacked by the directors of Agro Complex Kenya Limited at the lands office after it had been stamped through the collusion of land registry staff and was then transferred to the Plaintiff. While this was happening, the genuine owners of Agro Complex (K) Limited were pestering the office of the Commissioner of Lands to prepare a title for them which is what led to the request being made of the Director of Surveys for a certified copy of the deed plan pursuant to which the second grant was processed and signed by the Commissioner of Lands, Mr. Z. A. Mabea, on 30/10/2007, and registered as I. R. No. 108022. He explained that that was how L.R. No. 22140 ended up with two grants being I.R. Nos. 87670 and 108022.

49. Mr. Mburugu conceded that from the certificates of incorporation for Agro Complex (K) Limited and Agro Complex Kenya Limited and based on the letters from the Registrar of Companies confirming the directors of the two companies, it was clear that these were different companies. He concluded that the transfer of L.R. No. 22140 I.R. No. 87670 by the directors of the 1<sup>st</sup> Third Party to the Plaintiff was fraudulent since they never owned the land and did not pay the stand premium for L.R. No. 22140. He maintained that Agro Complex Kenya Limited were not the allottees of the Suit Property and that the transfer to the Plaintiffs was unprocedurally done. He produced a copy of the letter dated 7/9/2009 from the Ministry of Lands to the Attorney General explaining the circumstances of the allocation of the Suit Property. He also produced a copy of a letter dated 23/4/2013 which he wrote while at the National Land Commission giving the same position on the registration of the Suit Property. He also produced an internal memo he wrote to the chairman of the National Land Commission dated 25/5/20116 giving his opinion on the ownership of the Suit Property.

50. He produced various documents including a copy of the 1<sup>st</sup> Defendant's letter dated 8/10/2007 requesting the Commissioner of Lands to process the grant in its name; a copy of the form from Director of Surveys forwarding the duplicate deed plan; copy of the letter of allotment; the summons issued by the National Land Commission (NLC) to the Plaintiff, 1<sup>st</sup> Defendant, 6<sup>th</sup> Defendant and Royal Importers and Exporters Limited summoning them to attend the public hearing on 22/7/2016 at NLC's offices; a copy of NLC's letter dated 14/3/2018 addressed to the CID Director giving the background on the acquisition of the Suit Property. The penultimate paragraph of the letter dated 14/3/2018 stated that L.R. No. 29606 came about as a result of the amalgamation of L.R. Nos. 15110 to 15113 which ceased to exist in 1996 when these parcels of land were amalgamated to create L.R. No. 22140. The NLC Chairman concluded that the title existing for L.R. No. 29606 I. R. No. 142826 was invalid and should be expunged from the records.

51. Mr. Mburugu confirmed that he was involved in the investigations relating to the transactions over the Suit Property. He worked as a Land Officer in the Ministry of Lands and was assigned duties relating to court matters. At the time he gave evidence, he was working with NLC. He stated that the lands office received a complaint from the original allottee of the Suit Property that the file and documents relating to the land it was allocated got lost as they were following up the issuance of the title. A temporary file had to be opened and they wrote to the Director of Surveys to give them a certified copy of the deed plan to enable them prepare another title for the allottees. He confirmed that he dealt with Mr. Muingi and Mr. Kimani around 2005. He also confirmed that the lands file has been missing since 2016.

52. He stated that when a deed plan got lost the owner of the land should obtain a police abstract and an affidavit deponing to the loss following which a letter is written to the Director of Surveys to provide a certified copy of the deed plan. He had not seen an abstract or affidavit or the letter written to the Director of Surveys to provide the certified copy of the deed plan. The report about the loss of the deed plan was made around 2005 and he was not aware that by then a title had been issued to the Plaintiff. He maintained that the procedure employed in obtaining a certified copy of the deed plan was proper. He clarified that his evidence was based on the investigations he undertook at the request of the Attorney General based on this suit and that he did not deal with the allocation of the suit land or the registration of the grants in dispute. During his investigations, he obtained information from correspondence file number 107936 which was kept at the Ministry of Lands. If a deed plan is reported as misplaced and it had not been used to prepare a grant, they would request for a certified copy from the Survey Department. He maintained that the Commissioner of Lands was not aware that a title had been issued over the Suit Property registered as I.R. No. 87670/1.

53. He stated that when a transfer is made on an existing grant, one needs a rates clearance certificate, consent to transfer, rent clearance certificate, original title and the transfer documents. The name of the transferee is endorsed on the title upon payment of the stamp duty and registration of the transfer. As part of his duties, he carried out allocations of land but not the registration of documents and added that if someone went to the Lands Office with a letter of allotment, the lands officers would interrogate it to determine whether it was genuine. He confirmed that the 1<sup>st</sup> Defendant's title was issued in 2007 using a deed plan issued in 1996.

54. He gave the procedure followed in the allocation of land. A person applies for allocation of a piece of land and the lands officers check in their Plan Records Office and if they find that the land is available and not planned, they ask the Director of Physical Planning to prepare a part development plan (pdp) which forms the basis for the allocation of the land. The applicant indicates on a sketch the land they wish to be allocated. A certificate of incorporation is not required at the point of application for allotment of land. He stated that there were people who

would apply for allocation of land using names of companies which would be incorporated at the time of preparing the title.

55. He confirmed that he used to see Mr. Mingi in their office when their deed plan got lost. Mr. Mingi confirmed to him that he had paid the stand premium which was why he was pushing the lands officers after the deed plan got lost. He confirmed that the titles issued to the 1<sup>st</sup> Third Party and the 1<sup>st</sup> Defendant were processed in two different files. The 1<sup>st</sup> Third Party's title was prepared in file number 107936 while the 1<sup>st</sup> Defendant's title was processed in file number 107936/TC, which was a temporary file used because the original file was missing. He stated that the original deed plan was used to prepare the 1<sup>st</sup> Third Party's title and a certified copy of the deed plan was used to prepare the 1<sup>st</sup> Defendant's title over the Suit Property. There were two deed files and two correspondence files relating to the Suit Property which they reviewed during the investigations.

56. He stated that the preparation of a title entails various steps and that when the owners of the suit land were going through the process of obtaining the title they could not find the grant which had been finalised by the Commissioner of Lands and taken to the Lands Registrar for registration. The grant disappeared in the lands registry before it could be given to its owner who was the 1<sup>st</sup> Defendant named in the letter of allotment. The officials of the 1<sup>st</sup> Defendant kept going to the lands office to find out what had happened and after several years the lands officials wrote to the Director of Surveys to provide a certified copy of the deed plan to enable them prepare another grant to replace the one which got lost in the registry.

57. Mr. Mburugu stated that the title numbers for the four plots which were consolidated to create the 6<sup>th</sup> Defendant's title ceased to exist in 1996 when they were amalgamated to create L.R. No. 22140.

58. Mr. Kanjama applied to have the replying affidavit sworn by the late Wilfred Mingi Waweru admitted in evidence under Section 35 (1) of the Evidence Act. Mr. Washika, Mr. Ashitiva and Mr. Bundotich opposed the admission of the affidavit of the late Mr. Mingi. The thrust of their objection was that the affidavit was made by a person interested in the suit land in proceedings that were pending in court. The court allowed the application and reserved the reasons for the ruling which were to be included in this judgement.

59. The court looked at the Evidence Act and the authorities furnished by the parties on this point. Section 34 of the Evidence Act provides that evidence given by a witness in a judicial proceeding is admissible at a later stage of the proceedings for the purpose of proving the facts it states in the circumstances set out which include where the witness is dead; and where the subsequent proceeding is between the same parties or their representatives and the adverse party had the opportunity to cross examine the witness and the questions in issue are the same in the two suits.

60. The affidavit filed in court on 12/8/2008 was sworn by Mr. Mingi in these proceedings which relate to the dispute over ownership of the suit land. The Plaintiff had an opportunity to cross examine Mr. Mingi. The averments in the affidavit only touched on the Plaintiff and the court does not see how they would prejudice the 6<sup>th</sup> Defendant.

61. Peter Kiboi Wahome gave evidence. He stated that he the proposed director of the 1<sup>st</sup> Defendant and that he was well versed with the matter in dispute having been informed by Mr. Mingi who is now deceased. Mr. Mingi approached him in 2007 and asked him to partner with him in his business venture. He knew that Mr. Mingi was dealing with the importation of agro-based products. Mr. Mingi informed him that he had acquired a piece of land along Mombasa Road on which he intended to develop an agro-based production company. He asked him to assist in the financing of the project and pointed out the land along Mombasa Road next to the Tiles and Carpets godown.

62. Mr. Mingi told him that he had difficulty obtaining the title to the land because there were persons who had encroached on the land and he had not paid the balance of the stand premium and the accrued land rent. Mr. Mingi informed him that he had reported the matter to the Anti-Corruption Commission and CID. They agreed that he would finance the processing of the title and as compensation, he would be appointed a director and shareholder of the 1<sup>st</sup> Defendant since he was interested in the project Mr. Mingi wanted to undertake on the suit land. He got the funds and appealed to the Commissioner of Lands to waive part of the ground rent and the original stand premium. They were asked to pay Kshs. 120,000/= which they paid and obtained the title over the suit land.

63. He stated that Mr. Mingi informed him that he had been trading in the name of Agro Complex (K) Limited and had applied to reserve the name but did not finalise its incorporation. He added that at the time the land was allotted to him, the government required one to have a company incorporated because the industrial plots could only be allocated to companies and not individuals. That was the reason why Mr. Mingi sought the reservation of the company name at the time he applied for allotment of the Suit Property and later pursued the incorporation of the company. Mr. Mingi brought in his brother and sister who are the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants as directors of the company for purposes of its incorporation. Mr. Mingi informed him that he made payment through his then advocate, Susan Munyi and Company Advocate using the letter of allotment. At that point the Ministry of Lands officials requested that he produces the certificate of incorporation before the registration of the grant could be finalised. Mr. Mingi initiated the incorporation of the company which was concluded in 1998.

64. Mr. Mingi informed Mr. Wahome that he later fell out with Susan Munyi Advocate through whom he had paid part of the stand premium forcing him to terminate her services. He started pursuing the registration of the grant but was unable to do so since he did not have the funds to pay the rent, rates and the balance of the stand premium.

65. Mr. Mingi told him that he discovered in 2006 that people had encroached on his land and asked R. W. Chege and Associates Advocates to issue a demand letter to the trespassers. In 2003 Mr. Mingi was asked by the Ministry of Lands officials to pay a further sum of Kshs. 30,000/= towards the stamp duty for the title to be issued. Mr. Mingi's efforts were frustrated by officers in the lands office which prompted him to seek Mr. Wahome's intervention in 2007. As the investigations were going on, Mr. Mingi obtained a letter from the Ministry of Lands addressed to the Attorney General giving the true position with regard to the ownership of the Suit Property. Mr. Wahome stated that he was a valuer and was familiar with properties and that he paid the sum of Kshs. 120,000/=.

66. Charles Odhiambo Ayoro, the 11<sup>th</sup> Defendant gave evidence. He is the 6<sup>th</sup> Defendant's General Manager. He stated that the 6<sup>th</sup>

Defendant was the registered proprietor of L.R. No. 29606 (original number 15110 – 15113) grant number 142826 which resulted from the amalgamation of parcel numbers 15110 to 15113 which the 6<sup>th</sup> Defendant purchased between 11/4/2011 and 13/4/2012. L.R. No. 15110 originally belonged to the 12<sup>th</sup> Defendant and was transferred to the 6<sup>th</sup> Defendant on 11/4/2011; L.R. No. 15111 belonged to him and he transferred it to the 6<sup>th</sup> Defendant on 11/4/2011; L.R. No. 15113 belonged to the 9<sup>th</sup> and 10<sup>th</sup> Defendants and was transferred to the 6<sup>th</sup> Defendant on 11/4/2011. L.R. No. 15112 originally belonged to Royal Importers and Exporters Limited and was transferred to the 6<sup>th</sup> Defendant on 13/4/2012.

67. Mr. Ayoro maintained that the process of transfer of the original parcels of land to the 6<sup>th</sup> Defendant was proper and that the 6<sup>th</sup> Defendant undertook due diligence and obtained consent to transfer the land. He stated that the 6<sup>th</sup> Defendant took possession of the land and fenced the land using barbed wire and stationed guards on it. It sought to amalgamate the plots and was granted approval to do so by the City Council of Nairobi. A new rates card was opened by the City Council of Nairobi to enable the 6<sup>th</sup> Defendant pay rates. The 6<sup>th</sup> Defendant obtained approval on 19/12/2013 from the City Planning Department of the Nairobi City County to construct a perimeter wall around the Suit Property. On 10/7/2014 one of the guards on the Suit Property called him and informed him that there were persons harassing the guards on the suit land while threatening to demolish the wall. He lodged a complaint at the Embakasi Police Station. Police officers went to the land and informed him that there was a court order given in **ELC Suit No. 1018 of 2014** to maintain security over the Suit Property.

68. Mr. Ayoro urged the court to order the eviction of the Plaintiff from the suit land and issue an injunction to restrain the Plaintiff from dealing with the Suit Property. He also sought the sum of Kshs. 7,931,400/= against the Plaintiff for the demolished perimeter wall or that the Plaintiff be compelled to restore the 6<sup>th</sup> Defendant's wall. He produced a copy of the 6<sup>th</sup> Defendant's title over the suit land issued on 20/2/2013. He maintained that the 6<sup>th</sup> Defendant was an innocent purchaser for value without notice. He did not produce any sale agreement in respect of the four plots which the 6<sup>th</sup> Defendant purchased from the 7<sup>th</sup> to 12 Defendants. He did not produce evidence of payment of stamp duty.

69. He confirmed that the letter of allotment dated 27/6/2000 for unsurveyed industrial plot number F1 was the basis for the allocation of the plot to him and that he made payment on 15/11/2010. He did not know that two other titles had already been issued over the Suit Property. He conceded that in the letter of allotment the government stated that it would not accept any liability in the event of prior commitment or otherwise of the land.

70. He maintained that the 6<sup>th</sup> Defendant land's was in Nairobi which is why they sought the approval of the City Council of Nairobi. He did not know why the surveyor stated that the land was in Laikipia. He relied on the report prepared by the Deputy Registrar dated 9/9/2014 on the destruction of the 6<sup>th</sup> Defendant's perimeter wall. He stated that before paying for the plot allocated to him, he inquired from the Ministry of Lands officials whether the plot was still available and was told to go ahead and pay the stand premium.

71. Mr. Alfred Omondi Mola, the 12<sup>th</sup> Defendant gave evidence. He stated that he obtained a letter of allotment from the Commissioner of Lands dated 27/6/2000 for parcel number 15110 in respect of which he paid Kshs. 165,860/= and was issued a certificate of title. He transferred the piece of land to the 6<sup>th</sup> Defendant on 11/4/2011. He could not recall the bank through which he paid the stand premium. He confirmed that the sketch plan referred to in his letter of allotment was not attached to the letter. He stated that he sold the land to the 6<sup>th</sup> Defendant for Kshs. 8,750,000/= but had no evidence of this in court. He stated that it took him ten years to pay for the land after it was allocated to him in 2000. He confirmed that he coordinated with the 11<sup>th</sup> Defendant the payment for a letter of allotment which is why the two cheques came from the same bank account. He stated that he was 23 years old when the land was allocated to him.

72. The 4<sup>th</sup> and 5<sup>th</sup> Defendants called three witnesses to testify on their behalf. Alice Mwendwa, a Senior State Counsel and Assistant Registrar of Companies at the Business Registration Service Nairobi gave evidence. She stated that Agro Complex Kenya Limited was registered as a limited liability company on 30/9/1986 as company number 32887. Its shareholders were Christopher Chetalam Kale and James Kisa while its directors were Elisha Chebii Chesiyana and Christopher Chetalam Kale. Agro Complex (K) Limited was registered as a limited liability company on 19/5/1998 vide company number 81005 with its shareholders and directors as Wilfred Mingi Waweru, Peter Kimani Kimaru and Jane Wambui.

73. She stated that the Registrar of Companies wrote to the directors of the 1<sup>st</sup> Defendant on 16/10/2008 stating that they had noticed an earlier registration of a company known as Agro Complex Kenya Limited on 30/9/1986 before Agro Complex (K) Limited sought registration on 19/5/1998. The Registrar of Companies pointed out that the two companies bore similar names and could not exist concurrently since they were likely to cause confusion to ordinary members of the public. The Registrar added that the allocation of the name Agro Complex (K) Limited to the 1<sup>st</sup> Defendant was inadvertent and was not tenable pursuant to Section 20 of the Companies Act. The Registrar asked the 1<sup>st</sup> Defendant to change its name within six months failing which Section 20 (2)(b) of the Companies Act would be revoked.

74. Ms. Mwendwa produced a copy of the certificate of incorporation for Agro Complex (K) Limited dated 19/5/1988 being certificate number C81005 and certificate number C32887 issued on 30/9/1986 for Agrocomplex Kenya Limited. She also produced form CR 12 issued by the Registrar of Companies giving the names of the shareholders and directors of Agrocomplex Kenya Limited and Agro Complex (K) Limited. She produced a copy of certificate number C81005 for Agro Complex (K) Limited dated 19/5/1998.

75. She stated that a name reservation would last for 30 days and if one failed to register the company within the 30 days they had to apply for extension of time while attaching the initial reservation. When a person reserved a name, a receipt and a reservation letter would be issued to the person. He stated that the letter dated 9/5/1989 written by Mr. Mingi reserving the name Agro Complex (K) Limited did not have any indication to confirm that it was received at the Companies Registry. She stated that it was not possible for the name to have reserved for 9 years from 1989 to 1998.

76. She denied that the certificate of incorporation for Agro Complex (K) Limited issued on 19/5/1988 originated from their office. She

stated that it is possible to have two companies bearing the same name when a company's name is erroneously issued. The Registrar of Companies wrote to the company that was second in time to change its name within 60 days. The procedure for reservation and registration of business names was similar to that of companies except that they did not register initials for business names. To change a business name into a company one had to fill a form for cessation of the business name and make payment. Once the application is filed, the Registrar of Companies confirms that the business name has ceased and has been converted to a company by adding "limited" at the end of the name. The letter is what one attaches with other registration document.

77. Ms. Mwenda stated that her testimony was limited to the records held at the Companies Registry. She stated that when a name is reserved, they check in the companies' database and that in 1989 they used to do a manual search of the database. This changed in 2010 when they digitised the companies' records. She stated that they issued the directive to the 1<sup>st</sup> Defendant to change its name under the old law, the new law now allows the Registrar to strike out the second company. She later changed her evidence on the certificate of incorporation dated 1988 and stated that she produced it to show that the certificate could not have been registered as C81005 as at that time.

78. Priscilla Wango, a land surveyor working for the Survey of Kenya in the Ministry of Lands and Planning gave evidence. She stated that L.R. Numbers 15110 to 15113 were surveyed and received by the Director of Surveys on 8/2/1991. They were cancelled when an amalgamation was done creating L.R. No. 22140 (I.R. No. 87670/1) on deed plan number 207399 dated 6/8/1996. Another deed plan was reissued by the Director of Surveys when the 1<sup>st</sup> Defendant claimed that it had lost its deed plan. The certified deed plan gave rise to the 1<sup>st</sup> Defendant title which is L.R. No. 22140 (I.R. No. 108022) registered on 30/10/2007.

79. She stated that the title held by the 6<sup>th</sup> Defendant could not have been procedurally issued. From the survey records, it appeared that deed plan number 157691 for L.R. No. 15110 dated 17/9/1991 issued in respect of L.R. No. 15166/1; deed plan number 157692 for L.R. No. 15111 dated 17/9/1991; deed plan number 157692 for L.R. No. 15111 dated 17/9/1991; situated in Laikipia District, East of Nyahururu Municipality; deed plan number 157692 for L.R. No. 15111 dated 17/9/1991; deed plan number 157693 for L.R. No. 15112; and deed plan number 157694 for L.R. No. 15113 were all issued in respect of land situated in Laikipia District. She produced copies of these deed plans together with the survey plan showing the location of these parcels of land which abut a forest on the rear side with a road fronting the properties. She explained that the deed plan number 207399 did not get lost in the real sense but that it had been used to register another title.

80. She stated that in the Survey Department they issue a deed plan to the licensed surveyor who undertook the survey work or the person indicated as the one who would collect the deed plan. For new grants, the survey department sends the deed plan to the Ministry of Lands so that they can process the title. A request for survey for a new grant would come from the person allotted the land and would be accompanied by a pdp for the plot being allocated. She clarified that to undertake the survey they did not require identification of the person allocated the land, they only required the letter of allotment and pdp. She was aware that the CID had investigated the issue of the ownership of the title over the Suit Property. She did not know if the title was hijacked at the lands office. She confirmed that the deed plans in respect of the titles issued to the 7<sup>th</sup> to 12<sup>th</sup> Defendants were prepared by Mr. Harunani licensed surveyor who also prepared the deed plan in respect of L.R. No. 22140.

81. She added that the title in respect of L.R. No. 15110 issued to the 12<sup>th</sup> Defendant made reference to survey plan number 157691 which in the survey records shows that it related to land in Laikipia District, East of Nyahururu. She maintained that if indeed a grant was hijacked at the lands office then the right thing to do was a resurvey for purposes of issuing another land reference number and not requesting a certified copy of the deed plan. She maintained that the deed plan attached to the 6<sup>th</sup> Defendant's title did not exist as at 7/2/2013 as it had already been cancelled in 1991. According to Ms. Wango, the letter of allotment relied on by the 11<sup>th</sup> Defendant dated 27/6/2000 for industrial plot number F1 was irregularly issued because by 2000 the land was already surveyed and had a number.

82. Edwin Wafula, a Land Registrar at the Ministry of Lands based at Ardhi House gave evidence. He confirmed that the Suit Property was allocated to Agro Complex (K) Limited vide the letter of allotment dated 27/2/1990. The allottee accepted the offer and made payment of Kshs. 771,854/= vide receipt number D583381 dated 20/6/1996. The land was surveyed and given L.R. No. 22410, deed plan number 20399. A title was processed in the name of Agro Complex (K) Limited in 2001 and executed on 27/6/2001 by Sammy Mwaita, the Commissioner of Lands then. Mr. E.C. Chesinya and C.C. Chetalam applied for consent to transfer the Suit Property on 17/1/2002 as the directors of Agro Complex (K) Limited. Approval was given through letter reference 107936/22 of January 2002 and the Suit Property was transferred vide the transfer dated 30/9/2002 signed by Mr. E.C. Chesinya and C.C. Chetalam. It was booked for registration and the land was transferred to the Plaintiff with the transfer being registered on 14/10/2002.

83. Mr. Wafula had noted from the correspondence file that the deed plan got misplaced and a certified copy was called for from the Director of Surveys. The certified deed plan gave rise to the second title over the Suit Property issued in the name of the 1<sup>st</sup> Defendant as L.R. No. 22140 (I.R. No. 108022) registered on 30/10/2007 when the Plaintiff's title was already in existence. In his opinion, it was irregular to issue two grants that is, I.R. Nos. 87670 and 108022 in respect of L.R. No. 22140 for the reason that any aggrieved party should have moved to court to challenge the other title over the same land instead of obtaining double registration of the same piece of land.

84. He agreed that from the 1<sup>st</sup> Defendant's certificate of incorporation and that of the 1<sup>st</sup> Third Party, and the confirmation by the Registrar of Companies of the directors of these two companies, it was clear that they were two different companies and were registered as different entities. He concluded that the registration of the 1<sup>st</sup> Defendant as proprietor of the Suit Property in 2007 was irregular since there was an earlier title issued to the Plaintiff and that the 1<sup>st</sup> Defendant should have challenged the title in court instead of obtaining a second title over the same piece of land.

85. He stated that when a deed plan is lost it has to be reported and that due diligence is done to ascertain if it was used to prepare a grant. He confirmed that he had never seen the original letter of allotment for the suit land and could not recall if he saw the receipts for payment of the stand premium. He had heard of fraudsters hijacking letters of allotment in the lands office and stated that if a letter of allotment is hijacked by a party who subsequently obtained a title then the title was fraudulent and should be revoked. He was aware that Mr. Silas Kiogora Mburugu carried out investigations in relation to the dispute over title to the Suit Property. According to him, where the full stand premium is not paid on allocation of land, the title issued should be revoked. He had not seen evidence of payment of stand premium either

by the 1<sup>st</sup> Defendant or the 1<sup>st</sup> Third Party. On cross examination he stated that payment for the allotment of the suit land was made by Susan Munyi Advocate on behalf of the 1<sup>st</sup> Third Party.

86. On the title held by the 6<sup>th</sup> Defendant, Mr. Wafula's conclusion was that the title was unprocedurally issued since an earlier title had been issued to the Plaintiff in 2002. He stated that the 6<sup>th</sup> Defendant title which was issued unprocedurally after other titles had been issued can only stand if the other titles are revoked.

87. He explained the procedure for allocation of land and stated that for a new grant one has to apply for allocation of the land. If the land is available, a letter of allotment is issued setting out conditions for the offer. An applicant accepts the offer and pays the stand premium. The land is surveyed and a title is issued. He stated that when they become aware at the lands office of the existence of two titles over the same piece of land they either instruct the police to investigate the matter or instruct the Attorney General's office to move the court for revocation of the title that was issued fraudulently. He added that in this case, the lands office became aware of the existence of multiple titles over the same piece of land long after the titles had been issued.

88. Parties filed submissions which the court has considered. The court summarised the issues for determination as follows:

- a. Which company between the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Third Party was lawfully registered?
- b. Do the Plaintiff's land being L.R. No. 22140 under grant no. I.R. 876770 and deed plan no. 207399; and the 1<sup>st</sup> Defendant's property being L.R. No. 22140 under grant no. I.R. 108022 and deed plan No. 207399; and the 6<sup>th</sup> Defendant's property L.R. No. 29609 under grant I.R. 142826 and deed plan no. 348750 all refer to the same parcel of land?
- c. Who between the Plaintiff, the 1<sup>st</sup> Defendant and the 6<sup>th</sup> Defendant is the lawful proprietor of the Suit Property?
- d. Ought the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Third Parties indemnify the 4<sup>th</sup> and 5<sup>th</sup> Defendants?
- e. Should the 4<sup>th</sup> and 5<sup>th</sup> Defendants compensate the 6<sup>th</sup> Defendant in the event that the Suit Property is successfully challenged?
- f. Who should pay for the demolition of the 6<sup>th</sup> Defendant's wall? and
- g. Who should pay the costs of the suit?

89. The first issue for determination is, between the 1<sup>st</sup> Third Party and the 1<sup>st</sup> Defendant, who was lawfully registered as a company? The Plaintiff submitted that the 1<sup>st</sup> Third Party was first to be incorporated and relied on the certificate of incorporation given in 1986. It also relied on the evidence of Susan Munyi who stated that she acted for the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties in various transactions and who denied ever acting for Mr. Mingi. The Plaintiff pointed out that the letter Mr. Mingi wrote reserving the company name was not received at the Companies Registry. It contended that a name could not have been reserved for nine years and in further support of its submission relied on the letter from the Registrar of Companies informing the 1<sup>st</sup> Defendant that its registration was inadvertent and was not tenable.

90. The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties submitted that the 1<sup>st</sup> Third Party was duly registered on 30/9/1986 vide certificate number C32887 issued by the 4<sup>th</sup> Defendant. They urged that as the custodian of documents relating to registration of companies, the 4<sup>th</sup> Defendant was under a statutory duty not to register companies with similar names or names that are deceptively similar to already existing companies and if through inadvertence such registration occurred, then the second company was required to change its name within six weeks. The Third Parties submitted that twelve years after the 1<sup>st</sup> Third Party was registered, the 4<sup>th</sup> Defendant colluded with some individuals and fraudulently registered a company known as Agro Complex (K) Limited and issued it with certificate number C819005, with a name similar to that of the 1<sup>st</sup> Third Party the only difference being that the name Kenya was abbreviated as "K". The 3<sup>rd</sup> Party submitted that the registration of the 1<sup>st</sup> Defendant using a name similar to the 1<sup>st</sup> Third Party's name was a fraudulent scheme intended to deceive persons dealing with the 1<sup>st</sup> Defendant that it was the 1<sup>st</sup> Third Party and that it was the owner of the Suit Property.

91. The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties urged that the 1<sup>st</sup> Third Party was lawfully registered by the 4<sup>th</sup> Defendant but the 1<sup>st</sup> Defendant was not. They relied on Section 57 of the Companies Act which prohibited the Registrar from registering a company by a name that was the same as another name appearing in the index of the company names. They reproduced Section 20 of the repealed Companies Act which empowered the Registrar to direct a company registered subsequently with a name similar to an existing company to change its name. They also relied on the duration for which a reservation of a company name could last in challenging the 1<sup>st</sup> Defendant's registration as a company.

92. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the 1<sup>st</sup> Defendant failed to produce a copy of the business name which it claimed Mr. Mingi traded under before he incorporated the 1<sup>st</sup> Defendant. They maintained that Mr. Mingi's letter reserving the company name was never received at the Companies Registry and added that there was no evidence that the 1<sup>st</sup> Defendant applied for conversion of the business name to a limited liability company. They relied on the directive given by the Registrar of Companies requiring the 1<sup>st</sup> Defendant to change its name.

93. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants submitted that Mr. Mingi who had been using the business name shared the idea of having the title over the Suit Property issued in the company's name with Mr. Stanley Kigera Thuo and that that led to the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant registering a name similar to the 1<sup>st</sup> Defendant's name. They relied on the 1<sup>st</sup> Defendant's certificate of incorporation and the letter from the Registrar of Companies giving the names of the directors of the 1<sup>st</sup> Defendant in urging that the 1<sup>st</sup> Defendant was legally registered.

94. From the evidence of Alice Mwendwa, it emerged that the Companies Registry issued three certificates of incorporation; certificate number C32887 dated 30/9/1986 was in respect of Agro Complex Kenya Limited, the 1<sup>st</sup> Third Party while certificate number certificate number 81005 dated 19/5/1998 was issued to Agro Complex (K) Limited, the 1<sup>st</sup> Defendant. She also produced another certificate number C81005 for Agro Complex (K) Limited which at some point she disowned as being a forgery and stated that she did not know its source. She also produced form CR12 for both the 1<sup>st</sup> Defendant and the 1<sup>st</sup> Third Party. The 1<sup>st</sup> Third Party and the 1<sup>st</sup> Defendant produced their memorandum and articles of association which on the face of them appear to have been registered.

95. The 2<sup>nd</sup> Third Party only produced a copy of the 1<sup>st</sup> Third Party's certificate of incorporation despite stating in his evidence that he had traded in this company for twenty years. He stated in his evidence that for the twenty years they traded as the 1<sup>st</sup> Third Party they did not file tax returns. He later claimed that they filed annual returns at the Companies' Registry but did not have copies of the returns. Since the company name was in issue one would have expected the 1<sup>st</sup> Third Party to produce letters on its letterhead or other documents to confirm that it had traded under its name or even the annual returns it filed at the Companies Registry. The 2<sup>nd</sup> Defendant produced various letters on the notepaper of Agro Complex (K) Limited dated 25/6/1998, 21/7/2007, 8/10/2007 and 7/4/2008. He also produced a copy of the 1<sup>st</sup> Defendant's PIN certificate issued by the Kenya Revenue Authority dated 21/3/2006.

96. The registration of companies is undertaken by the Registrar of Companies, who under Section 3 of the repealed Companies Act was required to keep a register of companies in which all matters prescribed in that Act were to be entered. Section 20(2) of that Act, permitted a company to change its name with the sanction of the Registrar of Companies within six months of it being registered by a name that was too similar to the name of an existing company if the registration of the latter company was done through inadvertence or otherwise.

97. The 1<sup>st</sup> Defendant was registered on 19/5/1998. The 4<sup>th</sup> Defendant directed the 1<sup>st</sup> Defendant to change its name within six weeks vide the letter dated 16/10/2008. This was ten years after the 1<sup>st</sup> Defendant was registered by the 4<sup>th</sup> Defendant. No explanation was given by the 4<sup>th</sup> Defendant's witness as to how that office registered two companies with very similar names without noticing this anomaly for such a long time. There is no evidence that the 1<sup>st</sup> Third Party traded under that name and whether it is still trading. There is evidence the 1<sup>st</sup> Defendant wrote letters using its name and took out a tax PIN. In the court's view, both the 1<sup>st</sup> Third Party and the 1<sup>st</sup> Defendant were lawfully incorporated and the Registrar of Companies can only deregister the 1<sup>st</sup> Defendant in accordance with the provisions of the Companies Act.

98. The second issue for determination is whether L.R. No. 22140 under grant no. I.R. 876770 claimed by the Plaintiff, L.R. No. 22140 under grant no. I.R. 108022 which the 1<sup>st</sup> Defendant claimed it owns and L.R. No. 29609 under grant I.R. 142826 which the 6<sup>th</sup> Defendant lays claim to all refer to one and the same piece of land. From the letter of allotment dated 27/2/1990 and the land reference, there is no doubt that the land claimed by the Plaintiff and the 1<sup>st</sup> Defendant is the same and was processed through the same deed plan. The 1<sup>st</sup> Third Party's title which it transferred to the Plaintiff was processed using the original deed plan while that of the 1<sup>st</sup> Defendant was processed using a certified copy of the same deed plan.

99. The 6<sup>th</sup> Defendant submitted that the three titles held by the Plaintiff, the 1<sup>st</sup> and 6<sup>th</sup> Defendants referred to the same piece of land. The 11<sup>th</sup> Defendant who testified on behalf of the 6<sup>th</sup> Defendant stated that one of the guards that the 6<sup>th</sup> Defendant had stationed on its land called him on 10/7/2014 and informed him that there were persons harassing the guards on the land and threatening to demolish the wall. The wall was demolished and the 6<sup>th</sup> Defendant has counterclaimed against the Plaintiff for the cost of putting up the wall. The court issued orders restraining the parties from dealing with the Suit Property in 2014. These facts confirm that the land claimed by the Plaintiff, the 1<sup>st</sup> Defendant and the 6<sup>th</sup> Defendant is the same piece of land.

100. The third issue for determination is, who between the Plaintiff, the 1<sup>st</sup> Defendant and the 6<sup>th</sup> Defendant has a superior claim to the Suit Property. Both the 1<sup>st</sup> Defendant and 1<sup>st</sup> Third Party relied on the letter of allotment dated 27/1/1990 and the payment of Kshs. 771,854/= forwarded by Susan Munyi and Company Advocates to the lands office on 3/4/1996 as the foundation for their claims to the suit land.

101. The Plaintiff submitted that it was an innocent purchaser for value without notice and that it purchased the Suit Property from the 1<sup>st</sup> Third Party. It relied on the agreement for sale dated 14/7/2001 and the transfer registered on 14/10/2002 both of which were executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Third Parties as directors of the 1<sup>st</sup> Third Party.

102. The Plaintiff submitted that the 6<sup>th</sup> Defendant's claim to the Suit Property was bleak and farfetched since according to the surveyor who testified, the survey plans in respect of L.R. Nos. 15110 to 15113 were situated in the District of Laikipia, East of Nyahururu Municipality. The Plaintiff submitted that the 1<sup>st</sup> Defendant obtained its title over the Suit Property through deceit when it presented itself as the 1<sup>st</sup> Third Party and procured a certified copy of the deed plan. The Plaintiff urged that its title over the Suit Property was the first one in time and must therefore prevail.

103. The Third Parties submitted that the 1<sup>st</sup> Third Party applied for allocation of the Suit Property and engaged the services of Susan Munyi Advocate. They averred that the 5<sup>th</sup> Defendant was under a duty not to issue two titles over the same piece of land and that it was responsible for any loss damage or costs that may be occasioned to any party in this suit. They added that there was no basis for an indemnity or contribution from the Third Parties who are not responsible for maintaining land records in the land registry.

104. The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties urged that the 1<sup>st</sup> Defendant did not exist on 27/2/1990 when the letter of allotment was issued. They relied on the case of **Charles Karathe and 2 others v the Administrators of the Estate of John Wallace Mathare (Deceased) and others [2013] eKLR** in which the court observed that a nonexistent company could not hold title after a finding had been made that the company did not exist when it was registered as the owner of the land. The court notes that by the time the 1<sup>st</sup> Defendant was registered as proprietor of the Suit Property it had been registered as a company.

105. The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties relied on the evidence of Susan Munyi Advocate who disputed the 1<sup>st</sup> Defendant's claim or that she ever acted for it. They urged that the 1<sup>st</sup> Third Party's name was used interchangeably because Kenya and "K" mean one and the same thing. They urged the court to find that a letter of allotment was issued to the 1<sup>st</sup> Third Party and not the 1<sup>st</sup> Defendant. They challenged the evidence of Silas Kiogora Mburugu as being untrue and urged the court to go by the evidence of Edwin Wafula which they submitted was credible and presented the true position.

106. The 1<sup>st</sup> and 2<sup>nd</sup> Third Parties relied on Section 60 and 61 of the repealed Registration of Titles Act on the powers of the registrar and the court where a certificate of title is issued in error. They also urged the court to go by the evidence of Priscilla Wango and submitted that the title held by the 6<sup>th</sup> Defendant was fraudulent. They urged the court to find that the 1<sup>st</sup> Third Party was the genuine allottee of the Suit Property and that no fraud on the part of the Plaintiff or the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties had been proved. They relied on Section 23 of the Registration of Titles Act and the protection afforded to a registered proprietor of land. They added that by the time the 7<sup>th</sup> to 12<sup>th</sup> Defendants obtained the letters of allotment and the titles which were consolidated to create the 6<sup>th</sup> Defendant's title, there was no land available for allocation to these parties. They urged the court to allow the Plaintiff's claim and dismiss the counterclaims by the 1<sup>st</sup> and 6<sup>th</sup> Defendants as well as the claim by the 4<sup>th</sup> and 5<sup>th</sup> Defendants for indemnity against them.

107. The 4<sup>th</sup> and 5<sup>th</sup> Defendants submitted that the 1<sup>st</sup> Defendant obtained its title fraudulently when it complained that it had lost the deed plan yet the Plaintiff had already obtained its title over the land. They urged the court to revoke the 1<sup>st</sup> Defendant title and that of the 6<sup>th</sup> Defendant.

108. The 6<sup>th</sup> Defendant submitted that the letter of allotment could not have been issued to the 1<sup>st</sup> Defendant since it was not in existence at the time the allotment was made and therefore its title was null and void. It submitted that it was a *bona fide* purchaser for value and that this court should uphold its title to the Suit Property.

109. In determining the entity whom the letter of allotment was issued to it is necessary to look at the circumstances surrounding the allocation of the Suit Property. Neither the 1<sup>st</sup> Third Party nor the 1<sup>st</sup> Defendant produced a copy of the application they made for the allotment of the land. Mr. Mburugu confirmed that a certificate of incorporation was not required at the time of allotment of land and that it was only required at the point of registration of the title.

110. Susan Munyi advocate testified that she forwarded the payment of Kshs. 771,854 as stand premium from the funds she was holding on behalf of the 1<sup>st</sup> Defendant. She did not produce any correspondence her firm exchanged with the 1<sup>st</sup> Third Party on the allotment of the suit land. The court notes that she only produced correspondence relating to the transfer of L.R. No. 209/10801- Embakasi Nairobi. In her evidence she stated that she only handled the part of forwarding the payment to the lands office yet the 2<sup>nd</sup> Third Party claimed she handled other aspects of the transaction. The court is not convinced that Susan Munyi did not act for Mr. Mingi as she claimed based on the letter Mr. Mingi wrote to the Lands terminating her services. The court is inclined to believe the evidence of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants that Mr. Mingi was most probably allocated the Suit Property. Mr. Mingi went to great lengths to pursue the suit land which the 1<sup>st</sup> Third Party and Plaintiff did not take possession of for a very long time until the 6<sup>th</sup> Defendant came into the scene.

111. Looking at the evidence adduced by the 2<sup>nd</sup> Third Party, the manner in which the 1<sup>st</sup> Third Party claimed it acquired the suit land can be summarised as follows: The letter of allotment was issued to the 1<sup>st</sup> Third Party on 27/2/1990. The letter of allotment demanded stand premium and other fees of Kshs. 943, 850/=. It accepted the offer of allotment after eight years on 3/4/1996 through Susan Munyi and Company Advocates and paid part of the stand premium of Kshs. 771,854/=. The 1<sup>st</sup> Third Party did not pay the balance of the stand premium but was issued a title over the Suit Property on 18/12/2001 and transferred the land to the Plaintiff on 4/10/2004. There is no evidence that the Plaintiff paid any consideration to the 1<sup>st</sup> Third Party for the purchase of the land or that the 1<sup>st</sup> Third Party ever paid land rent or rates for the Suit Property or even that it paid registration fees or stamp duty. No explanation was given by the 2<sup>nd</sup> Third Party as to why it took eight years to pay for the allotment and a further five years to register the land yet the deed plan was prepared in 1996.

112. Silas Mburugu and Edwin Wafula stated in their evidence that a person applying for allocation of land had to attach a sketch of the land he wished to be allocated and that the lands officials would establish from their records if the land was available before issuing a letter of allotment to the applicant. The 2<sup>nd</sup> Third Party stated in his evidence that they did not apply for allocation of the suit land, they applied for allocation of a plot, which raises doubts as to whether the 1<sup>st</sup> Third Party applied for allocation of the suit land.

113. On their part, the 1<sup>st</sup> to 3<sup>rd</sup> Defendants claimed that Mr. Mingi applied for and was allocated the suit land in 1990 but could not process the title until he had incorporated the 1<sup>st</sup> Defendant. They also claimed that Mr. Mingi faced financial difficulties and even attempted to sell the land. The evidence of Mr. Silas Mburugu who investigated the issuance of the three titles over the Suit Property was that Mr. Mingi pursued the issuance of the title relentlessly until the lands officers called for a certified copy of the deed plan which was used to process the 1<sup>st</sup> Defendant's title. Mr. Mingi claimed that his title had been hijacked at the lands office through the collusion of the officials at the lands office. After learning that the 1<sup>st</sup> Third Party had transferred the suit land to the Plaintiff Mr. Mingi complained about the transfer to the CID, the Kenya Anti-Corruption Commission and the Ministry of Lands. The 1<sup>st</sup> to 3<sup>rd</sup> Defendants produced copies of receipts issued by the lands department for the additional stand premium of Kshs. 120,000/= and 30,000/=.

114. The court prefers the evidence of Mr. Silas Mburugu who Mr. Edwin Wafula confirmed investigated the issue of multiple titles issued over the suit land. Mr. Mburugu's evidence and conclusion was based on documents he perused at the time he carried out investigations in the lands office before the lands files went missing. Mr. Edwin Wafula did not appear to have had the benefit of looking at those documents.

115. The 4<sup>th</sup> and 5<sup>th</sup> Defendants' filed Mr. Silas Mburugu's witness statement but later changed their minds about calling him to testify. The court notes that the 4<sup>th</sup> and 5<sup>th</sup> Defendants took diametrically opposed positions in this matter. In their Amended Defence they claimed that

the Plaintiff's title was a forgery and averred that the Plaintiff procured its title through deceit by misleading the Commissioner of Lands. They then took out a third party notice claiming indemnity and contribution from the Third Parties for any judgement that may be entered against them on the grounds that the Third Parties presented forged documents and entered into a transfer knowing that they did not own the suit land and were perpetuating a fraud or illegality. Surprisingly, they only challenged the 1<sup>st</sup> and 6<sup>th</sup> Defendants' titles in their submissions and appeared to support the Plaintiff's claim.

116. Weighing the evidence of the Plaintiff and the Third Parties against that of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants, the court finds that the 1<sup>st</sup> Defendant has a better claim to the suit land. The Suit Property having been allocated in 1990, it was not available for alienation in 2000 when the 7<sup>th</sup> to 12<sup>th</sup> Defendants claim to have been allocated portions of this land which they sold to the 6<sup>th</sup> Defendant. The first title in time must prevail. The court does not think the 6<sup>th</sup> Defendant is entirely blameless for the position it found itself in based on the evidence given by the 11<sup>th</sup> Defendant who sold one of the four plots to the 6<sup>th</sup> Defendant.

117. On the claim for indemnity and contribution by the Third Parties, the Plaintiff submitted that the claim must fail because the witnesses called by the 4<sup>th</sup> and 5<sup>th</sup> Defendants confirmed that the dealings by the Third Parties were all above board. The Third Parties submitted that the 4<sup>th</sup> and 5<sup>th</sup> Defendants were not entitled to indemnity or contribution from the Third Parties as they were responsible for the negligence, fraud and incompetence in allowing the 1<sup>st</sup> Defendant to be registered. They relied on the 4<sup>th</sup> Defendant's letter directing the 1<sup>st</sup> Defendant to change its name.

118. Both Mr. Silas Mburugu and Mr. Edwin Wafula confirmed that the records at the lands office relating to the Suit Property went missing at several points in time, which is why a certified copy of the deed plan was retrieved from the survey department and used to process the 1<sup>st</sup> Defendant's title. Had the lands officials been diligent and honest in keeping proper records over the Suit Property, they would not have issued multiple titles over the same land to different persons. The same case applies to the Registrar of Companies who is to blame for registering two companies with very similar names. The 4<sup>th</sup> and 5<sup>th</sup> Defendants are not entitled to any indemnity or contribution from the Third Parties.

119. The Plaintiff submitted that the 6<sup>th</sup> Defendant did not adduce any evidence in support of its claim for the costs of putting up the perimeter wall around the Suit Property and urged the court to dismiss this claim. The 6<sup>th</sup> Defendant submitted that it was entitled to compensation from the Plaintiff of Kshs. 7,931,400/= for the demolished wall that it had put up around the Suit Property. It urged the court to allow its counterclaim. The 6<sup>th</sup> Defendant neither led evidence to prove its claim for compensation for the cost of the demolished wall nor did it prove that the wall was demolished by the Plaintiff. The court declines to grant the compensation sought by the 6<sup>th</sup> Defendant.

120. In the event that the court found fault with its title, the Plaintiff submitted that it would be seeking full compensation from the 4<sup>th</sup> and 5<sup>th</sup> Defendants and relied on the case of **Gitwany Investments Limited v Tajmal Limited and 3 others [2006] eKLR**. The Plaintiff sought damages in the sum of Kshs. 60,000,000 against the 1<sup>st</sup> and 6<sup>th</sup> Defendants for trespass and for being denied use of the land it purchased. The Plaintiff did not prove that it was an innocent purchaser for value without notice of any defect in the 1<sup>st</sup> Third Party's title. Looking at the evidence adduced by the 2<sup>nd</sup> Third Party and that of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants, it is clear that the Plaintiff's director, Mr. Aram Mbui was aware of the circumstances surrounding the allocation of the Suit property to Mr. Mingi before the 1<sup>st</sup> Third Party sold and transferred the Suit Property to the Plaintiff. Priscilla Nyambura Njue stated in her evidence that Mr. Mbui knew Mr. Mingi was selling the Suit Property after he was shown the land by her husband. His evidence on how he learnt that the Suit Property was on sale was not persuasive.

121. The court dismisses the claims filed by the Plaintiff and the 6<sup>th</sup> Defendant. The 4<sup>th</sup> and 5<sup>th</sup> Defendants' claim for indemnity and contribution against the Third Parties is also dismissed. Since the 4<sup>th</sup> Defendant was not blameless in the registration of the 1<sup>st</sup> Defendant and the 5<sup>th</sup> Defendant was lax in maintaining its records over the Suit Property which led to the filing of this suit, the court is inclined to direct that each party will bear its costs of the two suits.

122. The court grants prayers (a), (b) and (c) of the 1<sup>st</sup> to 3<sup>rd</sup> Defendants' counterclaim dated 31/1/2018.

123. The court dismisses the Plaintiff's claim and the counterclaim filed by the 6<sup>th</sup> Defendant in **ELC Case No. 1018 of 2014**.

Dated and delivered at Nairobi this 17<sup>th</sup> day of January 2020.

**K.BOR**

**JUDGE**

**In the presence of:-**

Mr. E. Washika for the Plaintiff

Mr. V. Anyona holding grief for Mr. Kanjama for the 1<sup>st</sup> to 3<sup>rd</sup> Defendants

Mr. Washika holding brief for Mr. Motari for the 4<sup>th</sup> and 5<sup>th</sup> Defendants

Mr. Ashitiva for the 6<sup>th</sup> Defendant

Mrs. P. Ochieng for the 11<sup>th</sup> and 12<sup>th</sup> Defendants

Mr. S. Bundotich for the 1<sup>st</sup> and 2<sup>nd</sup> Third Parties

Mr. V. Owuor- Court Assistant

No appearance for the 7<sup>th</sup> to 10<sup>th</sup> Defendants and the 3<sup>d</sup> Third Party