



**Vivo Energy Kenya Limited (Formerly known as Kenya Shell Limited)
v Red Kaka Limited & 3 others (Environment and Land Case Civil
Suit 766 of 2015) [2025] KEELC 4815 (KLR) (24 June 2025) (Ruling)**

Neutral citation: [2025] KEELC 4815 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 766 OF 2015
SO OKONG'O, J
JUNE 24, 2025**

BETWEEN

VIVO ENERGY KENYA LIMITED (FORMERLY KNOWN AS KENYA SHELL LIMITED) PLAINTIFF

AND

**RED KAKA LIMITED 1ST DEFENDANT
AYAN ENTERPRISES LIMITED 2ND DEFENDANT
COUNTY GOVERNMENT OF NAIROBI 3RD DEFENDANT
REGISTRAR OF TITLES 4TH DEFENDANT**

RULING

1. The Plaintiff (formerly known as Kenya Shell Limited) instituted this suit against the Defendants through a plaint dated 5th August 2015. The Plaintiff averred that at material times relevant to these proceedings, it was the registered owner of all those properties known as L.R No. 209 /405 /6 and L.R No. 209/405/7 situated along Ngong Road, Adams Arcade, Nairobi within the Republic of Kenya. The Plaintiff averred that all that property known as L.R No. 209/405/6 was originally known as L.R No. 450/26/4 under a Deed Plan number 80455 and measured 0.469 acres while all that property known as L.R No. 209/405/7 was originally known as L.R No. 450/26/5 under Deed Plan number 80456 and measured 1.985 acres.
2. The Plaintiff averred that in exercise of its rights over the said properties, the Plaintiff applied to the 3rd Defendant to subdivide L.R Number 209/405/7 into two portions, namely, L.R No. 209/405/8 (hereinafter referred to as " the suit property") and L.R No. 209/405/9. The Plaintiff averred that it would at the trial refer to the Indenture dated 24th October 1963 and registered on 13th November 1963, and the application made to the City Council of Nairobi for their full meaning, tenor and effect.



3. The Plaintiff averred that it lawfully continued to use the suit property and even entered into leases with third parties such as Wildlife Safari Kenya Limited in respect thereof. The Plaintiff averred that it leased to Wildlife Safari Kenya Limited a portion of the suit property now known as L.R No. 209/405/11. The Plaintiff averred that it would at the hearing of the suit refer to the lease dated 26th June 1995 registered by the 4th Defendant on 18th July 1995 for its full meaning, tenor and effect.
4. The Plaintiff averred that all that property known as L.R No. 209/405/10 and L.R No. 209/405/11 were the intended subdivisions of the suit property. The Plaintiff averred that the subdivision scheme for the division of the suit property into the two parcels of land was implemented, and the lease dated 26th June 1995 in respect of L.R No. 209/405/11 in favour of Wildlife Safari Kenya Limited was registered on 18th July 1995. The Plaintiff averred that it would at the hearing of the suit refer to the said lease and Deed Plan Number 188821 for their full meaning, tenor and effect.
5. The Plaintiff averred that as the registered owner of L.R Number 209/405/10, it continued to hold the Deed Plan No. 188820 in respect of all the said property. The Plaintiff averred that in recognition of its proprietary interest in the suit property, the court issued orders in HCCC No. 1356 of 2000, Wildlife Safari Kenya Limited-vs-Kenya Shell Limited where Wildlife Safari Kenya Limited was ordered to deliver vacant possession to the Plaintiff of the portion of the suit property it was occupying in terms of the lease dated 26th June 1995 aforesaid. The Plaintiff averred that it would at the hearing refer to the pleadings filed and orders issued in the said case for their full meaning, tenor and effect.
6. The Plaintiff averred that it had never sold to any third party nor had it entered into any agreement that had the effect of legally extinguishing its legal ownership of all those properties known as L.R No. 209/405/6 and L.R No. 209/405/7. The Plaintiff averred that it was still holding the original Indenture dated 24th October 1963 in respect of the said properties. The Plaintiff averred that no court proceedings or any other lawful process had been undertaken to extinguish its interest in the said properties.
7. The Plaintiff averred that when it sought to conclude the subdivision or otherwise deal with the suit property, it was advised by the 4th Defendant that the folio relating to the said property had been misplaced and/or was missing from their records. The Plaintiff averred that it was directed to file a Deed of Indemnity to enable the 4th Defendant to attend to the application it had lodged with the 4th Defendant. The Plaintiff averred that through its advocates on record and acting on the representation made by the 4th Defendant, it lodged the Deed of Indemnity requested by the 4th Defendant on 24th February 2015.
8. The Plaintiff averred that it came to its attention that the 1st Defendant, which had never had the legal ownership or possession of the suit property, had lodged a Deed of Indemnity with the 4th Defendant seeking a provisional title over the suit property. The Plaintiff averred that acting on the said fraudulent representation, the 4th Defendant proceeded to issue a notice in the Kenya Gazette, Gazette Notice Number 7759, by which he falsely and/or fraudulently represented to the public that the 1st Defendant was the registered proprietor of the suit property under a lease registered as I.R 111525/11 and that sufficient evidence had been adduced to show that the lease was lost. The 4th Defendant gave notice that after the expiry of sixty (60) days from the date of the publication of the notice, a provisional certificate of title would be issued to the 1st Defendant, provided that no objection was received within that period.
9. The Plaintiff averred that the said Gazette Notice was brought to its attention in April 2015 and the alleged lease alluded to in the notice by the 4th Defendant was alleged to have been issued by the 3rd Defendant to the 1st Defendant on 20th August 2007. The Plaintiff averred that the purported lease by



the 3rd Defendant in respect of the suit property which was fraudulent and without consideration was issued through a Grant registered at the Registry of Titles, Nairobi as I.R Number 19995/1.

10. The Plaintiff averred that the purported lease and the consequential processes were fraudulent and illegal, and were solely aimed at unlawfully defeating the Plaintiff's right to the suit property. The Plaintiff averred that any provisional title issued by the 4th Defendant to the 1st Defendant through the said fraudulent and/or illegal process was a nullity and ought to be revoked, and the suit property restored to the Plaintiff. The Plaintiff pleaded several particulars of illegality and fraud against the Defendants.
11. The Plaintiff averred that the 1st Defendant not having been the registered owner of the suit property could not transfer any interest therein to the 2nd Defendant nor could the 4th Defendant purport to issue and/or cause the publication of the Gazette Notice Number 7759 or proceed to issue any Provisional Title in respect of the suit property.
12. The Plaintiff averred further and in the alternative that under the special conditions of the purported lease issued by the 3rd Defendant to the 1st Defendant, the 1st Defendant was barred from transferring its interest in the suit property to the 2nd Defendant. The Plaintiff averred further that the lease dated 20th August 2007 was not capable of being a basis for any dealing in an immovable property, as it was neither drawn by an advocate nor was it attested and sealed. The Plaintiff averred that the purported lease was fraudulent and illegal and any processes founded on it were nullities and should be cancelled.
13. The Plaintiff averred that it came to its attention that the main director of the 1st Defendant, Peter Kamau Nyutu, was at all material times a person with political ties with the 3rd Defendant a fact that should not have been ignored and/or suppressed by the 3rd Defendant being a body which ought to exhibit accountability, due care and prudence whilst dealing with persons having ties with it. The Plaintiff averred that it was because of those ties and to insulate the fraudulent dealings that the Defendants hurriedly purported to register the lease purportedly issued by the 3rd Defendant to the 1st Defendant on 21st May 2008 and 2 months later purported to effect the transfer thereof to the 2nd Defendant and thereafter about 5 years later purported to issue a notice of the loss of the lease which was to have a retrospective effect. The Plaintiff averred that the actions by the Defendants were callous and illegal, and were solely aimed at defeating the Plaintiff's proprietary rights over the land parcels, L.R No. 209/405/6 and L.R No. 209/405/7.
14. The Plaintiff averred that despite the various requests made to the 4th Defendant to desist from engaging in processes that would prejudice the Plaintiff's rights over the land parcels, L.R No. 209/405/6 and L.R No. 209/405/7, the 4th Defendant had at the instance of the 1st Defendant continued to engage further in illegal acts that were solely aimed at furthering the fraud complained of. The Plaintiff pleaded the particulars of the said acts. The Plaintiff prayed for judgment against the Defendants jointly and severally for;
 1. A permanent injunction restraining the Defendants either by themselves, their advocates, agents, holders of their Powers of Attorney or whomsoever from dealing in any way, disposing, alienating, advertising for sale, charging, assigning interests in, mortgaging, transferring or in any other way dealing and/or interfering with and claiming under their titles or names or otherwise from entering upon, remaining upon or dealing in any other manner howsoever with all that property known as L.R No. 209/405/8 or the two subdivided portions or intended to be subdivided being L.R No. 209/405/10 and L.R No. 209/405/11;
 2. A declaration that the Grant purported to be I.R Number 111525 constituting the 3rd Defendant as the lessee of all that property known as L.R No. 209/405/8 being the piece of



land situate at Adams Arcade, Nairobi within the Republic of Kenya containing One Decimal Two Nine Seven Four (0.2974) of a hectare or thereabouts and more particularly delineated and described on Deed Plan Numbers 188820 and 188821 and described in the alleged Grant as Land Survey Plan Number 93000, any Certificate of Lease issued pursuant thereto and the Lease dated 20th August 2007 purportedly made between the 1st Defendant and the 3rd Defendant were fraudulently obtained and are illegal, null and void ab initio;

3. A declaration that all the processes consequential and purportedly founded on the Grant registered in favour of the 3rd Defendant are illegal, null and void ab initio;
 4. An order of mandamus directed at the 4th Defendant or such other persons acting on his instructions to cancel the Grant in the Nairobi Land registry being I.R Number 19995/1 with respect of all that property known as L.R No. 209/405/8 being the piece of land situate at Adams Arcade, Nairobi within the Republic of Kenya containing One Decimal Two Nine Seven Four (0.2974) of a hectare or thereabouts and more particularly delineated and described on Deed Plan Numbers 188820 and 188821 and described in the alleged Grant as Land Survey Plan Number 93000 together with all and any consequent transactions;
 5. An order of certiorari to remove into the High Court and quash the Gazette Notice Number 7759 published in the Kenya Gazette on 31st October 2014 to the extent that it purported to hold the 1st Defendant as the registered owner of all that property known as L.R No. 209/405/8 and proceeded to sanction the issuance of a Provisional Certificate of Title to the 1st Defendant;
 6. An order of certiorari to remove into the High Court and quash the decision made by the 4th Defendant on 5th March 2015 by which he issued a Provisional Certificate of Title No. I.R 161133 to the 1st Defendant;
 7. An order of mandamus directed at the 4th Defendant, Director of Survey, and the County Government of Nairobi to reconstruct such records as may be necessary to give effect to the Plaintiff's registered interest as the owner of all that property known as L.R Number 209/405/8 as subdivided into all those properties known as L.R No. 209/405/10 and L.R No. 209/405/11;
 8. A declaration that the Plaintiff is the registered owner of all that property known as L.R No. 209/405/8 as subdivided into all those properties known as L.R No. 209/405/10 and L.R No. 209/405/11 or such other portions;
 9. Damages against the 1st and 2nd Defendants for the fraudulent dealing with the Plaintiff's interest in all that property known as L.R No. 209/405/8;
 10. Costs of the suit;
 11. Interest on the above at court rates from the date of judgment until payment in full; and
 12. Such other and further relief that this honourable court may deem just and fit to grant.
15. The 1st Defendant filed its statement of defence on 19th December 2016. The 1st Defendant denied all the averments in the plaint. The 1st Defendant averred that the Plaintiff had never had any ownership rights over the suit property, as the property legally belonged to the 1st Defendant, which was the registered proprietor thereof. The 1st Defendant averred that the purported subdivision that gave rise to the suit property was unknown to it.



16. The 1st Defendant averred that it was unaware of any previous dealings involving the suit property before it acquired it. The 1st Defendant averred that it was the registered proprietor of the suit property, which had not been subdivided. The 1st Defendant averred that it acquired the suit property through allotment from the then City Council of Nairobi on 23rd February 2007.
17. The 1st Defendant contended that after the allotment, the then City Council of Nairobi granted it a lease dated 20th August 2007, which was submitted to the Lands Office for processing of title on 21st May 2008. The 1st Defendant averred that upon examination and due diligence, it was confirmed that the lease had been executed by the mayor and the town clerk as required, and the same was subsequently registered in favour of the 1st Defendant. The 1st Defendant averred that after the registration of the lease, he became the legal owner of the suit property. The 1st Defendant averred that it thereafter took possession of the property and occupied the same. The 1st Defendant averred that it had since then been paying land rates for the property.
18. The 1st Defendant averred that its title to the suit property got lost sometime in 2014 necessitating the making of an application for a provisional title on 26th June 2014. The 1st Defendant averred that the Registrar of Titles gave notice of the loss and intention to issue a Provisional Title in the Kenya Gazette through Gazette Notice Number 7759 published on 31st October 2014. The 1st Defendant averred that there was no objection raised within the notice period of 60 days, and as such, it was issued with a provisional title. The 1st Defendant averred that it acquired the suit property from the 3rd Defendant's predecessor and had no notice of the alleged defects in its title or previous dealings involving it.
19. The 1st Defendant admitted that its Managing Director, Peter Kamau Nyutu, was once a councillor at the City Council of Nairobi. The 1st Defendant averred that, like any other Kenyan citizen, Peter Kamau Nyutu had a constitutional right to acquire land anywhere in Kenya. The 1st Defendant averred that it was a completely distinct and separate entity from its directors and had the right and capacity to own property, political associations of its directors notwithstanding. The 1st Defendant averred that, being the registered proprietor of the suit property in possession, it had licensed hawkers and transporters to sell their wares and park their lorries on the suit property. The 1st Defendant prayed that the suit be dismissed with costs.
20. The 2nd Defendant did not defend the suit. The 3rd Defendant filed its statement of defence on 8th February 2017. The 3rd Defendant denied all the averments in the plaint. The 3rd Defendant averred that according to its records, the 1st Defendant was the ratable owner of the parcel of land known as L.R No.209/405/7 which gave rise to two plots. The 3rd Defendant averred that the suit property, L.R No. 209/405/8 was a subdivision of L.R No.209/405/7. The 3rd Defendant averred that the suit property was to be used in the development of a Bowling Centre. The 3rd Defendant denied that it was a party to any act of illegality or fraud in the registration of the 1st Defendant as the owner of the suit property. The 3rd Defendant averred that the suit was defective, lacked merit and should be dismissed. The Plaintiff filed a reply to the 3rd Defendant's defence on 3rd March 2017, in which it joined issue with the 3rd Defendant in its defence save for the admissions.
21. The Attorney General entered an appearance on behalf of the 4th Defendant and filed a statement of defence on 18th November 2015. The 4th Defendant denied all the allegations in the plaint. The 4th Defendant averred that he received a lease for registration from the 3rd Defendant, which had allocated the suit property to the 1st Defendant, and which lease appeared duly sealed and authenticated by the relevant authority.



22. The 4th Defendant averred that upon receipt of the said lease, it, in good faith and without knowledge that the suit property was registered in the name of the Plaintiff, registered the suit property in the name of the 1st Defendant. The 4th Defendant averred that the registration of the suit property in the name of the 1st Defendant as the owner was done in good faith. The 4th Defendant averred that it turned out later that the 3rd Defendant had misrepresented to the 4th Defendant that it had authority to allocate the suit property to the 1st Defendant when it knowingly knew that it lacked such authority. The 4th Defendant averred that the registration of the suit property in the name of the 1st Defendant was obtained through misrepresentation and was therefore illegal. The 4th Defendant pleaded several particulars of misrepresentation, mistake, illegality and collusion between the 1st and 3rd Defendants.
23. The 4th Defendant averred that the 1st Defendant misrepresented to the 4th Defendant that its title to the suit property was lost, and that was why the 4th Defendant put in motion the process of issuing a provisional title. The 4th Defendant averred that the acts of fraud pleaded in the plaint were committed by the 1st Defendant in collusion with the 3rd Defendant. The 4th Defendant reiterated that it was not a party to the fraud.
24. The 4th Defendant averred that the 1st and 3rd Defendants misrepresented to it that the land was available for allocation and registration, an action which led to the registration of the suit property owned by the Plaintiff in the name of the 1st Defendant. The 4th Defendant averred that it would seek indemnity from the 1st and 3rd Defendants for any damages, losses and costs for which he may be found liable. The 4th Defendant gave notice to the 1st and 3rd Defendants under Order 1 Rule 24 of the Civil Procedure Rules of his intention to claim full indemnity from them for any damages, costs and losses for which it may be found liable upon the determination of the suit on the basis that the 3rd Defendant purported to allocate the suit property to the 1st Defendant when it knew that it did not have authority to allocate the suit property and that, the 3rd Defendant in collusion with the 1st Defendant obtained registration of the suit property in the name of the 1st Defendant through misrepresentation. The 4th Defendant prayed that judgment be entered for the Plaintiff as prayed in the plaint, save for damages, costs and losses for which he claimed full indemnity from the 1st, 2nd and 3rd Defendants.
25. At the trial, the Plaintiff's first witness was Joseph Wambua Mulusya (PW1). PW1 introduced himself as a land consultant and a trained land economist. He told the court that he majored in Land Management Surveying and that he was a member of the Institute of Surveyors of Kenya (I.S.K) since 1982. He stated that the Plaintiff had been his client since 1999 and had consulted him on a number of land-related issues. He adopted his witness statement dated 5th August 2015 as part of his evidence in chief.
26. PW1 stated that the Plaintiff was initially represented by Kiragu Kimani advocate of Hamilton Harrison & Mathews Advocates. Kimani Kiragu had given him two documents namely, a lease for land parcel, L.R No. 209/405/8 (I.R No. 111525) and an Indenture dated (sic) 13th November 1963 for two properties namely, L.R No. 209/405/6 and L.R No. 209/405/7 registered on the same date. The indenture was transferring the two parcels of land from Kenya Shell [1926] Ltd. to Kenya Shell Ltd. Attached to the Indenture were Deed Plan No. 80455 for L.R No. 209/405/6 measuring 0.469 Acres and Deed Plan No. 80456 for L.R No. 209/405/7 measuring 1.985 Acres. L.R No. 209/405/6 and L.R No. 209/405/7 were transferred to Kenya Shell Ltd. in 1963.
27. PW1 stated that he was instructed by Hamilton Harrison & Mathews Advocates to investigate the authenticity of the lease which was granted by the City Council of Nairobi to the 1st Defendant. He was also to establish whether there had been any tampering with the title of the Plaintiff in respect to L.R No. 209/405/8 (the suit property). He established that L.R No.209/405/8 was a product of



the subdivision of L.R. No. 209/405/7 shown in the Deed Plan No. 80456 at page 5 of the Plaintiff's bundle of documents. He stated that the letter dated 12th September 1972 from the Commissioner of Lands to Kenya Bowling Centres Ltd. at page 6 of the Plaintiff's bundle of documents gave a final approval for the subdivision of L.R. No. 209/405/7. He stated that the indenture dated 24th July 1973 at page 7 of the Plaintiff's bundle of documents, was transferring a portion of L.R. No. 209/405/7, namely, L.R. No. 209/405/9 to Kenya Bowling Centres Ltd. He stated that the Plaintiff had sold to Kenya Bowling Centres Ltd. L.R. No. 209/405/9 in 1973 and remained with L.R. No. 209/405/8 (the suit property).

28. PW1 stated further as follows: At page 13 of the Plaintiff's bundle was the Deed Plan for L.R. No. 209/405/9. The Deed Plan showed the land which was sold to Kenya Bowling Centres Ltd. which measured 0.5058 Ha. The document at page 14 of the Plaintiff's bundle of documents were the minutes of the Town Planning Committee of the City Council of Nairobi for the meeting which was held on 3rd May 1971. Minute No. 3 referred to change of use of L.R. No. 209/405/7 (part). The City Council of Nairobi identified the owner of L.R. No. 209/405/7 as the Plaintiff. The City Council of Nairobi also recognised the transaction between the Plaintiff and Kenya Bowling Centres Ltd. The transaction was approved conditionally. At page 20 of the Plaintiff's bundle of documents was a letter dated 9th September 1972 addressed to the Commissioner of Lands by the City Engineer, City Council of Nairobi. The letter was copied to the Plaintiff and Kenya Bowling Centres Ltd.
29. PW1 was shown the Rates Demand Note dated 13th June 1973 at page 23 of the Plaintiff's bundle of documents addressed to Pramod Patel Advocate. He stated that Pramod Patel was acting for the Plaintiff and the Demand Note related to L.R. No. 209/405/7. PW1 was also shown the letter dated 29th March 1982 by the Plaintiff addressed to the Secretary Nairobi City Commission at page 25 of the Plaintiff's bundle of documents. He stated that the letter recognised that the Plaintiff was the owner of L.R. No. 209/405/8 and that it was transferring L.R. No. 209/405/9 to Kenya Bowling Centres Ltd. PW1 was also shown the letter dated 11th May 1983 at page 27 of the Plaintiff's bundle addressed to the Nairobi City Commission by the Plaintiff. He stated that the said letter referred to L.R. No. 209/405/8 which remained with the Plaintiff a fact that was supported by the rates demand notes from the City Council of Nairobi dated 8th April 1983 and 16th April 1984 at pages 28 and 29 of the Plaintiff's bundle. PW1 stated that the letter by Gatome & Associates dated 12th November 1992 to the Plaintiff at page 30 of the bundle was referring to a new subdivision of L.R. No. 209/405/8 into L.R. No. 209/405/10 and L.R. No. 209/405/11 which was approved by the Director of City Planning & Architecture in a letter dated 24th February 1993 to the Commissioner of Lands at page 32 of the bundle.
30. PW1 stated that at page 38 of the Plaintiff's bundle of documents was a lease between the Plaintiff and Wildlife Safari Kenya Ltd. He stated that in this lease, the leased parcel of land was L.R. No. 209/405/11 and the lease was registered on 18th July 1995. He told the court that as at 18th July 1995, L.R. No. 209/405/8 had ceased to exist following a subdivision. He stated that at page 43 of the Plaintiff's bundle was the Deed Plan for L.R. No. 209/405/11 dated 17th August 1994. He stated that the suit between Wildlife Safari Kenya Ltd. and Kenya Shell Ltd. was a dispute over the lease. When referred to the lease dated 20th August 2007 between the City Council of Nairobi and the 1st Defendant at page 161 of the Plaintiff's bundle, PW1 stated that the lease was over L.R. No. 209/405/8 which was not in existence as at 20th August 2007. He stated that the lease was not drawn by an advocate. He stated that the title number given on the heading of the lease was I.R. 111525 and in the body of the lease the title number given is I.R. No. 19995/1. He stated that the lease referred to the Registration of Titles Act, Chapter 281 Laws of Kenya and the Government Lands Act, Chapter 280 Laws of Kenya. PW1 stated that the City Council of Nairobi did not own L.R. No. 209/405/8 as at 1st December 1963. He stated that the land was owned by Kenya Shell [1926] Ltd. which transferred the same to the Plaintiff.



- He stated that in 1963, L.R No. 209/405/8 did not exist. He stated that what existed were L.R No. 209/405/6 and L.R No. 209/405/7 and by 1971, the City Council of Nairobi had already recognised the Plaintiff as the owner of L.R No. 2091/405/8.
31. When referred to the letter of allotment dated 23rd February 2007 produced by the 1st Defendant as D.EXH.1(See page 1 of the 1st Defendant's list of documents), through which the City Council of Nairobi allocated L.R No. 209/405/8 to the 1st Defendant, PW1 stated that the stand premium in the letter of allotment was given as Kshs. 400,000/- while in the lease between the two, the consideration is given as Kshs. 100,000/-.
 32. PW1 stated further that the leasehold interest that the 1st Defendant was said to have in L.R No. 209/405/8 (suit property) was transferred to the 2nd Defendant on 21st July 2008 (see page 169 of the Plaintiff's bundle). PW1 stated that in the Gazette Notice Number 7759 at page 234 of the Plaintiff's bundle of documents published in the Kenya Gazette of 31st October 2014, the 4th Defendant notified the public about the loss of the lease in respect of L.R No. 209/405/8 (I.R No. 111525/1) in favour of the 1st Defendant. PW1 stated that as at 31st October 2014, the 1st Defendant had already transferred L.R No. 209/405/8 to the 2nd Defendant and could not have therefore given a notice of the loss of a lease. PW1 stated that the Gazette Notice Number 7760 published on the same date by the 4th Defendant at the instance of the 1st Defendant was in respect of L.R No. 11377/1, I.R No. 111525/1. He stated that he had not come across L.R No. 11377/1 in the documents he had referred to earlier. He stated that the title number (I.R No.) in the two notices was the same. PW1 stated that the provisional title issued by the 4th Defendant to the 1st Defendant for the suit property did not refer to any of the title numbers in the two Gazette Notices. The provisional title referred to Title No. I.R 161133 (see page 235 of the Plaintiff's bundle), which was not mentioned in any of the two Gazette Notices.
 33. PW1 stated that the lease attached to the provisional title at page 237 of the Plaintiff's bundle of documents was drawn under the Registration of Titles Act, Chapter 281 Laws of Kenya (R.T.A) (now repealed) while its preamble refers to the Registration of Titles Act, Chapter 281 Laws of Kenya and the Government Lands Act, Chapter 280 Laws of Kenya (now repealed). PW1 stated that a title cannot be issued under two land registration systems. He stated that there was no rent called fee simple. He stated that a property held in fee simple is freehold and not leasehold. He stated that the I.R No. referred to in the body of the document was 19995/1. He stated that at the top of the document, there was reference to No. I.R 111525. He stated that he could see below No. I.R 111525 another No. I.R 161133. He stated that he could see a total of three (3) I.R numbers. He stated that the only I.R No. which was typed was I.R No. 19995/1. He stated that between entry Nos. 1 and 2 at page 246 of the Plaintiff's bundle was a handwritten note to the effect that entry No. 2 had been expunged. PW1 stated that he was satisfied that the suit property belonged to the Plaintiff.
 34. On 5th October 2018, the parties agreed to admit in evidence all the bundles of documents that they had filed.
 35. On cross-examination by Dr. Khaminwa for the Plaintiff, PW1 stated that he received instructions from the Plaintiff to investigate the lease document from the 3rd Defendant to the 1st Defendant that was transferred to the 2nd Defendant. He stated that he discussed the matter with Hamilton Harrison & Mathews Advocates, which was acting for the Plaintiff. He stated that the Plaintiff told him that its property was L.R No. 209/405/8 (the suit property) and showed him the title for the property. He stated that he was paid for his services. He stated that he carried out investigations and produced a report dated 8th March 2011, at pages 94 to 100 of the Plaintiff's bundle of documents. He stated that the report contained his investigation and findings. He stated that he carried out the investigation



- personally before preparing the report. He stated that he went through various documents and found errors on the lease document.
36. PW1 stated that he found that the 1st Defendant was holding a forged lease document and did not have a valid title. He stated that the 1st Defendant had never occupied the suit property. He stated that he went through the records kept by the 3rd Defendant and found that the suit property had been owned by the Plaintiff since 1963 and that the Plaintiff had been the ratepayer. He stated that he did not come across any document or information relating to the 1st Defendant other than the forged lease document. He admitted that he was not an expert on forgery but stated that from his training and experience, he could tell a forged document. PW1 stated that the I.R No. in the lease document was No. 111525 while the property was described in the body of the lease as I.R No. 19995/1. He stated that there was another lease at page 237 of the Plaintiff's bundle dated 20th August 2007. He stated that this lease had many I.R numbers. He stated that the documents could not be found at the land registry, although they were stamped. He told the court that there was a third forged lease document dated 20th August 2007 at page 230 of the Plaintiff's bundle (attached to the Plaintiff's application for injunction). He stated that this lease had I.R No. 11628. He stated that he found that the ratepayer for the suit property was the Plaintiff and not the 1st Defendant. He stated that he was not aware if the 1st Defendant had been paying rates. He stated that in the leases, the 1st Defendant was described as lessee while the suit property was freehold and not leasehold.
 37. On cross-examination by Mr. Gachie also for the 1st Defendant, PW1 stated that he got his instructions from the firm of Hamilton, Harrison & Mathews Advocates (HHM Advocates). He stated that he was called by Kimani Advocate from the firm to his office, where he was instructed on what to do. He stated that he collected a copy of the title for the suit property from HHM Advocates. He stated that the indenture dated 24th October 1963, at page 1 of the Plaintiff's bundle, was one of the documents which he got from HHM Advocates. He stated that the indenture was for L.R No. 209/405/6 and L.R No. 209/405/7. He stated that L.R No. 209/405/7 was subdivided to give rise to L.R No. 209/405/8 ("suit property") and L.R No. 209/405/9. He stated that L.R No. 209/405/8 remained in the indenture and was not given another title, and it had a deed plan. He stated that he visited the disputed land. He stated that the suit property was "L" shaped and bordered by Shell Petrol Station on Sonning Road and Adams Arcade Shopping Centre. He stated that on the lower side, there was parking for Uchumi Supermarket.
 38. He stated that he was given a copy of the 1st Defendant's lease by HHM Advocates. He stated that the document was purportedly signed by the Mayor, Town Clerk and the 1st Defendant. He stated that the letter of allotment dated 23rd February 2007 by the 3rd Defendant to the 1st Defendant agreed with the 1st Defendant's lease but did not agree with the records held by the 3rd Defendant. He stated that as at the date of the said letter of allotment, the City Council of Nairobi was not the registered owner of the suit property.
 39. PW1 stated that he had produced several documents showing that, according to the 3rd Defendant's records, the ratepayer for the suit property was the Plaintiff. He denied that the 1st Defendant was the ratepayer for the suit property.
 40. PW1 admitted that during the subdivision process, there were normally conditions imposed by the City Council of Nairobi. When referred to the minutes at page 16 of the Plaintiff's bundle, he stated that the meeting held on 28th March 1972 discussed the development proposal on the suit property and the Plaintiff was represented. He stated that among the items discussed was the relinquishing of the council's plot south of the Plaintiff's plot. He denied that the subdivision approval was given subject to the Plaintiff relinquishing its plot to the City Council of Nairobi. When referred to the



letter dated 9th September 1972, at page 20 of the Plaintiff's bundle, he stated that the letter concerned the subdivision of L.R No. 209/405/7. He stated that Kenya Bowling Centres Ltd. bought L.R No. 209/405/9 and the letter dated 9th September 1972 stated that the "L" shaped sub-plot would be released when development proposals had been approved by the council. He stated that it was incorrect to say that after the subdivision of L.R. No. 209/405/7, a portion thereof was released to the council. He stated that the subdivision approval did not talk about a surrender and that the release referred to in the letter was of the sub-plots. He stated that the first plot to be released was the sub-plot that was sold to Kenya Bowling Centres Ltd. and the next to be released was the suit property.

41. PW1 stated that the council's plot referred to in minute 1 (iii) of the minutes for the meeting held on 28th March 1972 at page 16 of the plaintiff's bundle was land that was used for parking. He stated that the land belonged to the council and was not the suit property. He stated that the land was being used for parking by Kenya Bowling Centers Ltd. He stated that the land referred to was not the suit property and did not belong to the Plaintiff. When referred to minute 6(iv) of the same minutes, he admitted that there was a council plot next to L.R No. 205/405/9. When referred to the deed plan at page 5 of the Plaintiff's bundle, he stated that the deed plan was for L.R No. 209/405/7. He stated that L.R No. 209/405/6 did not belong to the council. He stated that L.R No. 209/405/6 was a petrol station which was still in place, while L.R No. 209/450/25 was Adams Arcade Shopping Centre, which also did not belong to the council. He stated that there was Government Land marked "C.L" below L.R No. 209/405/7. He stated that this was the council land that was being used by Kenya Bowling Centres Ltd.
42. PW1 stated that the dispute over the suit property went back to 1980s, even before the 1st Defendant came into the picture. He stated that there was no dispute between the Plaintiff and the City Council of Nairobi over the ownership of the suit property. PW1 denied that L.R No. 209/405/7 was subdivided to give rise to L.R Nos.209/405/10 and 11. He stated that he confirmed from the land registry that L.R No. 111525 belonged to L.R No. 11377/1 which was situated at Karen.
43. On cross-examination by Mr. Motari for the 4th Defendant, PW1 confirmed that the suit property was freehold and its title did not have an I.R Number. When referred to the lease dated 20th August 2007 between the 1st Defendant and the 3rd Defendant, he stated that the 3rd Defendant could not grant the 1st Defendant a lease in respect of the suit property that was owned by the Plaintiff under freehold tenure. He stated that the suit property was registered under the Government Lands Act and had not been surrendered to the Government. He stated that the 3rd Defendant had no interest in the land that it could confer upon the 1st Defendant. PW1 stated that a freehold title could have an I.R number if there was a subdivision and a surrender of the title. He stated that the land, the subject of the Indenture, was surrendered recently for amalgamation by the Plaintiff. He stated that the suit property had been subdivided, but remained under the Government Lands Act. He stated that the suit property could not give rise to an R.T.A title.
43. On cross-examination by Ms. Mogusu for the 3rd Defendant, PW1 stated that Kenya Shell Ltd. got the suit property from the colonial government and not from the 3rd Defendant. He stated that it was not true that the suit property was also given to the 3rd Defendant by the colonial government. He stated that the subdivision of L.R No. 209/405/7 gave rise to L.R No. 209/405/8 and LR No. 209/405/9. He told the court that the Director of Survey only prepared a Deed Plan for L.R No. 209/405/9 which was transferred to Kenya Bowling Centres Ltd. He told the court further that L.R No. 209/405/8 remained in the conveyance in the name of Kenya Shell. He stated that before L.R No. 209/405/9 was transferred to Kenya Bowling Centres Ltd. a certificate of subdivision had to be registered in the Indenture of L.R No. 209/405/7 showing that the land had been subdivided into two. He stated that



a deed plan for L.R No. 209/405/8 was to be prepared and kept by the Director of Surveys, and it could only be registered in case there was a transaction affecting L.R No. 209/405/8.

44. PW1 testified that there was a certificate of subdivision registered in the conveyance showing that L.R No. 209/405/7 had been subdivided. He stated that the land registered under the Government Lands Act could not change to land registered under the Registration of Titles Act unless there was an application for surrender and conversion. He stated that he did not come across any application for conversion. He stated that I.R No. 111525 belonged to a property in Karen, which was allocated to the City Council of Nairobi. He stated that the lease between the 3rd Defendant and the 1st Defendant referred to the Karen property, I.R No. 111525. He stated that the Karen property was bigger than the suit property on Ngong Road. He stated that to get the physical location of a property, you use L.R number. He stated that the I.R number in the lease did not lead to L.R No. 209/405/8. It led to another L.R number.
45. The Plaintiff's next and last witness was NAOMI NJERI ASSUMANI (PW2). PW2 told the court that she was the head of legal and company Secretary of the Plaintiff, Vivo Energy Kenya Ltd. (formerly Kenya Shell Ltd.). PW2 adopted her witness statement dated 4th August 2015 as part of her evidence in chief. She told the court that Joseph Mulusya(PW1) was known to her. She stated that PW1 was a land consultant for the Plaintiff and was instructed in the matter before the court. She stated that PW1 submitted a report dated 8th March 2011. She stated that she had not seen a report from any of the Defendants contradicting the findings of PW1. She stated that the document at page 16 of the Plaintiff's bundle contained the minutes of the meeting held on 28th March 1972 to discuss development proposals by Kenya Bowling Centres Ltd. She stated that the 3rd Defendant was represented in the said meeting as well as the Plaintiff. She told the court that KBC Ltd. meant Kenya Bowling Centres Ltd.(KBC).
46. PW2 stated that the land that was owned by the Plaintiff was described as "L" shaped land. She stated that there was also another land that KBC was interested in. The "L" shaped land and the land that KBC was interested in were different parcels of land. While referring to minute 5, he stated that the relinquishment referred to was not of the "L" shaped land. When referred to the letter dated 9th June 1993 in the Plaintiff's further list of documents, PW2 stated that the letter was addressed by the Commissioner of Lands to Gatome & Associates which was their agent. She stated that the letter concerned the subdivision of L.R No. 209/405/8 – Ngong Road and was a provisional approval of a subdivision scheme. She stated that the letter showed that the subdivision scheme for L.R No. 209/405/8 was approved. PW2 stated that it was the "L" shaped land that was being subdivided
47. PW2 stated that the Deed Plan dated 17th August 1994 at page 43 of the Plaintiff's bundle for L.R No. 209/405/11 showed that as at that date (17th August 1994), the "L" shaped plot had been subdivided into LR No. 209/405/10 and LR No. 209/405/11 and ceased to exist. PW2 stated that the Plaintiff was in possession of the suit property. She stated that the Plaintiff was unable to use the property because of the ongoing case. She stated that the Plaintiff had opened new petrol stations since it took over Kenya Shell, had revamped the old Kenya Shell stations and also developed convenient retail outlets in many of its stations. She stated that their petrol station on Ngong Road would have done much better if they had developed the convenience retail outlets. She stated that they were losing about Kshs.1,000,000/- per month on fuel sales. She stated that if they had developed the convenience retail outlets like shops, they would have earn about Kshs.700,000/- more which they were losing. She stated that they had another petrol station just before the junction mall whose use they had optimised. She stated that the best comparison for the Ngong road station would be the petrol station at Lavington along James Gichuru Road because of its size.



48. On cross-examination by Mrs. Mogusu for the 3rd Defendant, PW2 stated that she was not working for the Plaintiff when the subdivision of the suit property was done. She stated that she had access to all the property records held by the Plaintiff. She told the court that the Plaintiff had not transferred the suit property to any of the Defendants. She reiterated that L.R No. 209/405/7 was subdivided and gave rise to L.R No. 209/405/8 and L.R No. 209/405/9, and that L.R No. 209/405/9 was sold to Kenya Bowling Centers Ltd. in 1973. She stated that that was the only transfer she was aware of.
49. On cross-examination by Dr. Khaminwa, for the Plaintiff, PW2 stated that she was aware that there was a Gazette Notice about the loss of the title held by the 1st Defendant. She stated that the Deed Plan for L.R. No. 209/405/8 (suit property) was not submitted to the Survey Department by the surveyor during the subdivision of L.R No. 209/405/7. She stated that it was L.R No. 209/405/7 that gave rise to L.R No. 209/405/8 and L.R No. 209/405/9. She stated that there was a mistake in her statement. She stated that the Deed Plan for LR No. 209/405/8 was surrendered to create L.R No. 209/405/10 and L.R No. 209/405/11.
50. On cross-examination by Mr. Gachie also for the Plaintiff, PW2 stated that they had an indenture in respect of the suit property. She stated that the indenture was for L.R No. 209/405/7 which was subdivided into L.R No. 209/405/8 and 209/405/9. She stated that L.R No. 209/405/9 was sold while L.R No. 209/405/8 was subdivided to give rise to L.R No. 209/405/10 and LR No. 209/405/11. She stated that they had an indenture for L.R No. 209/405/9 and that there were no dealings with L.R No. 209/405/8 except the subdivision thereof. She stated further that they had a Deed Plan for L.R No. 209/405/8, which they surrendered when they got titles for L.R No. 209/405/10 and L.R No. 209/405/11. She stated that there was a possibility that they did not keep a copy of the deed plan for L.R No. 209/405/8. She stated that the minutes of the meeting held on 28th March 1972, at page 60 of the Plaintiff's bundle of documents, show that the council's plot was different from their plot. She stated that there was a council plot next to L.R No. 209/405/9. She told the court that the council did not have the right to transfer the Plaintiff's land to the 1st Defendant. She stated that the 1st Defendant did not have a legitimate right to L.R No. 209/405/8. She stated the Plaintiff had maintained all along that L.R No. 209/405/8 belonged to it.
51. PW2 stated that there was no ownership dispute between the council and the Plaintiff over the suit property. She confirmed that L.R No. 209/405/8 was subdivided and gave rise to L.R No. 209/405/10 and L.R No. 209/405/11. She stated that L.R No. 209/405/8 ceased to exist following the said subdivision. She reiterated that the deed plan for L.R No. 209/405/8 was surrendered. She told the court that it was not mandatory that for each subdivision a provision must be made for public utility plots. She reiterated that the Plaintiff had a tussle with the City Council of Nairobi over the suit property. On further cross-examination by Dr. Khaminwa, PW2 stated that she was not present during many of the transactions.
52. On re-examination by Mr. Luseno, PW2 stated that the land the subject of the Indenture was L.R No. 209/405/6 and L.R No. 209/405/7, measuring 1.985 acres and 0.469 acres respectively. She reiterated that L.R No. 209/405/7 was subdivided to give rise to L.R No. 209/405/8 and L.R No. 209/405/9. She stated that the proposed subdivision of L.R No. 209/405/8 was approved on 16/3/1993 and gave rise to L.R No. 209/405/10 and L.R No. 209/405/11. She stated that the surveyor who carried out the subdivision was Gatome & Associates. She stated that after they subdivided L.R No. 209/405/8, they surrendered the Deed Plan for L.R No. 209/405/8 and obtained Deed Plans for L.R No. 209/405/10 and L.R No. 209/405/11 and this was what she tried to explain in her statement.
53. PW2 stated that when they discovered the fraud, they did not have the Deed Plan for L.R No. 209/405/8 as they had surrendered the same. She stated that L.R No. 209/405/8 was what had become



L.R. No. 209/405/10 and L.R. No. 209/405/11 which from their Deed Plans were not “L” shaped. PW2 stated that the subdivision of L.R. No. 209/405/8 did away with the “L” shape. She told the court that the 1st Defendant was being investigated for fraud relating to the suit property. She stated that they had put up a perimeter wall around the property with the permission of the County Government of Nairobi. She stated that the County Government had never interfered with their rights.

54. The first witness for the Defendants was JOSEPH WANGOMBE KAMUYU (DW1), who testified on behalf of the 4th Defendant. DW1 introduced himself as a land registrar working with the Ministry of Lands at Ardhi House, Nairobi. He told the court that he joined the Ministry of Lands in 2006 and that he was well versed with the dispute before the court. He stated that he recorded a witness statement that was filed on 18th November 2015. He adopted the statement as part of his evidence in chief. He stated that he swore an affidavit in the matter on 9th November 2015 that was filed in court on the same date. He adopted the same also as part of his evidence in chief.
55. On cross examination by Mr. Luseno for the Plaintiff, DW1 stated that he was an advocate of the High Court of Kenya admitted in 2005. On being shown the lease by the City Council of Nairobi (Council) to the 1st Defendant dated 20th August 2007, he stated that the same should have been drawn by an advocate. He stated that the said lease was not drawn by any advocate. He told the court that the word I.R stands for Inland Registry and that an I.R number is given to a particular parcel of land upon registration. He stated that it was not possible for one parcel of land to have more than one I.R. number. He stated that clause (b) on the first page of the lease showed that what was being leased was a subplot of the plot mentioned in the lease that measured 0.2974 Ha. He stated that in that case, the leased portion should have been less than 0.2974 Ha. He stated that in clause (a), there was a reference to the Government Lands Act (G.L.A). He stated that the lease could not have been issued under both the Registration of Titles Act (R.T.A) and GLA. He stated that the instrument of title under the RTA was a Grant while the instrument of title under the GLA was an indenture, and that you could not have both. He stated that in the first paragraph at page 15 of the document, the term of the lease was to commence in 1963. He stated that the term of a sublease should match that of the mother title. He stated that he had not seen a copy of the mother title held by the Council. He told the court that a fee simple is a freehold title and has no term. He stated that there is no rent payable for a fee simple property. He stated that if any rent is payable, it is normally referred to as a peppercorn. When shown page 23 of the Plaintiff's bundle, he stated that he could see the entries. He stated that he could also see a stamp bearing the name Kamuyu. He stated that there were two stamps bearing the name J. W. Kamuyu. One was at the top while the other was at the bottom. He stated that one stamp was put on 21st July 2008 while the other was put on 5th March 2015. He stated that the stamp and signature of 21st July 2008 put on top of the document were not his. He told the court that the handwritten narration was in his handwriting and the signature below was his.
56. DW1 stated that the Plaintiff's indenture in respect of the suit property was issued under the G.L.A. He told the court that the Government could not allocate private land. He stated that a fraudulent allotment does not confer a valid title, as fraud goes to the root of the title. He stated that it was the 4th Defendant who was the custodian of the land records in Kenya, and he was representing the 4th Defendant. He stated that land is normally surrendered to the Ministry of Lands. He stated that land could not be surrendered to the County Government. He stated that the suit property from their records was not surrendered by the Plaintiff. He stated that when land is subdivided, the reference number ceases to exist when the titles for the subdivisions are issued and registered. He stated that the particulars of the letter of allotment are normally not put in the Grant, save for the allottee, the term of the grant and the rent. He stated that if the details in the letter of allotment and the Grant did not tally then that was an irregularity. He stated that the County Government could not issue an allotment



letter and that they could only sublease what they already owned. He stated that when a title is lost, it is for the registered owner to report the loss. He stated that this applied even where the title is lost in the hands of the land registrar.

57. On cross-examination by Mr. Gachie for the Plaintiff, DW1 stated that he had covered the issue of the records in his replying affidavit and the annexures thereto. He stated that the records were in the land registry and he had not brought them with him. He stated that the County Government could sublease land owned by it. He stated that the title he was being referred to was a lease and that it was neither a Grant, a Certificate of title or an indenture. He stated that the 1st Defendant claimed that the suit property was leased to it by the City Council of Nairobi. He told the court that he had not seen any title in the name of the County Government in respect of the suit property. He stated that he had seen an indenture indicating that L.R No. 209/405/6 and L.R No. 209/405/7 belonged to Kenya Shell.
58. DW1 stated that he had not seen a title for LR No. 209/405/8 in the name of the Plaintiff or Kenya Shell. He told the court that the suit property is situated at Adams Arcade Off Ngong Road. He stated that the City Council of Nairobi had submitted a lease for registration in favour of the 1st Defendant. He stated that he registered the lease in favour of the 1st Defendant on 21st May 2008. He stated that for him to register the lease in favour of the 1st Defendant, he must have been satisfied that the land belonged to the City Council of Nairobi, the lessor. He stated that the Caveat Emptor at page 34 of the Plaintiff's bundle concerned L.R No. 209/405/10 and there was no mention of L.R. No. 209/405/8. When shown the sketch map at page 33 of the Plaintiff's bundle, he stated that L.R No. 209/405/6 belonged to Kenya Shell and that the sketch map was for a proposed subdivision of L.R No. 209/405/8.
59. When shown the Deed Plan attached to the lease in favour of the 1st Defendant which he registered, he stated that he could see L.R No. 209/405/8. He stated that he could see the 1st Defendant's parcel in the sketch map he had been shown earlier for the subdivision of L.R No. 209/405/8. When shown the Deed Plan for L.R No. 209/405/9 dated 3rd May 1973 at page 13 of the Plaintiff's bundle filed with the plaint, he stated that he could see L.R No. 209/405/8. He told the court that this showed that L.R No. 209/405/8 was in existence as at that date. He stated that the Deed Plan at page 26 of the Plaintiff's bundle was for L.R No. 209/405/7. He stated that he could see that there was some form of resemblance in the two deed plans. He stated that he had not seen a Grant in respect of L.R. No. 209/405/8 in the name of the City Council of Nairobi or Kenya Shell. He told the court that in a sublease, the lessee would be taking the remainder of the term granted to the lessor. He stated that the term of the lease is pegged on the term in the mother title. He stated that the City Council, according to the preamble of the lease, had a lease of 99 years from 1963. He stated that as of 2007, it had some years left that it could sublease to the 1st Defendant.
60. When shown the letter of allotment dated 23rd February 2007, addressed to the 1st Defendant by the City Council of Nairobi at page 1 of the 1st Defendant's bundle of documents, DW1 stated that for them, this kind of a letter of allotment did not carry any weight. He stated that there was no specific format for a letter of allotment. He stated that a request for the subdivision of land is approved by several departments including, director of surveys, director of physical planning, director of land administration (formerly Commissioner of Lands) and the County Government. He stated that the approval normally has conditions to be satisfied. He stated that he did not know if the approving authorities could impose, as a condition for approval, a surrender of land.
61. The 3rd Defendant, called ISAACK NYOIKE (DW2) its Chief Valuer as its witness. DW2 told the court that he had worked as a Chief Valuer since 2012. He adopted his witness statement dated 27th September 2018 as his evidence in chief.



62. On cross-examination by Mr. Motari for the 4th Defendant, DW2 stated that the duties of a valuer included preparation and maintenance of valuation records, property management and land administration. He stated that before one is entered in the valuation roll, he has to submit personal documents like Identity Card, PIN certificate and the title documents. He stated that based on these documents they prepare valuation and rating records. He stated that the title documents are received by them without prejudice, and they only seek verification of documents if there is a dispute, like when two or more parties are claiming one parcel of land. He stated that they will create an account without prejudice on the strength of the documents provided save where there is a dispute. He told the court that the system they were using at the time of giving evidence would detect a duplication of titles or numbers but previously they could not detect duplication of ownership. He stated that the rateable owner of L.R No. 209/405/8 according to their records was the 1st Defendant, Red Kaka Ltd. He stated that he could not recall when the 1st Defendant became the rateable owner of the suit property. He stated that there was a time when Kenya Shell was the rateable owner of the suit property. He stated that he could not recall when it was removed as the rateable owner of the suit property. He stated that they were issuing the rate demands to the rateable owner of the property. He stated that he could not confirm whether their records had both the Plaintiff and the 1st Defendant as rateable owners of the suit property.
63. DW2 stated further that he had not seen the 1st Defendant's lease in their physical file. He stated that the 3rd Defendant issues a letter of allotment at the point of allocation. He stated that the 3rd Defendant must own the land being allocated. He stated that from perusal of his physical file, he noted that the suit property came about as a result of the subdivision of L.R No. 209/405/7, which was then owned by Kenya Shell Ltd. He told the court that Kenya Shell wanted to convert the use of the parcel to a Bowling Centre. He stated that the City Council of Nairobi approved the conversion on several conditions. He stated that one of the conditions was that a site for parking had to be provided. He stated that it was on this condition that L.R No. 209/405/7 was subdivided to give rise to L.R No. 209/405/8 and L.R No. 209/405/9.
64. DW2 stated that L.R No. 209/405/8 in his view was to serve as an on-site parking. He stated that he did not know if the land was surrendered for on-site parking. When shown the letter of allotment dated 23rd February 2007 in favour of the 1st Defendant, he stated that the same was signed by the former deputy town clerk of the City Council of Nairobi. He stated that a deputy town clerk could sign a letter of allotment. He stated that the City Council could only allocate land that it owned. He stated that planning had to precede the allotment, the allotment had to be tabled before the committee of the council and approved. He stated that he had not come across this letter of allotment in his records. He stated that he could not confirm that this letter of allotment was issued by the City Council of Nairobi. He stated that letters of allotment take different formats depending on the schemes.
65. DW2 stated that he could not tell whether there was an application for allocation by the 1st Defendant. He stated that the allocation was not done by his office. He stated that the letter of allotment was said to have been copied to his department, but he had not seen the same. When shown the lease dated 20th August 2007 in favour of the 1st Defendant, he stated that the lease was one of the documents that are normally submitted to them to create a rating account. He stated that his department did not create leases. He told the court that the leases could be prepared internally or externally. He stated that he was unable to tell who drew the lease as the name of the drawer was missing. When shown his memo dated 27th July 2016 in which he commented on the memo by K.J.Ayiecho dated 30th May 2011 at page 64 of the Plaintiff's further list of documents filed on 11th October 2018, DW2 stated that K. J. Ayiecho was a former Chief Valuer. He stated that in his memo, K.J.Ayiecho stated that the suit property never belonged to the City Council of Nairobi. DW2 stated that in his memo of 27th July 2016, he stated



- that he could not trace Mr. Ayiecho's memo. DW2 stated that he did not doubt that the memo dated 30th May 2011 was signed by Mr. Ayiecho, who was the Chief Valuer.
66. On cross-examination by Mr. Luseno for the Plaintiff, DW2, upon being shown the letter dated 29th September 2011 to Momanyi and Co. Advocates, stated that the said letter was written by Karisa Iha, who was a former director of legal services at the City Council. He stated that in the letter, Karisa stated that the suit property did not belong to the Council. When referring to the memo that was issued by the former Chief Valuer, K.J.Ayiecho, dated 30th May 2011, shown to him earlier, DW2 stated that the legal department had confirmed at the time that the suit property did not belong to the Council. He admitted that in his witness statement, he had stated that he could not trace L.R. No. 209/7 in their records and that the land was not owned by the County Government. He stated that upon perusal of other documents, he learnt that L.R No. 209/7 was owned by Kenya Shell. He stated that his evidence about the subdivision was from what he gathered from the file for L.R No. 209/405/7.
67. DW2 told the court that from the documents he had been taken through, it appeared that as at 2007 there was no parcel of land known as L.R No. 209/405/8 that could be allocated by the Council to the 1st Defendant on 23rd February 2007. He stated that the County Government leases were being signed by the Town Clerk. He stated that previously the Town Clerk and the Mayor could sign leases. He stated that the Town Clerk could delegate the duty to his deputy. He stated that he did not know if the Mayor could delegate the duty.
68. DW2 testified that he had heard of Eng. S. K. Mburu. He stated that he was an employee of the City Council of Nairobi working as an engineer. He stated that his witness statement was drawn by the 3rd Defendant's advocates based on the discussions that he had with them. He stated that the statement was based on the documents they had in their physical file. He stated that in his statement, he only responded to the issues that were raised. He stated that he saw the letter of allotment dated 23rd February 2007 and the lease in favour of the 1st Defendant in court. He stated that he had not come across any document showing that the County Government had owned L.R No. 209/405/8 at any time. He stated that they had since adopted a system that could detect duplication of records. He stated that previously, they did not verify ownership details. He stated that payment of rates did not confer ownership rights. He told the court that as at 2008, there was no parcel of land known as LR. No. 209/405/8. He stated that if there were any rates due, it would be on the subplots, L.R Nos. 209/405/10 and 11. He stated that he did not know if Kenya Shell had defaulted in rate payment in respect of L.R Nos. 209/405/10 and 11.
69. In re-examination by Ms. Obudu, DW2 stated that it was possible for one to pay rates for a property he did not own because payment of rates was not equivalent to ownership of the property.
70. The last witness was the 1st Defendant's director, PETER KAMAUNYUTU(DW3). DW3 introduced himself as a businessman and a former politician. He stated that he was a councillor at the City Council of Nairobi for 25 years. He stated that he recorded a witness statement that was filed in court on 19th December 2016. He adopted the same as his evidence in chief. He stated that he filed a bundle of documents dated 14th December 2016, which he produced as D.EXH. 1 to 7 respectively. He also adopted the contents of his affidavit filed on 11th December 2015 in reply to the Plaintiff's application for injunction and the affidavit sworn on 30th June 2016 in support of his application dated 30th June 2016 as part of his evidence in chief.
71. On cross-examination by Mr. Luseno for the Plaintiff, DW3 was shown the minutes of the Town Planning Committee held on 3rd July 1971 at page 14 of the Plaintiff's bundle of documents filed together with the plaint. DW3 stated that he was 65 years old having been born in 1958. He stated that he was 13 years old in 1971 and did not know what happened then. He stated that he was allocated the



- suit property by the 3rd Defendant. He stated that he did not know what the 3rd Defendant was saying about the allotment and ownership of the suit property. He stated that he saw a letter to the effect that the 3rd Defendant surrendered its title. He stated that Mr. Nyoike (DW2) only dealt with rates at the 3rd Defendant. He stated that the 1st Defendant had two (2) directors, Peter Kamau Nyutu and David Maina Muhuthia (deceased). He stated that he was not aware that the children of the deceased director of the 1st Defendant had disowned the suit.
72. He stated that in the 1st Defendant's letter of allotment dated 23rd February 2007, the 1st Defendant's address is given as c/o City Council of Nairobi and the area of the land was given as 0.2974 Ha. When shown the Deed Plan at page 10 of the 1st Defendant's bundle of documents, he stated that the area of the land was given as 0.2374 Ha. He stated that there appeared to be a difference in acreage in the letter of allotment and the Deed Plan. When shown the lease document at page 2 of the 1st Defendant's bundle of documents, he stated that the same was drawn by, Advocate, City Hall, Nairobi. He stated that the name of the advocate was not given. When shown the lease at pages 172 to 180 of the Plaintiff's bundle of documents filed with the plaint, he stated that he could see entry No. 2 at page 180 of the bundle which was a transfer of the lease to Ayan Enterprises Ltd. on 21st July 2008. He told the court that he did not sell the property. He told the court that he had a case against the Land Registrar over this entry. He stated that he made a complaint to the police. He stated that he had not read the Land Registrar's statement as well as the statement of the 3rd Defendant's witness.
73. DW3 stated that he had a claim against the 2nd Defendant. He stated that he was a councillor for 25 years in Woodley/Golf Course. He stated that he was not aware that the Plaintiff had complained to the District Officer against him in 2003 and that he was not aware of the letter that the District Officer had written to the chief. He stated that he was aware that the Plaintiff had complained against him to the Directorate of Criminal Investigations(DCI). He stated that the Plaintiff however ran away after the DCI looked at the documents. He denied that he filed a suit to stop the criminal proceedings against him. He told the court that he had a receipt for the payment he made for the stand premium mentioned in the letter of allotment dated 23rd February 2007. He stated that he gave the receipt to his advocates. He stated that he did not know where the advocate took the receipt for the payment of Kshs. 450,000/- being the allotment fees. He stated that when the letter of allotment was issued to him, he was a councillor for Woodley.
74. DW3 stated that he swore an affidavit about the loss of his title for the suit property. He stated that he had received a copy of the title from the 3rd Defendant before he swore the affidavit/statutory declaration. He stated that he was told by DW1 at the Land office that the title got lost. He stated that the communication was in the form of a memo from the Land's office to the police. He stated that he was not given a copy of the memo. He stated that the affidavit/statutory declaration was drawn by him. He stated that the affidavit was not in the name of the 1st Defendant. He stated that Alfred Mwai Kariuki was a director of the 1st Defendant who sold his shares to David Maina Muhuhia. He stated that Alfred Mwai Kariuki was not a director of the 1st Defendant in 2014. He stated that David Maina Muhuhia died during COVID- 19 pandemic in 2020.
75. On cross-examination by Ms. Oduru for the 3rd Defendant, DW3 was shown the letter of allotment dated 23rd February 2007 and he confirmed that he was to accept the allotment within 30 days. He stated that he accepted the allotment and made the payment. He stated that he did not know where the 1st Defendant's advocates had taken his letter of acceptance of the allotment. He stated that he had also paid for the allotment. He admitted that he had not produced the letter of acceptance and the receipt. He stated that he was a councillor for 25 years. He stated that he was not present when the lease in his favour was being signed by the Mayor. He stated that the seal on the lease belonged to the



- 3rd Defendant. He stated that the title was being processed at the Ministry of Lands. He told the court that his title got lost during the processing of the same. He stated that the 3rd Defendant was involved in the processing of the title.
76. On cross-examination by Mr. Motari for the 4th Defendant, DW3 stated that the 1st Defendant was incorporated in 2006 with the objectives of doing many things including dealing with land. He stated that the 1st Defendant resolved to apply for the suit property. He stated that he had not produced the application but the same was available. He stated that he applied to be allocated the suit property. He stated that he was in the inspectorate committee and the general-purpose committee. He stated that whatever they resolved would be taken to the full council for final approval. He stated that there was a Town Planning Committee that dealt with land. He stated that he did not have the Town Planning Committee resolution that approved the allocation of the suit property to him. He stated that he had a letter of acceptance of the allotment, but he had not produced the same. He stated that the suit property was surveyed by the City Council Surveyor, Mr. Nyoike. He stated that he had a beacon certificate, but he had not produced it. He stated that he started paying rates in August 2015 and paid backdated rates.
77. DW3 stated that the total amount payable was Kshs. 119,000/-, and the bill given to him was dated 19th August 2015. He stated that he had the receipt for the payment he made but had not produced the same. He stated that he did not know who surrendered the suit property to the 3rd Defendant. He stated that he did not have the deed of surrender. He stated that he did not know the purpose for which the suit property was surrendered to the 3rd Defendant. He stated that he had some document evidencing the surrender. He told the court that he was not given a copy of the title that was surrendered. He stated that he had not raised a counter-claim. He stated that it was the 1st Defendant which had a title to the suit property. He stated that the Plaintiff did not have a title to the suit property.
78. In re-examination by Mr. Gachie, DW3 stated that the Plaintiff had no title to be cancelled. He reiterated that it was the 1st Defendant which had a title to the property in dispute, and that was why it had not counter-claimed for cancellation of the title. He stated that the suit property was surrendered to the 3rd Defendant, which allocated the same to the 1st Defendant. He stated that before the land was allocated to him, the same was occupied by hawkers. He stated that he did not know how the suit property left the hands of the Plaintiff or anyone else. He stated that he swore the affidavit about the loss of the title on behalf of the 1st Defendant. He stated that in the affidavit, he stated that the title for the suit property got lost in the hands of Mr. Wamuyu, the Land Registrar. He reiterated that he reported the loss to the police.
79. DW3 stated that when he was allocated the suit property on 23rd February 2007, he was a councillor and was using the postal and physical address of the City Council where he was working. He stated that when he was allocated the land, it had not been surveyed. He stated that the correct measurement of land is determined after survey. He stated that the area in the letter of allotment was approximate and it could increase or go down upon survey. He stated that the 2nd Defendant was not known to him. He stated that the purported transfer of the suit property to the 2nd Defendant was done when his title got lost. He stated that he did not transfer the suit property to the 2nd Defendant. He stated that a subdivision must be approved by the council and the council normally give conditional approval. He stated that it was normally a requirement during a subdivision that a plot be surrendered to the council. He stated that the 1st Defendant would not have been put in the City Council's rating system if he had not paid for the allotment. He stated that even the lease could not have been processed if he had not paid for the property. He stated that there was sufficient evidence that he accepted the allotment and paid for the property.



80. He stated that from the minutes of the Town Planning Committee meeting held on 3rd May 1971, and the resolution of the committee, the subdivision was approved subject to certain conditions. He stated that the minutes of the meeting held on 28th March 1972, at page 16 of the Plaintiff's bundle of documents filed with the plaint, talked of relinquishment of the Council's plot. He stated that he had evidence that the 3rd Defendant allocated the suit property to the 1st Defendant. He referred the court to paragraph 3 of the letter dated 13th December 2016. He stated that the letter confirmed that the 1st Defendant was the rateable owner of the suit property. He stated that the records for the suit property were kept by the 3rd Defendant which fed the same to their rating system. He stated that he had not been accused of forgery by the 3rd and 4th Defendants in the manner he acquired the suit property or the certificate of title.
81. In re-examination by Dr. Khaminwa, DW3 stated that he paid the allotment fees and was still paying land rates for the suit property. DW3 reiterated that the suit property was allocated to the 1st Defendant. He stated that the property was allocated procedurally. He stated that there was no claim over the suit property before it was allocated to the 1st Defendant. He stated that he did not know the history of the suit property. He stated that the court should find that the suit property belonged to the 1st Defendant.

The submissions

82. After the close of evidence, the court directed the parties to make closing submissions in writing.

The Plaintiff's submissions

83. The Plaintiff filed submissions dated 8th August 2024 and supplementary submissions dated 18th November 2024. In its submissions, the Plaintiff framed the following issues for determination which it submitted on;

1. Who is or was the registered owner of the suit property?

84. The Plaintiff submitted that PW1 produced a report that spoke to the tenure under which the suit property was owned, and the instrument of title issued under such tenure. The Plaintiff submitted that the suit property was a creature of transactions over L.R No. 209/405/6 (Original Number 450/26/4) and L.R No. 209/405/7 (Original Number 450/26/5). The Plaintiff submitted that PW1 and PW2 produced indentures issued under the Government Lands Act in respect to L.R No. 209/405/6 and L.R No. 209/405/7 and placed before the court documents speaking to lawful transactions thereon, including subdivisions that culminated in the suit property.
85. The Plaintiff submitted that an extract of the postal search produced by the Plaintiff and the 1st Defendant revealed that the suit property remained on record after the subdivision of L.R No. 209/405/7, a process that was undertaken by the Plaintiff, then known as Kenya Shell Limited. The Plaintiff submitted that this unrebutted evidence is in the records held by the 4th Defendant. The Plaintiff submitted that DW2 confirmed that the 3rd Defendant never owned L.R No. 209/405/7 and that both DW1 and DW2 agreed that the payment of land rates is not proof of ownership of land. The Plaintiff submitted that DW2 confirmed and spoke of the then weak systems of the 3rd Defendant that previously could not detect duplicity in rate payment. The Plaintiff submitted that PW2 confirmed that save for a sale to Kenya Bowling Centres Limited and a lease issued to Wildlife Safari Kenya Limited, the Plaintiff had never transferred any interest in its property(ies) in issue to any third party, the Defendants herein inclusive.



86. The Plaintiff submitted that the lease to Wildlife Safari Kenya Limited was approved and registered by the 4th Defendant upon an application for consent being sought on 10th October 1992. The Plaintiff submitted that PW2 placed before the Court evidence that spoke to historical dealings involving the suit property including enforcement of legal rights by the Plaintiff before the High Court and the registration of a lease in favour of Wildlife Safari Kenya Limited. The Plaintiff submitted that none of the Defendants rebutted the evidence presented by the Plaintiff on the root of its title and the historical dealings involving the suit property. The Plaintiff cited Supreme Court Petition No. 8 (E010) of 2021, Dina Management Limited v The County Government of Mombasa & 4 Others, and submitted that it had proved to the required standard that it was and continues to be the registered owner of the suit property.

2. Whether the suit property was available for allotment in 2007

87. The Plaintiff submitted that an allotment can only be effected on unallocated public land and that the decision to allocate land is governed by statute and is process-driven. The Plaintiff submitted that under Section 3(a) of the Government Lands Act, Chapter 280 Laws of Kenya (now repealed), the President had the power to make grants or dispositions of any estates, interests or rights in or over unalienated government land. The Plaintiff submitted that the Government Lands Act defined unalienated government land to mean government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. The Plaintiff submitted that the Act did not envisage that such powers would be exercised by the Town Clerk of a County Council or the Mayor.

88. The Plaintiff submitted that the purported allotment letter to the 1st Defendant did not have the PDP Number but had a land reference number 209/405/8. The Plaintiff submitted that it is upon the person seeking to derive a benefit from an allotment letter to lead evidence as to the legality of the process attendant to the issuance of such a letter, compliance with the conditions therein and the processing of a title pursuant thereto.

89. The Plaintiff submitted that the 1st Defendant did not discharge this burden placed upon him by Section 107 of the *Evidence Act*, Chapter 80 Laws of Kenya. The Plaintiff submitted that no evidence was led on the payment of the stand premium within the prescribed time limit, the processing and procuring of a Beacon Certificate, and the Part Development Plan. In support of this submission, the Plaintiff cited Dina Management (supra) and Nairobi ELC Number 796 of 2014, Vekariya Investments Limited v National Land Commission & Others. The Plaintiff submitted that the fact that the PDP was not produced was not in dispute, meaning that the 1st Defendant could not identify the location of the property, the subject of his alleged letter of allotment taking into account that some of the title numbers (I.R. Numbers) in the 1st Defendant's lease document were in respect of a property located in Karen. In support of this submission, the Plaintiff relied on Nairobi ELC No. 498 of 2004, Muthithi Investments Limited v Andrew S. Kyendo & Others, Mombasa ELC No. 55 of 2020, Technology Investments Limited v Asu Khanji Patel & Another and Eldoret ELC No. 159 of 2015, Daniel Kiplimo Busienei v Alphax College Limited & Others.

90. The Plaintiff submitted that the entity which purported to issue the allocation letter dated 23rd February 2007, being the Town Clerk of the then City Council of Nairobi, did not have the authority to issue the same. The Plaintiff submitted that on that ground alone, the alleged letter of allotment was an illegal instrument and could not be the basis of a lawful conveyance. The Plaintiff submitted that the dispute before the court was not one of double allocation but rather of an illegal or unlawful allocation. The Plaintiff submitted that it is settled that an unlawful allotment cannot confer any interest in land, notwithstanding that lawful processes have been undertaken. In support of this submission, the



Plaintiff relied on the Court of Appeal Civil Appeal No. 16 of 2018, Pankajkumar Hemraj Shah & Another v Abbas Lali Ahmed & Others. The Plaintiff submitted that there was no unalienated land capable of being allocated in February 2007 as the letter of allotment purported to do. The Plaintiff submitted that the suit property was at all material times private property. The Plaintiff relied further on the Supreme Court Petition No. 5 (E006) of 2022, Torino Enterprises Limited v Hon Attorney General and Nairobi HCCC No. 73 of 2000, Syedna Mohammed Burhannuddin Saheb & Others v Benja Proerties Limited & Others.

91. The Plaintiff submitted that as at 23rd February 2007, there was no property described as L.R No. 209/405/8, the same having been lawfully subdivided by its owner, the Plaintiff. The Plaintiff submitted further that L.R No. 209/405/8 was also never a public property available for allotment. The Plaintiff submitted that the property was at all times legally owned by the Plaintiff. The Plaintiff submitted that the 3rd Defendant was never the registered owner of L.R No. 209/405/8 and was therefore not capable of conferring a right in respect thereof to a third party. The Plaintiff submitted that it is settled that an allotment of private property is of no consequence and cannot confer a proprietary interest. In support of this submission, the Plaintiff relied on the Court of Appeal Civil Appeal No. 79 of 2007, Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 Others, Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane), suing on behalf of the Estate of Mohamed Haji Dagane) v Hakar Abshir & 3 others [2021] eKLR, Kisii ELC No. 120 of 2008, Kenya Anti-Corruption Commission v Abel Songonde Momanvi & Another, Bungoma ELC No. E003 of 2022, Zeinab Zulekha Ahmed v Imelda Wamalwa & Others, African Line Transport Co. Ltd. v The Hon .AG., Mombasa HCCC No.276 of 2013, Nelson Kazungu Chai & 9 Others v Pwani University College [2014] eKLR.
92. The Plaintiff reiterated that the suit property was not unalienated government land and as such, the same was not available for allocation even by the President let alone the 3rd Defendant's Town Clerk. In support of this submission, the Plaintiff cited Machakos Petition No. 7 of 2017, Kapiti Plains Estate Limited v Attorney General & Others.

3. Whether the 1st Defendant holds a valid lease and Provisional Certificate of Title in respect of the suit property

93. The Plaintiff submitted that when a title is under challenge on account of fraud and/or illegality, the burden shifts to the party waving the title to prove that the same was procedurally acquired. In support of this submission, reliance was placed on Civil Appeal No. 239 of 2009, Munyu Maina v Hiram Gathitha Maina and ELC No. 787 of 2012, Daudi Kiptugen v Commissioner of Lands & 4 Others. The Plaintiff submitted that the 3rd Defendant denied ever having owned the suit property, which was a creation of a subdivision of L.R No. 209/405/7, and the 4th Defendant stated on oath that the suit property was legally owned by the Plaintiff.
94. The Plaintiff submitted that PW1 testified that after the subdivision of L.R No. 209/405/7 by the Plaintiff with the approval of the 3rd and 4th Defendants, the Plaintiff sold one of the resultant plots, being L.R No. 209/405/9 to Kenya Bowling Centres Limited and retained the other portion L.R No. 209/405/8 (the suit property). The Plaintiff submitted that this fact was proved by the Postal Search produced in evidence which had an endorsement by a Land Registrar known as E.N Phonseca as follows: "Remainder: 209/405/8 (original 209/405/7/1)". The Plaintiff submitted that the search forms part of the 1st Defendant's Supplementary List of Documents and is at page 371 of the Plaintiff's bundle of documents.



95. The Plaintiff submitted that the 1st Defendant did not tender any evidence as to the historical dealings and processes attendant to the acquisition of the alleged lease and Provisional Certificate of Title. The Plaintiff submitted that the lease alleged to be held by the 1st Defendant was fraudulent and illegal for the reasons which came out in evidence highlighted earlier in the judgment. The Plaintiff submitted that while the lease was alleged to have been issued by the 3rd Defendant, the fraudulent Deed Plan attached thereto indicated that the suit property was originally L.R No. 209/405/7/1, which the postal search confirmed was owned by the Plaintiff. The Plaintiff submitted that the entire process of falsely reporting the loss of the title in respect to the suit property, obtaining a Police Abstract and, causing the publication of contradictory Gazette Notice in respect of a property that had long been subdivided, was part of a fraudulent scheme to sanitise a fraud upon the Plaintiff. The Plaintiff submitted that the lease and the Provisional Certificate of Title issued to the 1st Defendant were not valid documents as they were creatures of a fraudulent scheme aimed at affecting the Plaintiff's property rights over the suit property. The Plaintiff submitted that the two documents were null and void and of no legal consequence. The Plaintiff submitted that the same were anchored on an illegal letter of allotment and as such were similarly illegal.

4. Whether the Plaintiff is entitled to damages

96. The Plaintiff submitted that damages ensue if a registered owner proves that rights to quiet possession and use of its property have been infringed. The Plaintiff submitted that PW2 led evidence as to how the acts of the Defendants frustrated the Plaintiff's ability to redevelop the suit property in conformity with industry practices. The Plaintiff submitted that it was PW2's evidence that a fully redeveloped fuel station with attendant convenience retail services would have enhanced revenue as follows;

1. Kshs. 1,000,000/- monthly in fuel sales; and
2. Kshs. 700,000/- monthly in the form of revenue from retail convenience stores.

97. The Plaintiff submitted that PW2's evidence was from a person with knowledge of the operations of service stations, and was not rebutted by any of the Defendants. The Plaintiff submitted that it had discharged its burden of proving that it was the registered owner of the suit property, while the 1st Defendant's evidence fell short of such proof as he only waved a copy of a fraudulently obtained Provisional Certificate of Title.

The 1st Defendant's submissions

98. The 1st Defendant filed submissions dated 31st October 2024. The 1st Defendant framed the following issues for determination;

1. Who is the registered and legal proprietor of the property, L.R No. 209/405/8?
2. What was the legal effect of the lease having not been drawn by an advocate?
3. Whether the Plaintiff is entitled to the orders of Mandamus and Certiorari.
4. Whether the Plaintiff is entitled to an award of damages.

Who is the registered and legal proprietor of the property, L.R No. 209/405 /8?

99. The 1st Defendant submitted that it was the registered proprietor of the suit property, having acquired it through an allotment from the City Council of Nairobi in 2007. The 1st Defendant submitted that the necessary procedures leading to the allocation of the suit property were duly complied with. The 1st Defendant submitted that upon being granted the lease by the Council, the lease document dated



20th August 2007 was submitted to the 4th Defendant for verification, registration and processing of a title in the 1st Defendant's name.

100. The 1st Defendant cited Article 40 of *the Constitution* of Kenya, Sections 24, 25 and 26 of the *Land Registration Act* 2012 and submitted that it acquired a good title over the suit property worthy of protection.

What was the legal effect of the lease having not been drawn by an advocate?

101. The 1st Defendant submitted that the Plaintiff had contended that the lease document in favour of the 1st Defendant was drawn by an unknown entity at the City Council of Nairobi. The 1st Defendant submitted that the Plaintiff had contended further that the lease having not been prepared by an advocate, the same was invalid and could not confer any rights known under the law. The 1st Defendant submitted that the court should not lose sight of the fact that the 4th Defendant's witness, the Land Registrar, testified and confirmed that the 1st Defendant obtained the lease from the 3rd Defendant, which had errors in terms of referring to the Government *Land Act* and Registration of Titles Act land registration regimes.
102. The 1st Defendant submitted that the witness from the 3rd Defendant testified that the 3rd Defendant had a conveyancing department with qualified advocates, and that it was these advocates who drew and prepared the lease in question. The 1st Defendant submitted that the issue of the validity of the said lease on account of the lack of identity of the drawer could not arise. In support of this submission, the 1st Defendant relied on the Supreme Court case of National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR.
103. The 1st Defendant submitted that the court should take judicial notice that the City Council of Nairobi used to prepare valid lease documents in its name rather than in the name of any particular advocate, since the entity owned the documents, and not an individual advocate a position which the 3rd Defendant's witness confirmed.

Whether the Plaintiff is entitled to the orders of Mandamus and Certiorari

104. The 1st Defendant submitted that the grant of the orders of Certiorari and Mandamus is discretionary and the court is entitled to take into account the nature of the process against which such orders are sought and satisfy itself that there is reasonable basis to justify the grant of the orders sought. The 1st Defendant submitted that such orders can only be granted in a Judicial Review application and not in a suit commenced by a plaintiff. The 1st Defendant submitted that mandamus is an equitable remedy that serves to compel a public authority to perform its public duty and controls procedural delays. In support of these submissions, the 1st Defendant relied on Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another [2018] eKLR and Republic v Kenya National Examination Council exparte Gathenji & 9 others[1997] eKLR.
105. The 1st Defendant submitted that the Plaintiff had failed to establish and/or meet the threshold for the grant of orders of Mandamus and Certiorari, which are discretionary. The 1st Defendant submitted that the Plaintiff had failed to prove that the suit property rightfully belonged to it. The 1st Defendant submitted that the Plaintiff did not establish the process followed in the property's acquisition neither did it explain its claim over the property long after the subdivision of the original parcel. The 1st Defendant submitted that the allegations of fraud and illegalities levelled against it had not been proved. The 1st Defendant submitted that there was no basis for cancelling its interest in the suit property.



Whether the Plaintiff is entitled to an award of damages

106. The 1st Defendant submitted that the damages sought by the Plaintiff was in the nature of special damages. The 1st Defendant submitted that such claim must not only be pleaded and particularised, but must also be strictly proved. The 1st Defendant submitted that the Plaintiff had plucked figures to the tune of Kshs. 1,700,00/- from nowhere and thrown the same upon the face of the court seeking to be awarded the same. The 1st Defendant submitted that the Plaintiff had compared the suit property with the nearby fuel stations allegedly operated by the Plaintiff to show how much was being lost in terms of revenue streams. The 1st Defendant submitted that, other than throwing the figures plucked from the air and making outrageous comparisons, no pleading, particularisation, or concrete evidence in support of the claim was produced at trial. The 1st Defendant submitted that the Plaintiff had failed to prove its claim for damages. The 1st Defendant submitted that the Plaintiff did not supply the books of accounts or financial statements of any of the fuel stations used for comparison. The 1st Defendant submitted that the award sought, if granted, would amount to unjust enrichment. In support of this submission, the 1st Defendant relied on *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] eKLR.

The 3rd Defendant's submissions

107. The 3rd Defendant filed submissions dated 3rd December 2024. The 3rd Defendant framed the following issues for determination;

1. Who owns the suit property?
2. Whether the Plaintiff is entitled to the reliefs sought.

Who owns the suit property?

108. The 3rd Defendant submitted that the evidence adduced by the Plaintiff showed that the suit property came about as a result of a subdivision of L.R No. 209/405/7. The 3rd Defendant submitted that from the documents relied on by the Plaintiff, specifically the conditions for the subdivision at pages 16, 17, 18 and 19 of the Plaintiff's bundle of documents, the Plaintiff was to relinquish the 3rd Defendant's plot south of its plot, which was L.R 209/405/8. The 3rd Defendant submitted that Kenya Bowling Centres Ltd., to which L.R 209/405/9 had been leased, had expressed an intention to consolidate its plot and that of the 3rd Defendant, which was never to be. The 3rd Defendant submitted that PW2 only dealt with the historical transactions involving the indenture, but did not explain why the Plaintiff did not process a Deed Plan for L.R No.209/405/8, which was surrendered to the 3rd Defendant and the Plaintiff's interest in it had been extinguished after subdivision. The 3rd Defendant submitted that the Plaintiff had not explained and/or adduced evidence as to how it would leave its plot undeveloped since 1972.

109. The 3rd Defendant cited Section 26 (1) of the *Land Registration Act* 2012 and submitted that the Plaintiff had not produced any title. The 3rd Defendant submitted that the 1st Defendant had on the other hand produced a title together with the rates payment receipt from the 3rd Defendant, asserting his ownership of the property. The 3rd Defendant submitted that the 4th Defendant, through Mr. Kamuyu (DW1), decided to change the position by claiming that the Plaintiff was the owner of the suit property. The 3rd Defendant submitted that DW1 claimed that he checked the indenture after a complaint was made by the Plaintiff and confirmed that the suit property belonged to the Plaintiff. The 3rd Defendant submitted that this position was not tenable because it was the same indenture that



DW1 checked, did due diligence on and registered the lease in favour of the 1st Defendant. The 3rd Defendant submitted that it was also the same indenture that DW1 checked and issued a provisional title to the 1st Defendant.

110. The 3rd Defendant submitted that there was no evidence that it was a party to the fraud particularised in the plaint. The 3rd Defendant submitted that it had the power to allocate land, which power it procedurally exercised in allocating the suit property to the 1st Defendant.

Whether the Plaintiff is entitled to the reliefs sought?

The 3rd Defendant submitted that the plaintiff had not proved its case on a balance of probabilities. The 3rd Defendant submitted that any litigant who seeks the reliefs of Mandamus and Certiorari must first obtain leave of the court to bring judicial review proceedings which the Plaintiff failed to do. In support of this submission, the 3rd Defendant relied on Republic v County of Kwale & Another Ex parte Kondo & 57 Others. The 3rd Defendant submitted that by seeking these prayers in an ordinary suit, thereby bypassing the requirement for leave, the Plaintiff undermined the court process and the court should decline to grant the reliefs. The 3rd Defendant prayed that the suit be dismissed with costs.

The 4th Defendant's submissions

111. The 4th Defendant filed submissions dated 22nd October 2024. The 4th Defendant framed the following issues for determination;
1. Whether the Plaintiff is the registered owner of the suit property.
 2. Whether the 1st Defendant was allocated the suit property by the 3rd Defendant.
 3. Who should pay the costs of the suit?

Whether the Plaintiff is the registered owner of the suit property

112. The 4th Defendant submitted that the suit property was registered under the Government Lands Act, Chapter 280 Laws of Kenya (GLA) (now repealed) and not under the Registration of Titles Act, Chapter 281 Laws of Kenya (RTA) (now repealed). The 4th Defendant submitted that the I.R. Number 111525 which was used in the alleged lease between the 3rd Defendant and the 1st Defendant was not for L.R No. 209/405/8 but was for a different property being L.R No. 11377/1, which is not the subject of these proceedings. The 4th Defendant submitted that L.R No. 11377/1 measures 2.01 hectares and is a creature of subdivision of L.R No. 11377, which is situated in Karen area and not Adams Arcade.
113. The 4th Defendant submitted that the 1st Defendant's documents pointed to a claim over land in Karen Market under Survey Plan No. F/R 100/67. The 4th Defendant submitted that L.R No. 11377/1 comprises the City Council Market, the Karen Chief's Offices, a City Council Nursery School and a Community Centre. The 4th Defendant submitted that the correct Deed Plan for L.R No. 11377 is Deed Plan No. 80904 as indicated in the Survey Plan No. F/R 100/67. The 4th Defendant submitted that L.R No. 209/405/7 measuring 1.985 acres was subdivided into L.R No. 209/405/8 measuring 0.7348 acres and L.R No. 209/405/9 measuring 1.2498 acres under Survey Plan No. F/R 126/18 of 22nd September 1972.
114. The 4th Defendant submitted that after the subdivision of L.R No. 209/405/7, L.R No. 209/405/8 remained in the name of Kenya Shell Limited while L.R No. 209/405/9 was transferred to Kenya Bowling Centres Ltd. on 25th July 1973 and was registered under the Government *Land Act* (G.L.A) in Volume No. 48 Folio 61 /1. The 4th Defendant submitted that the records at the County Government



of Nairobi showed that L.R 209/405/8 and L.R No. 209/405/9 were entered in the Valuation Roll for the year 2001, and L.R No.209/405/8 was valued at Kshs. 32,008,000/- and L.R No. 209/405/9 at Kshs. 54,441,000/-. The 4th Defendant submitted that the Plaintiff had demonstrated the history of its title to the suit property and the title was traceable. The 4th Defendant submitted that it was also demonstrated that the suit property had been in the possession of the Plaintiff, hence the Plaintiff's title was protected under Section 23 of the Registration of Titles Act (now repealed).

Whether the 3rd Defendant owned and could allocate the suit property to the 1st Defendant.

115. The 4th Defendant submitted that the Plaintiff produced before the court an indenture for the suit property issued in 1923, which was valid and existing as at the time the 1st Defendant purported to have been allocated the suit property. The 4th Defendant submitted that during the application for subdivision, there was no surrender of the suit property to the 3rd Defendant to warrant an allocation as alleged by the 1st Defendant. The 4th Defendant submitted that whereas the 1st Defendant's interest in the suit property was anchored on the letter of allotment dated 23rd February 2007, the Plaintiff had owned the suit property since 1965. The 4th Defendant submitted that the 3rd Defendant never owned the suit property and, as such, could not allocate the same to the 1st Defendant. The 4th Defendant submitted further that, in any event, the purported allocation was not procedurally undertaken.
116. The 4th Defendant submitted that a title or a lease is an end product of a process. The 4th Defendant submitted that if the process that was followed prior to issuance of the title did not comply with the law, then such a title cannot be held as indefeasible. The 4th Defendant submitted that the allocation of the suit property having been irregular, the 1st Defendant did not acquire a valid interest in the property which he could pass to 2nd Defendant.
117. The 4th Defendant submitted that the grant or title held by the 1st Defendant was a nullity and could not enjoy protection under Article 40 of *the Constitution*. The 4th Defendant submitted that the title should be declared a nullity and cancelled.

Who should bear the costs of the suit?

118. The 4th Defendant submitted that Section 27(1) of the *Civil Procedure Act* 2010 provides that costs shall follow the event, but the same is at the discretion of the court, which must be judiciously exercised. The 4th Defendant submitted that the Plaintiff was entitled to the costs as it had proved its case on a balance of probability as against the 1st and 2nd Defendants. The 4th Defendant urged the court to enter judgment for the Plaintiff against the 1st and 2nd Defendants.

The Plaintiff's supplementary submissions

119. The Plaintiff filed supplementary submissions dated 18th November 2024 in response to the 1st, 3rd and 4th Defendants' submissions.
120. With regard to the 1st Defendant's submissions, the Plaintiff responded to the following five issues;
1. Admissibility of the evidence of PW 1 (Joseph Wambua Mulusya);
 2. Judicial interpretation of the sanctity of a title under challenge;
 3. Applicability of the case of NBK v Anaj Warehousing [2015] eKLR to the impugned lease;
 4. Propriety of the orders of Mandamus and Certiorari in the present suit; and
 5. Proof of Damages.



The admissibility of the evidence of PW1

121. The Plaintiff submitted that PW1 testified as an expert witness and his testimony, together with his investigation report, comprised expert evidence. In support of this submission, the Plaintiff relied on the Court of Appeal case of *Mutonyi v Republic* [1982] KLR 203 at 210, in which the court stated as follows concerning expert evidence:

“Expert evidence is evidence given by a person skilled and experienced in some professional or special sphere of knowledge of the conclusions he has reached on the basis of his knowledge, from facts reported to him or discovered by him by tests, measurements and the like.”

122. The Plaintiff submitted that the evidence of PW1 consisted of an account of his findings from his analysis of the official records of the Commissioner of Lands, the valuation department, the survey department and the city planning and architecture departments of the City Council of Nairobi. The Plaintiff submitted that PW1’s report was admitted in evidence and the Defendants were given an opportunity to cross-examine him over the same. The Plaintiff submitted that none of the Defendants elected to call a rebuttal witness. The Plaintiff submitted that evidence of an expert can only be impeached by other expert evidence. The Plaintiff relied on Nairobi HCCC No. 427 of 2010, *Ali Mohamed Sunkar v Diamond Trust Bank (K) Limited*, in support of this submission. The Plaintiff submitted that none of the Defendants called an expert witness to rebut the evidence of PW1. The Plaintiff submitted that the evidence of PW1 having been admitted, the Defendants could only attack its probative value, but not its admissibility.

Judicial interpretation of the sanctity of the title under challenge

123. The Plaintiff submitted that the courts no longer take the production of a title deed as proof of ownership of land. In support of this submission, the Plaintiff cited *Munyu Maina v Hiram Gathiha Maina* [2013]eKLR. The Plaintiff submitted that it challenged the legality of the 1st Defendant’s title. The Plaintiff submitted that the 1st Defendant merely waved the alleged provisional title to the court and argued on its sanctity, but did not demonstrate how he acquired the said title and that the said acquisition was valid, procedural and legal.

Applicability of the case of *NBK v Anaj Warehousing* [2015] eKLR to the impugned lease

124. The Plaintiff submitted that the decision of the Supreme Court in *Anaj Warehousing* cited by the 1st Defendant only protects the validity of documents drawn by advocates who have not taken out practising certificates (the exception). The Plaintiff submitted that the Supreme Court in this case was emphatic that all other documents drawn by unqualified persons are invalid and void. The Plaintiff submitted that the lease in dispute before the court was drawn by a non-identifiable advocate. The Plaintiff submitted that the 1st Defendant’s argument that the lease was drawn by the 3rd Defendant is legally untenable to validate the said lease as the 3rd Defendant is not a qualified person under Sections 9 and 10 of the *Advocates Act*.

Propriety of orders of Mandamus and Certiorari

125. The plaintiff submitted that under Section 13 (7) of the *Environment and Land Court Act* 2011, this Court has the power to grant, among others, injunctions, prerogative orders and damages. The Plaintiff submitted that in Nairobi HC. Misc. Application No. 32 of 2011, *R v Registrar of Titles Ex-parte Kenya Shell Limited*, which was a Judicial Review Application, the court found that this court would be the best placed to hear and determine the dispute between the parties. The Plaintiff submitted



that the civil jurisdiction of this court was thus properly invoked by way of a plaint as opposed to a Judicial Review application. In support of this submission, the Plaintiff cited the decision of the Court of Appeal in *Sanghani Investment Ltd. v Officer in Charge Nairobi Remand and Allocation Prison* [2007] I E.A 354.

Proof of damages

126. The Plaintiff submitted that the damages sought are a consequence of fraud and trespass by the Defendants. The Plaintiff submitted that under Section 13(7) (c) of the Environment and *Land Act*, the court has to act judiciously. The Plaintiff invited the court to take into consideration the un rebutted evidence of PW2 as to the user of the Plaintiff's land banks and the motivation behind having ancillary services in a service station. The Plaintiff submitted that the evidence was provided by an officer who was well conversant with the business of the Plaintiff and/or the oil business.
127. In response to the 3rd and 4th Defendant's submissions, the Plaintiff submitted that the 3rd and 4th Defendant's submissions supported the claim by the Plaintiff insofar as legal ownership of the suit property was concerned. The Plaintiff submitted that the position taken by the 3rd and 4th Defendants supported the need for the issuance of the orders of Mandamus, Certiorari and Declarations sought by the Plaintiff.

Analysis and determination

128. I have considered the pleadings, the evidence and the submissions by the parties. I am of the view that the issues arising for determination in this suit are the following;
1. As between the Plaintiff and the 1st Defendant, who is the lawful owner of the suit property?
 2. Whether the 1st Defendant acquired the suit property fraudulently and illegally.
 3. Whether the Plaintiff is entitled to the reliefs sought against the Defendants.
 4. Who is liable for the costs of this suit?
129. As between the Plaintiff and the 1st Defendant, who is the lawful owner of the suit property, L.R No. 209/405/8.
130. From the evidence before the court, I am convinced that L.R No. 209/405/8 (the suit property) is and was at all material times registered under the Government Lands Act, Chapter 280 Laws of Kenya (now repealed). I am persuaded further that the suit property originated from L.R No. 209/405/7(Original No. 450/26/5) measuring 1.985 Acres (0.803 Ha.), which together with L.R No. 209/405/6 (Original No. 450/26/4) measuring 0.469 Acres (0.190 Ha.) were transferred to the Plaintiff then known as Kenya Shell Limited by Kenya Shell [1926] Limited through the indenture dated 24th October 1963. The Plaintiff produced in evidence copies of the indenture and the Deed Plans for the two parcels of land. The Plaintiff led evidence and produced documents showing that after L.R No. 209/405/7(Original No. 450/26/5) (hereinafter referred to as "the original parcel") was transferred and registered in the name of the Plaintiff, the Plaintiff caused the same to be subdivided into two portions namely; L.R No. 209/405/8(the suit property) (Original No. 209/405/7/1) and L.R No. 209/405/9(Original No. 209/405/7/2). The Plaintiff led evidence and produced documents showing that the Plaintiff sought and obtained approval from, among others, the 3rd Defendant (then the City Council of Nairobi) and the 4th Defendant (then the Commissioner of Lands) to subdivide the original parcel. From the evidence on record, the Plaintiff obtained final approval for the subdivision in respect of L.R No. 209/405/9 (Original No. 209/405/7/2), which was referred to as "sub-plot B" and the same was "released" by the 3rd Defendant. From the evidence on record, L.R No. 209/405/8



(Original No. 209/405/7/1) (the suit property), referred to during the subdivision as “L-shaped sub-plot”, did not obtain final approval and as such was not “released” by the 3rd Defendant. In its letter dated 9th September 1972, the City Council of Nairobi stated that the “L-shaped sub-plot will be released when development proposals have been approved by the Council”. This, in my view, explains why no Deed Plan was issued in respect of L.R No. 209/405/8. From the evidence on record, following the subdivision of the original parcel into L.R No. 209/405/8 (Original No. 209/405/7/1) and L.R No. 209/405/9 (Original No. 209/405/7/2) sometime in May 1973, the Plaintiff transferred L.R No. 209/405/9 (Original No. 209/405/7/2) measuring 0.5058 Ha. (1.250 Acres) to Kenya Bowling Centres Limited through an indenture dated 24th July 1973. This transfer left the other portion of the original parcel, L.R No. 209/405/8 (the suit property) owned by the Plaintiff measuring approximately 0.2972 Ha. intact although without a deed plan as the City Council did not give a final approval in respect thereof as it awaited development proposals from the Plaintiff.

131. The Plaintiff led evidence that it neither surrendered the suit property to the City Council of Nairobi nor sold the property to it or anyone else. What is before me is a case of competing titles. In *Munyu Maina v Hiram Gathiha Maina*(supra), the Court of Appeal stated as follows:

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

132. In *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others*[2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain...Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

133. In *Samuel Kamere v Land Registrar Kajiado*, Nairobi Court of Appeal, Civil Appeal No. 28 of 2005, the court while addressing the issue of competing titles stated that:

“It is evident that there are two competing claims over the suit property, and we have said that the plaintiff’s proprietary interest is already established. Since the appellant’s title is under challenge, in order to be considered a bona fide purchaser for value, he must prove that he had acquired a valid and legal title, secondly, that he carried out the necessary due diligence to determine the lawful owner from whom he acquired a legitimate title, and thirdly that he paid valuable consideration for the purchase of the suit property.”



134. In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated as follows:

- “(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.

The Halsbury’s Laws of England, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:

13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

The legal burden of proof is static, but the evidential burden of proof keeps shifting during the trial. The majority of the Supreme Court in *Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v IEBC & 2 Others* [2017] eKLR stated as follows on the evidential burden of proof in paragraphs 132 and 133 of the judgment:

- (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
- (133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach,



then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law...”

135. From the evidence on record, I am persuaded that the Plaintiff has established the root of its title to the suit property. I did not find any merit in the 1st Defendant’s contention that PW1’s evidence was hearsay and, as such, inadmissible. PW1 told the court that he was a land consultant, and he gave his credentials. He told the court that the Plaintiff retained his services with regard to the issues in dispute in this suit. He stated that he carried out investigations and submitted a report to the Plaintiff on 8th March 2011 through the Plaintiff’s previous advocates. PW1’s report was produced in evidence without any objection. I agree with the Plaintiff that it is the veracity of PW1’s evidence rather than its admissibility that can be called into question at this stage. The Defendants did not rebut the evidence of PW1 in any material respect.
136. Once the Plaintiff established the root of its title, the burden shifted to the 1st Defendant to establish that it acquired its title to the suit property lawfully. From the evidence on record, the root of the 1st Defendant’s claim over the suit property can be traced to the letter of allotment dated 23rd February 2007 issued to the 1st Defendant by the City Council of Nairobi (the Council). In the letter, the Council allocated to the 1st Defendant the property described as L.R No. 209/405/8-off Suna Road, Nairobi measuring approximately 0.2974 Ha. on terms and conditions contained in the letter. Following the allotment, the Council issued the 1st Defendant with a lease for the suit property dated 20th August 2007 under the Registration of Titles Act, Chapter 281 Laws of Kenya. The lease was registered on 21st May 2008 as I.R No. 111525/1 under Title Number I.R 111525. The lease was issued based on a certified copy of Deed Plan No. 9300. The Deed Plan was certified on 4th June 2009. There are several versions of this lease on record. It appears from some versions of the lease that the Title Number of the lease was amended and changed to I.R 161133. It is unclear when the amendment was made, as the changes are undated. On 14th August 2014, the 1st Defendant lodged an application with the 4th Defendant for a provisional certificate of title in respect of L.R No. 209/405/8, Title No. I.R 111525. The 1st Defendant claimed that its title deed got lost while it was being processed at Ardhi House in 2008. The 4th Defendant issued a Gazette Notice Number 7759 dated 31st October 2014 regarding the loss and its intention to issue a provisional certificate of title to the 1st Defendant. The Gazette Notice referred to L.R No. 209/405/8, Title No. I.R 111525. The provisional certificate of title issued to the 1st Defendant on 5th March 2015 related to Title No. I.R 161133 registered as I.R 161133/1. This was not the title that was gazetted as lost. There was also the issue of the competency of the 1st Defendant’s application for a provisional certificate of title in 2014, while it had transferred the suit property to Ayan Enterprises Limited, the 2nd Defendant on 21st July 2008.
137. Since the Plaintiff claimed that it was the owner of the suit property and had placed evidence before the court in proof of this fact, the burden was on the 1st and 3rd Defendants to prove that the City Council of Nairobi (the Council) had proprietary interest in the suit property that it could pass to the 1st Defendant through allotment. No evidence was produced by the 1st and 3rd Defendants in proof of the Council’s title to the suit property. In the lease dated 20th August 2007, it is indicated in the preamble that the suit property was granted to the Council by the President of the Republic of Kenya for a term of 99 years from 1st December 1963, which Grant was registered as I.R 19995/1. This preamble is contrary to the 3rd Defendant’s contention at the trial and in its submissions that the suit property was surrendered to it by the Plaintiff in 1973 as a condition for the approval of the subdivision of L.R No. 209/405/7 (the original parcel). It is inconceivable that the Government of Kenya could have granted to the 3rd Defendant (City Council of Nairobi) in 1963 a parcel of land which, according to the 3rd Defendant, was owned by the Plaintiff and was surrendered to the 3rd Defendant in 1973.



138. I am not persuaded that the Council owned the suit property at any time. The evidence placed before the court by the Plaintiff, which traces the origin of the suit property to the 1920s, leaves no doubt that the suit property was at all material time freehold land and that the same had never been owned by the Government. The Government could not therefore have granted the suit property to the Council in 1963 as it did not own the same. In any event, the suit property came into existence in 1973 following the subdivision of L.R No. 209/405/7. It could not, therefore, have been granted to the Council by the Government in 1963. Furthermore, no evidence of the purported Grant by the Government in favour of the Council was produced in court. The Plaintiff also produced evidence of the Council's rates demand upon the Plaintiff in respect of the suit property, which was duly paid. I am therefore not convinced that the Council owned the suit property at any time, let alone on 20th August 2007, when it purportedly leased the property to the 1st Defendant. From the evidence on record, the suit property was not even in existence on 20th August 2007. The suit property was subdivided in 1993 to give rise to L.R No. 209/405/10 and L.R No. 209/405/11. The subdivision was carried out following an approval that was granted by the same Council to the Plaintiff through a letter dated 24th February 1993. The Council, which acknowledged the Plaintiff's ownership of the suit property in 1993 and approved the Plaintiff's application to subdivide the property in 1993, could not claim in 2007 that the property belonged to it.
139. Since the Council did not have any proprietary interest in the suit property, it could not pass any title in the property to the 1st Defendant. The 1st Defendant did not, therefore, obtain a valid title to the suit property from the Council. The purported lease held by the 1st Defendant and the provisional certificate of title were all nullities the same having been obtained irregularly, illegally and fraudulently.
140. Given the foregoing, it is my finding that the Plaintiff is the lawful owner of the suit property.

Whether the 1st Defendant acquired the suit property fraudulently and illegally.

141. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another*[2000]eKLR, the court (Tunoi JA) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

142. In *Railal Gordhanbhai Patel v Lalji Makanji* [1957] E.A 314, the court stated as follows at page 317:

“Allegation of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

143. I have already found that the 1st Defendant acquired the suit property illegally in that the Council, which purported to allocate the property to the 1st Defendant, did not own the same. I am also persuaded from the evidence on record that the purported lease between the Council and the 1st Defendant, the registration thereof and the alleged loss of the title and subsequent issuance of a purported provisional certificate of title were fraudulent schemes to deprive the Plaintiff of the suit property. The purported lease had multiple Title Numbers, some of which referred to parcels of land in Karen. The lease was also purported to have been issued on the basis of a certified copy of Deed Plan No. 93000, certified on 4th June 2009. How can a lease dated 20th August 2007 be issued on the



strength of a Deed Plan certified on 4th June 2009? Furthermore, no evidence was led by the 1st and 3rd Defendants as to what happened to the original Deed Plan for the suit property dated 22nd December 2006. As mentioned earlier in the judgment, there is evidence that the suit property was transferred by the 1st Defendant to the 2nd Defendant on 21st July 2008. How was it possible for the 1st Defendant to apply for a provisional certificate of title in 2014 when it was not the owner of the suit property? As observed earlier, the provisional certificate of title issued to the 1st Defendant on 5th March 2015 was also in respect of Title No. I.R. 161133, whose loss was not gazetted. The provisional certificate of title was also issued on the ground that the original lease was mutilated rather than having been lost. I have also noted that although the letter of allotment had put the stand premium payable by the 1st Defendant at Kshs. 400,000/-, the lease talked of a consideration of Kshs. 100,000/-. There was no evidence that the 1st Defendant paid the said stand premium of Kshs. 400,000/- or the purported consideration of Kshs. 100,000/-. All these irregularities in my view are sufficient evidence of fraud. It is therefore my finding that the 1st Defendant acquired the suit property illegally and fraudulently. The 1st Defendant had no valid title in the suit property that it could transfer to the 2nd Defendant, which similarly did not acquire any valid interest in the suit property.

Whether the Plaintiff is entitled to the reliefs sought against the Defendants

144. The Plaintiff has sought several reliefs, which I have set out earlier in the judgment. From my findings above, the Plaintiff has proved its case against the Defendants. Among the reliefs sought are orders of certiorari and mandamus. The 1st and 3rd Defendants contended that these reliefs cannot be granted in a normal civil suit. They contended that the Plaintiff should have sought these orders in an application for judicial review after obtaining leave. As correctly submitted by the Plaintiff in response, the parties had been to the Judicial Review Division of the High Court where some of the orders sought herein were sought by the Plaintiff. The High Court directed that this court is the best forum for determining the dispute. This court has jurisdiction to issue the orders sought by the Plaintiff. Whether it will issue the orders as sought or will frame appropriate orders would be for the court to determine. The court has made a finding that the Plaintiff is the lawful owner of the suit property. The Plaintiff is entitled to a permanent injunction to restrain the 1st and 2nd Defendants from interfering with its quiet possession and enjoyment of the property. The Plaintiff is also entitled to a declaration that the purported title held by the 3rd Defendant over the suit property is null and void together with all the consequential processes founded thereon. The Plaintiff has also made a case for the cancellation of the illegal and fraudulent title. The Plaintiff has also made a case for a declaration that it is the owner of the suit property as subdivided and an order for the 3rd and 4th Defendants to reconstruct their records to give effect to the Plaintiff's interest in the suit property. I have, however, found the Plaintiff's claim for damages not proved. According to the evidence on record, the Plaintiff learnt of the 1st Defendant's purported interest in the suit property in 2010. The Plaintiff, which claimed that it had all along been in possession of the suit property, did not convince the court that the Defendants had prevented it from developing the suit property since the property came into existence in 1973. I find the award of damages proposed by the Plaintiff in its submissions not supported by any evidence.

Who is liable for the costs of this suit?

145. Section 27 of the *Civil Procedure Act* provides that costs are at the discretion of the court. As a general rule, costs follow the event unless the court for good reason orders otherwise. In Halbury's Laws of England, 4th Edition (Re-issue), [2010] Vol. 10, para 16 the authors have stated as follows:

“The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of



the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.

146. The Plaintiff has proved its case against the Defendants. No reason has been advanced by the Defendants why the Plaintiff should be denied its costs. I have noted, however, that the 2nd Defendant did not defend the suit while the 4th Defendant conceded the Plaintiff's claim in its statement of defence and submissions. I will therefore award the Plaintiff the costs of the suit to be paid by the 1st and 3rd Defendants only.

Conclusion

147. In conclusion, I hereby enter judgment for the Plaintiff against the Defendants for;

1. A permanent injunction restraining the 1st, 2nd and 3rd Defendants either by themselves, or through their advocates, agents, holders of their Powers of Attorney or whomsoever from dealing in any way, disposing, alienating, advertising for sale, charging, assigning interests in, mortgaging, transferring or in any other way dealing and/or interfering with or claiming under their titles or names or otherwise, entering upon, remaining upon or dealing in any other manner howsoever with all that property known as L.R No. 209/405/8 or the two subdivided portions or intended to be subdivided portions thereof being L.R No. 209/405/10 and L.R No. 209/405/11.
2. A declaration that the Grant (s) purported to be I.R Number 111525/I.R Number 161133/I.R Number 19995 constituting the 3rd Defendant/City Council of Nairobi as the lessee of all that property known as L.R No. 209/405/8 being the piece of land situated at Adams Arcade, Nairobi within the Republic of Kenya containing One Decimal Two Nine Seven Four (0.2974) of a hectare or thereabouts described in the said Grant as having been delineated on Deed Plan Number 93000, the Lease dated 20th August 2007 purportedly made between the 1st Defendant and the 3rd Defendant in respect of L.R No. 209/405/8, any Certificate of Lease/ Title issued pursuant thereto were fraudulently obtained and are illegal, null and void.
3. A declaration that all the processes consequential and founded on the purported Grant(s) registered in favour of the 3rd Defendant are illegal, null and void.
4. An order directed at the 4th Defendant to cancel the Grant(s) in the Nairobi Land registry being I.R Number 111525/I.R Number 161133/I.R Number 19995 issued with respect to all that property known as L.R No. 209/405/8 being the piece of land situate at Adams Arcade, Nairobi within the Republic of Kenya containing One Decimal Two Nine Seven Four (0.2974) of a hectare or thereabouts described in the said Grant(s) as having been delineated on Deed Plan Number 93000 together with all and any consequent transactions.
5. An order cancelling Gazette Notice Number 7759 published in the Kenya Gazette on 31st October 2014 to the extent that it purported to hold the 1st Defendant as the registered owner of all that property known as L.R No. 209/405/8 and proceeded to sanction the issuance of a Provisional Certificate of Title to the 1st Defendant.
6. An order cancelling the Provisional Certificate of Title No. I.R 161133 dated 5th March 2015 issued to the 1st Defendant by the 4th Defendant in respect of the property known as L.R No. 209/405/8.



7. An order directed at the 3rd and 4th Defendants, and the Director of Surveys to reconstruct such records as may be necessary to give effect to the Plaintiff's proprietary interest as the owner of all that property known as L.R Number 209/405/8 as subdivided into all those properties known as L.R No. 209/405/10 and L.R No. 209/405/11.
8. A declaration that the Plaintiff is the lawful owner of all that property known as L.R No. 209/405/8 as subdivided into all those properties known as L.R No. 209/405/10 and L.R No. 209/405/11.
9. Costs of the suit to be paid by the 1st and 3rd Defendants.

DELIVERED AND SIGNED AT KISUMU ON THIS 24TH DAY OF JUNE 2025.

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. S. Luseno for the Plaintiff

Dr. Khaminwa and Mr. Gachie for the 1st Defendant

N/A for the 2nd and 4th Defendants

Ms. Oduru for the 3rd Defendant

Ms. J. Omondi-Court Assistant

