

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO E038 OF 2020**

**MOUNT PLEASANT LIMITED .....  
PLAINTIFF**

**VERSUS**

**JAMES NJUGUNA MWANGI ..... 1<sup>ST</sup>  
DEFENDANT**

**JANE WANGUI MUNDIA ..... 2<sup>ND</sup>  
DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 3<sup>RD</sup>  
DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 4<sup>TH</sup>  
DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff asserts that it is the legitimate owner of the parcels of land originally known as L.R. 214/20/1/1 and L.R. 214/20/2, later amalgamated into L.R. 204/832, having purchased them in 2006 from Arthur and Margaret Wairimu Magugu. It is the Plaintiff's case that it took possession of the properties sometime after purchase and enjoyed possession until 2010 when multiple claims began to be made on the parcels.

2. It is alleged by the Plaintiff's Director that amongst the parties laying claim to their parcels of land are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who in 2013 and later on in 2020 invaded the said parcels and evicted their guards who were on the premises. On the other hand, the aforesaid 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim to have purchased the property from the late President of this country, H.E Daniel arap Moi.
3. It is their case that upon completion of the requisite payments, the former President granted them vacant possession of the suit property, and that upon perfection of the sale, they lodged an application for amalgamation of the two parcels which was duly undertaken, and the two parcels were amalgamated to form L.R No 214/832.

#### **The Plaintiff's case**

4. Vide an Amended Plaint dated 1<sup>st</sup> November, 2022, the Plaintiff seeks the following reliefs as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants:
  - i. ***A declaration that the Plaintiff is the sole registered legal owner of Land Reference No 214/20/2(registered at the Government Lands Registry at Nairobi in Volume N. 52 Folio 66 File 1555) and Land Reference No 214/20/1/1 (registered as aforesaid in Volume N.51 Folio 60 File 6050) having purchased the same from the late Mr. Arthur Kinyanjui Magugu and Mrs. Margaret Wairimu Magugu in 2007.***

- ii. In the alternative to (i) above, a declaration that Mr. Arthur Kinyanjui Magugu and Mrs. Margaret Wairimu Magugu acquired indefeasible title from H.E the late Daniel Toroitich Arap Moi by way of adverse possession which title was thereafter transferred to the Plaintiff who acquired a good title to the properties.**
- iii. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title over Land Reference No 214/20/2 (registered at the Government Lands Registry at Nairobi in Volume N. 52 Folio 66 File 1555) and Land Reference No 214/20/1/1 (registered as aforesaid in Volume N.51 Folio 60 File 6050) is null and void.**
- iv. A declaration that the purported amalgamation of the properties into Land Reference No 214/832 is null and void.**
- v. A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves or acting through their agents, servants and/or employees from accessing, entering onto, remaining on, subdividing, leasing, transferring, charging or dealing in any way with the properties.**
- vi. A mandatory injunction directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to immediately vacate the properties**

**and/or surrender vacant possession of the properties to the Plaintiff.**

- vii. An order for police assistance in removing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from the properties as well as to deter future attempts by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from interfering with the Plaintiff's quiet possession over the properties.**
  - viii. An order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants be liable to pay mesne profits of Kshs 500,000/= per month calculated from the date of illegal occupation till date for illegal possession and enjoyment of the Plaintiff's properties.**
  - ix. General damages for trespass and illegal eviction.**
  - x. The costs of this suit together with interest thereon from the date of judgment until payment in full; and**
  - xi. Such other and further relief that this Honourable Court may deem just and fit to grant.**
- 5. As against the 3<sup>rd</sup> Defendant, the Plaintiff seeks:**
- i. A declaration that the Plaintiff is the sole registered legal owner of Land Reference No 214/20/2 (registered at the Government Lands Registry at Nairobi in Volume N. 52 Folio 66 File 1555) and Land Reference No 214/20/1/1**

***(registered as aforesaid in Volume N.51 Folio 60 File 6050).***

- ii. A mandatory injunction directing the 3<sup>rd</sup> Defendant to rectify the Land Register for Land Reference No 214/20/2 and Land Reference No 214/20/1/1 within 7 days from the date of the judgment to reflect the Plaintiff as the registered owner of the suit properties.***
- iii. A mandatory injunction directing the 3<sup>rd</sup> Defendant to call and expunge the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' titles and conveyance from the Land Register within 7 days from the date of the judgment in respect of Land Reference No 214/20/2 and Land Reference No 214/20/1/1.***
- iv. A mandatory injunction that directed the 3<sup>rd</sup> Defendant within 7 days from the date of the Judgment to nullify the amalgamation of Land Reference No 214/20/2 and Land Reference No 214/20/1/1 into Land Reference No 214/832.***
- v. The costs of this suit together with interests thereon from the date judgment until payment in full; and***
- vi. Such other and further reliefs that this Honourable Court may deem just and fit to grant.***

6. The Plaintiff averred in the Plaint that it is the legal and registered owner of all that parcel of land known as Land Reference No 214/20/2 comprising of 3 acres and 37,030 square feet (*registered at the Government Lands Registry at Nairobi in Volume N.52 Folio 66/35 File 1555*) and Land Reference No 214/20/1/1 comprising of 0.733 acres (*registered as aforesaid in Volume N.51 Folio 60/31 File 6050*) bordering one another and situate in Muthaiga area within Nairobi County(hereinafter the *suit properties*).
7. Giving a historical background of the properties, the Plaintiff stated in the Plaint that the same were originally allocated by the Crown to James Archibald Morrison and were thereafter acquired by various parties on diverse dates and that pursuant to an Indenture of Conveyance dated 20<sup>th</sup> September, 1915 (*registered in the then Crown Lands Registry in Volume N VIII Folio 342/1*), James Archibald Morrison transferred L.R 214/20/2 to Donald Farquharson Seth Smith.
8. Mr. Morrison, vide an Indenture of Conveyance dated 10<sup>th</sup> September, 1919, transferred the remaining property L.R 204/20/1 to William Warneford Cresswell who later sub-divided the same and transferred the resulting sub-division, L.R 214/20/1/1 to Donald Farquharson Seth Smith vide an Indenture of Conveyance dated the 10<sup>th</sup> January, 1923(*registered in the Government Lands Registry in Volume N. 7 Folio 466/1*).

- 9.** Accordingly, as at 1923, the suit properties, L.R 214/20/2 and 214/20/1/1 were owned by Donald Farquharson Seth Smith. It was averred that by way of an Indenture of Conveyance dated 19<sup>th</sup> September, 1927, he transferred the property to Eileen Susanha Johanna Elizabeth Leslie Melville and the same was registered in the Government Lands Registry at Nairobi Volume N.8 Folio 342/8 File 1555 and Volume N.7 Folios 466/4 File 6050.
- 10.** Eileen Susanha died on the 20<sup>th</sup> December, 1945, leaving behind a will dated the 26<sup>th</sup> October, 1929 and two codicils both dated the 10<sup>th</sup> July, 1943. It was averred that in her will, she bequeathed the properties to Ferdinard William Cavendish Bentinck (K.B.E C.M.G Eighth Duke of Portland) (*hereinafter referred to as "the Beneficiary"*) who was also appointed executor of the will and that by a grant of probate of the will and two codicils was issued to the beneficiary by the then His Majesty's Supreme Court on 9<sup>th</sup> May, 1946 in Probate and Administration Cause No 24 of 1946.
- 11.** By way of an Indenture of Conveyance dated the 12<sup>th</sup> September, 1980 made between the beneficiary and H.E the late President Daniel Toroitich Arap Moi, the beneficiary conveyed the properties to the former President. This transaction was registered in the Government Lands Registry at Nairobi in Volume N.51 Folio 60/24 File 6050 and Volume N.8 Folio 421/28 File 1555.

- 12.** According to the Plaintiff, following his acquisition of the properties, the former President mortgaged the same to Standard Bank Limited to secure an overdraft facility of Kshs 3,100,000 and that the mortgage dated 12<sup>th</sup> September, 1980 was registered in the Government Lands Registry at Nairobi in Volume N.51 Folio 60/25 File 6050 and Volume N.8 Folio 421/29 File 1555.
- 13.** It was averred that Standard Bank Limited re-conveyed the properties to the former President Moi by a re-conveyance dated 1<sup>st</sup> April, 1982 which was registered in the Government Lands Registry at Nairobi in Volume N.51 Folio 60/26 File 6050 and Volume N.52 Folio 66/30 File 1555 and that on the same date, by an Indenture of Conveyance, the former President Moi conveyed the properties to the late Mr. Arthur Kinyanjui Magugu and Mrs. Margaret Wairimu Magugu in consideration of Kshs 3,000,000 which was registered in Volume N.51 Folio 60/27 File 6050 and Volume N.52 Folio 66/31 Folio 1555.
- 14.** It is the Plaintiff's case that the Magugu's, through a mortgage dated 15<sup>th</sup> July, 1987 and a further mortgage dated 17<sup>th</sup> June, 1988, charged the properties to National Bank of Kenya to secure a repayment of a financial facility of Kshs 8,000,000 and Kshs 2,500,000 respectively advanced by the bank to a third party known as MDC Limited and that the mortgage was registered in Volume N.51 Folio 60/28 File 6050 and Volume N.52 Folio 66/32 Folio 1555 while the

further mortgage was registered in the Government Lands Registry at Nairobi in Volume N.51 Folio 60/29 File 6050 and Volume N.52 Folio 66/33 Folio 1555.

15. It contended in the Plaintiff that MDC Limited, the borrower of the facility defaulted in repayment of the facilities causing the bank to commence the exercise of its statutory power of sale in recovering the sums due and owing thereunder and that this led to the Magugu's filing **Nairobi HCCC No 1022 of 1997: MDC Holdings Limited & 2 Others vs National Bank of Kenya Limited** seeking *inter-alia* to restrain the bank from exercising its statutory power of sale.
16. According to the Plaintiff, the suit was compromised by way of a consent recorded in court on the 16<sup>th</sup> October, 2002 and that it was agreed that the properties would be sold by way of private treaty on such terms to be negotiated and agreed by the parties.
17. With a view to acquiring the properties, it was noted, the Plaintiff instructed the firm of Centenary Valuers and Property Consultants to carry out due diligence and valuation; that the valuers found that the Magugu's were indeed the registered owners of the suit properties; that they thereafter begun negotiations culminating in an agreement for sale dated the 21<sup>st</sup> July, 2006 between the Plaintiff and the Magugu's and that the agreed upon purchase was Kshs 130,000,000.

- 18.** It was contended in the Plaintiff that the transaction transferring the properties from the Magugu's to the Plaintiff was handled by Messrs Chege Wainaina & Company Advocates and Messrs Mohamed Madhani & Co Advocates respectively; that the transaction took place between July, 2006 and September, 2007; that after the execution of the agreement, the Magugu's and the bank renegotiated on the sum payable to the bank to redeem the properties and agreed on an enhanced final figure of Kshs 90,000,000 and that the Plaintiff paid vide two bankers' cheques of Kshs 75,000,000 and Kshs 15,000,000 dated the 28<sup>th</sup> May, 2007 and 13<sup>th</sup> February, 2007 respectively.
- 19.** By virtue of a reconveyance dated the 17<sup>th</sup> September, 2007, it was argued, the properties were discharged and re-conveyed to the Magugu's to facilitate the concurrent and onward transfer to the Plaintiff and that the deed of reconveyance was registered in the Government Lands Registry at Nairobi in Volume N.51 Folio 60/30 File 6050 and Volume N.52 Folio 66/34 File 1555.
- 20.** The Plaintiff averred that simultaneously with the registration of the reconveyance of mortgage, a conveyance dated 17<sup>th</sup> September, 2007 made between the Plaintiff and the Magugu's was duly registered at the Government Lands Registry at Nairobi on the 3<sup>rd</sup> October, 2007 in Volume N.51 Folio 60/31 File 6050 and Volume N.52 Folio 66/35 File 1555.

- 21.** By virtue of the registration of the aforementioned conveyance on the 3<sup>rd</sup> October, 2007 and upon payment of the purchase price, it stated that the Plaintiff became the registered, legal and rightful owner and proprietor of the properties and that the Plaintiff also paid stamp duty assessed at Kshs 5, 205, 270/=.
- 22.** As the registered owner of the property, it was urged, the Plaintiff applied to the now defunct Commissioner of Lands for the amalgamation of the properties into a singular parcel and thereafter sub-division for purposes of development and the Director of Surveys, on or about the 6<sup>th</sup> December, 2007, informed the Commissioner of Lands that L.R 214/20/2 had previously been approved for sub-division into two parcels referenced as L.R 214/20/2/1 and 214/20/2/2 vide F/R 16/323.
- 23.** At its request, it was averred, the then Commissioner of Lands wrote to the Director of Surveys on the 10<sup>th</sup> July, 2008 informing him that the Plaintiff wished to have the earlier approved sub-divisions of L.R 214/20/2 into L.R 214/20/2/1 and 214/20/2/2, vide F/R 16/323 cancelled and requested the Director of Surveys to approve the newly proposed amalgamation of Land Reference Numbers 214/20/1/1 and 214/20/2 into one parcel of land and thereafter to subsequently sub-divide the amalgamated property as proposed by the Plaintiff.
- 24.** According to the Plaintiff, the process did not materialize, and the properties remained as originally registered in 1923

being L.R 214/20/2 registered in Volume N.52 Folio 66/35 File 1555 and L.R 214/20/1/1 registered in Volume N.51 Folio 60/31 File 6050.

- 25.** It is the Plaintiff's case that in 2010, unknown persons visited the suit parcels expressing interest in purchasing them notwithstanding the fact that it had never offered it for sale; that concerned, it instructed its advocates, Messrs. Mohamed Madhani & Company Advocates, who by a letter dated 28<sup>th</sup> June, 2010, requested the 3<sup>rd</sup> Defendant to register a general caveat over the properties prohibiting any dealings without its express consent.
- 26.** It was pleaded in the Plaint by the Plaintiff that on 1<sup>st</sup> July, 2010, the firm of Messrs Ochieng, Onyango, Kibet & Ohaga Advocates addressed a letter to its then counsel, alleging that it had unlawfully encroached upon L.R No. 214/20/2/1, said to belong to former President Moi, by constructing a perimeter wall around it and thereby denying him access. This claim was predicated on the assumption that L.R No. 214/20/2/1 existed.
- 27.** It was averred by the Plaintiff that on 30<sup>th</sup> March, 2013, its guards were arrested and detained at Muthaiga Police Station on fresh allegations of trespass; that they were later released on bail on 1<sup>st</sup> April, 2013 and were to appear in court on the 5<sup>th</sup> April, 2013 and that it emerged that the complaints had been made by one Mr. Samuel Kimely Birech on the strength of two certificates of postal search showing

that the late President was the alleged owner of the properties.

- 28.** Upon investigations, the police discovered that the two certificates by Mr. Birech were forgeries and that Mr. Birech was arrested and charged in Milimani Criminal Case No 949 of 2013: Republic vs John Kimely Birech with four counts of forging and uttering a document of title to land contrary to **Section 350(1)** and uttering a false statement contrary to **Section 353(1)** both of the **Penal Code**.
- 29.** The Plaintiff stated in the Plaint that it instituted **ELC Case No. 1412 of 2013, Mount Pleasant Limited v. John Kimely Birech**, seeking injunctive orders to restrain Mr. Birech from interfering with its quiet possession of the suit properties; that in his Defence, Mr. Birech stated that he was no longer in possession of the properties and had no continuing interest in them and that consequently, it withdrew the suit.
- 30.** The Plaintiff stated that in 2015, it conducted official searches on the suit properties, but only results for L.R. No. 214/20/2 were available; that he search for L.R. No. 214/20/1/1 could not be obtained as the 3<sup>rd</sup> Defendant indicated that the relevant file was missing and that between 18<sup>th</sup> December 2015, and 19<sup>th</sup> April 2016, it pursued reconstruction of the missing file, after which a search was successfully carried out and that a certificate of postal search

issued on 13<sup>th</sup> July 2016 confirmed that it was the registered owner of the property, and a subsequent search in 2017 reaffirmed the same position.

- 31.** However, it was averred, it later discovered that, unbeknownst to it, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had fraudulently caused the transfer of the properties into their own names and that it became aware of these fraudulent dealings when its security personnel were handed, by unknown persons, a certificate of postal search purporting to show that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were now the registered proprietors of the suit properties.
- 32.** It averred in the Plaint by the Plaintiff that it established that the transfer to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was allegedly vide a conveyance dated the 20<sup>th</sup> February, 2013 between them and the former President H.E Daniel Moi at a consideration of Kshs 320,600,000 which was well below the then prevailing market price for the properties and that the alleged ownership of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is inconceivable, given that the late President's title to the suit properties was fully extinguished in 1982 when they were conveyed to the Magugu family.
- 33.** According to the Plaintiff, all registered transactions relating to the properties between 1982 and 2007 inexplicably disappeared from the records and that it is implausible that a sitting Head of State, with significant control over government affairs, could have been unaware that his own

properties were allegedly irregularly taken over by his then Minister for Finance, Mr. Magugu.

34. Such a transfer, the Plaintiff argues, could not have occurred without the former President's involvement, noting that both the reconveyance and conveyance instruments were executed and registered on the same date, consistent with the normal procedure when charged property is sold.
35. The Plaintiff further argued that it is implausible that the National Bank of Kenya, at the time a government-owned financial institution, would have accepted the suit properties as security for loans advanced to the Magugu family if there had been any doubt that the properties had been acquired with the express knowledge and approval of the former President.
36. It was contended that the 1<sup>st</sup> Defendant's company, Muthaiga Luxury Homes Limited, instituted **Nairobi ELC Case No. 1040 of 2014** against the former President and other parties, a suit that similarly revolved around a contested sale and ownership of L.R No. 12422/19 (I.R 36415), also located in Muthaiga; that the aforesaid impugned transaction, like the one in the present case, occurred around the same period, involved the same parties, and was facilitated by the same Advocates and that the former President has since denied ever transferring L.R No. 12422/19 (I.R 36415) to the 1<sup>st</sup> Defendant's company or instructing Mr. Omwanza Ombati Advocate to act for him in the alleged transfer.

- 37.** According to the Plaintiff, it is revealing that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants only attempted to take possession of the properties, albeit unlawfully, immediately following the demise of the former President. It maintains that any proprietary interest of the former President was extinguished upon the transfer and registration of the Magugu family as proprietors in 1982, thereby rendering the Defendants' claim untenable.
- 38.** Alternatively, it was pleaded, the late President's interest was also extinguished by operation of **Sections 7 and 38** of the **Limitation of Actions Act**; that the Magugu family took actual physical possession of the properties with the full knowledge of the former President and that indeed, vide a letter dated 1<sup>st</sup> July, 2010, the former President through his Counsel acknowledged having sold the properties to the Magugu family.
- 39.** It was asserted by the Plaintiff that upon close scrutiny of the register relating to the titles held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, it emerged that the properties had allegedly been surrendered to the 3<sup>rd</sup> Defendant and subsequently amalgamated into a single parcel known as L.R No. 214/832; that this development is astonishing, as it has never surrendered the titles to the properties, and that it continues to hold the original conveyances, and has no intention whatsoever of relinquishing its proprietary interest.

- 40.** Moreover, it was averred, there are no documents on record evidencing the surrender or amalgamation of the titles, as would ordinarily be expected in such circumstances; that the land register was interfered with to erase all traces of successive ownership after the late former President, despite there being clear proof of subsequent proprietors and that the signature of the Registrar appearing on the impugned entries was irregularly procured, not being accompanied by the Registrar's name and number, contrary to established practice.
- 41.** The Plaintiff asserted that notwithstanding the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' alleged registration as proprietors of the suit properties in 2013, it has continued to enjoy possession thereof, save for sporadic interferences from third parties and that it has consistently taken deliberate steps to exercise its ownership rights, including erecting a fence around the properties, engaging a caretaker, and paying annual rates to the County Government.
- 42.** As regards the 3<sup>rd</sup> Defendant, it is asserted that it was negligent in failing to safeguard and secure the land records, despite having been expressly asked to do so on 16<sup>th</sup> July 2019 and that this inaction, according to the Plaintiff, emboldened trespassers and led to a series of unlawful intrusions upon the suit properties in 2020.
- 43.** The Plaintiff stated that in a bid to ascertain the current market value of the properties, it instructed two independent

valuers; That Redfearn Valuers Limited, by a report dated 26<sup>th</sup> May 2022, valued the properties at Kshs. 1,000,000,000; that Tysons Limited, by a report dated 10<sup>th</sup> June 2022, placed their value at Kshs. 900,000,000 and that considering the initial purchase price of Kshs. 130,000,000, the properties represent a potential profit margin of up to Kshs. 1,000,000,000/= in the event of resale.

- 44.** Further, the Plaintiff asserts, the rental income within the Muthaiga area where the properties are situated, averages Kshs. 500,000 per month and that it has been unjustly deprived of the use and benefit of its property and is entitled to mesne profits assessed at Kshs. 500,000/= per month.

**The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case**

- 45.** The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed an Amended Defence and Counterclaim on 25<sup>th</sup> January 2023. They denied the allegations in the Amended Plaintiff, asserting instead that they purchased the suit properties in 2012 pursuant to a sale agreement dated 19<sup>th</sup> December 2012.
- 46.** They averred that all requisite payments were made through their advocates, beginning with a deposit of Kshs. 32,060,000; that they duly paid the applicable stamp duty of Kshs. 12,824,040 and, upon registration of the conveyance, settled the outstanding balance of the purchase price amounting to Kshs. 288,540,000.

- 47.** It is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case that upon completion of the transaction and the handover of possession, Ms. Mary Kiarie, their Counsel, together with the 1<sup>st</sup> Defendant, visited the late President to formally, albeit informally, confirm that the sale of the properties had been successfully concluded and that they are perplexed by the Plaintiff's contradictory position in simultaneously pleading adverse possession while also asserting that the Magugu's purchased the suit properties from the former President. They maintain that the Magugu's lacked any documentary evidence of ownership which could have enabled them to transfer the properties to the Plaintiff.
- 48.** It is the Defendants' case that the amalgamation of the two parcels of land, by the 3<sup>rd</sup> Defendant, L.R. No. 214/20/2 and L.R. No. 214/20/1/1, was undertaken at their request as the lawful proprietors and that they initiated, lodged, and financed the application for amalgamation, after which they received an approval notification from the Physical Planning Office dated 28<sup>th</sup> March 2013, and subsequently a deed plan No. 360673 from the Director of Survey, with the resultant amalgamated parcel designated as L.R. No. 214/832.
- 49.** The Defendants contended that upon purchasing the suit properties, they immediately instituted strict security measures, including engaging the services of a security firm, Magnet Pin Point Limited, to guard the premises; that their employees subsequently reported that one Peter had laid

claim to ownership of the property, and that upon investigations, it was established that he was acting as an agent/ employee of Amin Manji, a director of the Plaintiff.

**50.** In view of the foregoing, it was averred, the OCS Muthaiga Police Station directed both parties to vacate the premises and to surrender their ownership documents for purposes of investigations.

**51.** The Defendants state that the Plaintiff has unlawfully trespassed over the suit properties and instructed its agents to do the same and that the sale agreements and valuations relied upon by the Plaintiff are irrelevant in the circumstances, noting that the high value of the property has inevitably attracted competing claims of ownership.

**52.** It is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' position that the Plaintiff should be held liable for presenting forged documents purporting to relate to the suit properties and that the Plaintiff's attempts to sell or develop land that does not belong to it are illegal, and appropriate action ought to be taken against it. Accordingly, the Defendants seek, through their Counterclaim for the following orders:

- i. A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are the absolute legal owners of the property known as L.R 214/832.***

- ii. A declaration that the alleged sale and transfer of the said Plot no L.R 214/832 to the Plaintiff is unlawful and fraudulent.*
- iii. An order directing the Registrar of Lands, Nairobi to cancel the Plaintiff's certificate of lease.*
- iv. A permanent injunction restraining the Plaintiff from entering into or in any way interfering with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants lawful use of land Plot L.R 214/832.*
- v. General damages and interests thereon.*

**The 3<sup>rd</sup> Defendant's case**

- 53.** The 3<sup>rd</sup> Defendant filed its Defence on 14<sup>th</sup> September 2021, stating at the outset that, according to its records, the land registers for Volume N8 Folio 342 File 1555 and Volume N7 Folio 466 File 6050, relating to L.R. No. 214/20/2 and L.R. No. 214/20/1/1 respectively, are missing and cannot be traced.
- 54.** Nonetheless, it was averred, the parcel (deed) files indicate that L.R. No. 214/20/2 measures approximately 3.3730 acres and was first registered in Volume N8 Folio 342 File 1555 pursuant to an Indenture of Conveyance dated 19<sup>th</sup> September 1927, while L.R. No. 214/20/1/1 measures approximately 0.733 acres and was first registered in Volume

N7 Folio 466 File 6050 under an Indenture of Conveyance dated 10<sup>th</sup> January 1923.

- 55.** The two parcels were initially registered in the names of James Archibald Morrison and William Warneford Cresswell, respectively; that thereafter, the properties changed hands on several occasions between 1924 and 1980 and that ultimately, by an Indenture of Conveyance dated 12<sup>th</sup> September 1980, executed between Ferdinand William Cavendish Bentinck and H.E. Daniel Toroitich Arap Moi, the two parcels were transferred to late President at a consideration of Kshs. 3,000,000 and the conveyance was duly registered on 24<sup>th</sup> December 1980 in Volume N51 Folio 60/25 File 6050 and Volume N8 Folio 421/28 File 1555.
- 56.** It was stated by the 3<sup>rd</sup> Defendant that on 12<sup>th</sup> September, 1980, the late President mortgaged the properties to Standard Bank Limited at a consideration of Kshs 3,100,000; that the said mortgage was registered on 24<sup>th</sup> December, 1980 in Volume N51 Folio 60/25 File 6050 and Volume N8 Folio 421 File 1555 and that the mortgage was re-conveyed vide re-conveyance dated 1<sup>st</sup> April, 1982 and registered on 2<sup>nd</sup> April, 1982 in Volume N52 Folio 66/30 File 1555 and Volume N51 Folio 60/26 File 6050 respectively.
- 57.** As per a copy of the conveyance dated 1<sup>st</sup> April, 1982, between the late President Moi and Arthur and Margaret Wairimu Magugu, it was averred, the two parcels, L.R 214/20/2 and L.R 214/20/1/1 were conveyed at a

consideration of Kshs 3,000,000 and the conveyance was registered in Volume N52 Folio 66/31 File 1555 and Volume N51 Folio 60/27 File 6050.

- 58.** It was averred by the 3<sup>rd</sup> Defendant that pursuant to a mortgage dated 15<sup>th</sup> July, 1987 and a further mortgage dated 17<sup>th</sup> June, 1988, the two parcels were mortgaged to National Bank of Kenya Limited at a consideration of Kshs 8,000,000 and Kshs 2,500,000 securing an aggregate maximum amount of Kshs 10,500,000 and this was registered in Volume N51 Folio 60/29 File 6050 and Volume N52 Folio 66/33 File 1555.
- 59.** In response to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim, the 3<sup>rd</sup> Defendant stated that its records reflect a conveyance dated 20<sup>th</sup> February 2013 between the late H.E. Daniel Toroitich Arap Moi, as the vendor and James Njuguna Mwangi together with Jane Wangui Mundia as purchasers and that the said conveyance purports to have transferred the properties to the two at a consideration of Kshs. 320,600,000 and to have been registered in Volume N104 Folio 208/25 File 6090 and Volume N104 Folio 208/29 File 1555.
- 60.** The 3<sup>rd</sup> Defendant, however, observed that these entries are inconsistent with earlier entries in the records relating to the further mortgage. Specifically, that as at 14<sup>th</sup> July 1988, the further mortgage is shown to have been registered in Volume N52 Folio 66/33 File 1555 in respect of L.R. No. 214/20/2, whereas the conveyance to James Njuguna Mwangi and Jane

Wangui Mundia purports to have been registered in Volume N104 Folio 208/20 File 1555.

- 61.** A further inconsistency, according to the 3<sup>rd</sup> Defendant, was noted in respect of the file number cited for L.R. No. 214/20/1/1, which was given as File 6090. According to the 3<sup>rd</sup> Defendant's records, File 6090 relates to L.R. No. 2/300, which is registered in the names of Rosemary Omwomo and Michael N. Ogolla.
- 62.** The 3<sup>rd</sup> Defendant states that the entries purporting to convey the properties to James Njuguna Mwangi and Jane Wangui Mundia as contained in Volume N104 Folio 207/25 and N104 Folio 209/29 were not signed rendering them invalid and that there are no documents in the parcel file in support of the surrender of the two properties in consideration for amalgamation into L.R 214/832.
- 63.** The 3<sup>rd</sup> Defendant noted that as per their records, a lease in respect of L.R. No. 214/823 was subsequently prepared pursuant to the purported amalgamation in favour of James Njuguna Mwangi and Jane Wangui Mundia and that the said lease was registered on 16<sup>th</sup> May 2019, whereupon a Certificate of Title, I.R. No. 207719, was issued on the same date.
- 64.** It is the 3<sup>rd</sup> Defendant's case that a perusal of the conveyance dated 20<sup>th</sup> February 2012, purportedly executed between H.E. Daniel Toroitich Arap Moi and James Njuguna Mwangi

together with Jane Wangui Mundia, and allegedly endorsed for stamp duty purposes by N.D. Nyambaso, revealed that the same was not authentic and that the matter is currently under investigation by the Directorate of Criminal Investigations.

- 65.** According to the 3<sup>rd</sup> Defendant, the power to cancel a title and to order rectification of the register is vested exclusively in the court and that the Plaintiff's suit should be allowed only to the extent admitted. The 4<sup>th</sup> Defendant did not participate in the proceedings.

### **Hearing and Evidence**

- 66.** The hearing commenced on 3<sup>rd</sup> March 2023 with PW1, Anverali Mohamed Karmeli Amershi, a director of the Plaintiff testifying. He adopted his witness statements dated 27<sup>th</sup> July 2020, and 1<sup>st</sup> November 2022, as his evidence-in-chief and produced documents numbered 10-48, save for document number 18 (a letter dated 21<sup>st</sup> October 1994), which was marked as PEXHB1. Documents 1-9 and 18 were marked as MFI2.
- 67.** PW1 testified that the suit challenges the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' acquisition of the suit properties, their parcels, which have been the subject of several encroachment attempts. He noted that this was the second case concerning the land, the first having been filed against Mr. John Birech, who lost interest in pursuing his defence, leading to the withdrawal of that suit.

- 68.** PW1 explained that the Plaintiff purchased the property from the National Bank of Kenya (NBK) and the Magugu's, who were indebted to NBK; that the purchase price was Kshs. 130,000,000 of which Kshs. 75,000,000 and an additional Kshs. 15,000,000 were paid to NBK, with the balance remitted to the Magugu's and that after completing payment, they took possession of the land in 2006.
- 69.** PW1 asserted that while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claimed to have purchased the land in 2012, the Plaintiff had been in possession since 2006. He maintained that the Defendants lack valid documentation to support their alleged purchase and questioned the valuation of Kshs. 300,000,000 in 2012. He urged the court to restore the Plaintiff possession of the property and award it damages, noting that they had been unlawfully evicted.
- 70.** On cross-examination, PW1 admitted that the amended Plaintiff lacked a verifying affidavit and that he had not produced documents proving his directorship, a company resolution to purchase the land, or evidence of advertisements for sale of the land by NBK. He further stated that he had not personally researched the history of the land, seen the sale agreement between the Magugu's and Moi, or called Ibrahim, the shareholder who informed him of NBK's sale as a witness. PW1 could not recall whether he signed the sale agreement himself, stating only that shareholder raised the purchase price, of which he personally contributed 22%.

- 71.** PW1 added that upon taking possession, there was a large house on the property which they demolished in anticipation of developing several homes. He admitted that NBK was not a party to the agreement between the Plaintiff and the Magugu's, and that he did not participate in negotiations.
- 72.** He conceded that the letter dated 23<sup>rd</sup> October 2006 from Chege Wainaina highlighted a disconnect between the Plaintiff and Mount Pleasant. He conceded to not being privy to the payment Kshs. 5 million, could not recall details about subdivision, amalgamation, or beaconing, and did not know the names of guards who were on the land. He stated that they erected a wall which was later demolished by invaders but had no drawings for it.
- 73.** PW1 stated that he did not testify in the criminal case against Birech and confirmed that the earlier civil case was withdrawn. He stated that police reinstated them on the land in 2013, but they were again evicted after Covid-19 and that he was unsure how their transfer was presented for registration.
- 74.** It was his further evidence on cross-examination that the Director of Surveys informed them that subdivision had been sought, but he did not establish who initiated it and that a subsequent search revealed that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had obtained a title and amalgamated the land, although he did not have a copy of that search.

- 75.** Finally, he testified that the forced sale value of the property at the time of purchase was given as Kshs. 114,000,000 although he was not accompanied by the valuer during inspection of the land.
- 76.** In re-examination, PW1 testified that the letter at page 174, dated 2006, marked the first involvement of Mr. Madhani Advocate; that the sale agreement had already been signed earlier, with Mr. Chege appearing for the Magugu's and that the agreement clearly set out the mode of payment of the purchase price, which was Kshs. 130,000,000.
- 77.** PW1 stated that the purchase price remained unchanged even after investors joined the transaction; that a deposit of Kshs. 13,000,000, representing 10% of the purchase price, was paid to the Magugus and that thereafter, NBK received Kshs. 90,000,000, while a cheque of Kshs. 27,000,000 was issued to Chege Wainaina on behalf of the Magugu's.
- 78.** He stated that when they later sought to amalgamate the land, they discovered that the property had already been subdivided into three plots instead of two, specifically that L.R. No. 204/20/2 had been subdivided into L.R. Nos. 214/20/2/1 and 214/20/2/2. Consequently, they did not pursue amalgamation.
- 79.** PW2, was Patrick Onyango Ogolla, an Advocate of the High Court. He testified that in 2006, he worked with the firm of Mohamed Madhani Advocates and handled transactions

relating to the suit properties. He adopted his witness statement dated 27<sup>th</sup> July 2020 as his evidence-in-chief and produced the documents at pages 75-146 as PEXHB2.

- 80.** PW2 stated that he has been with Mohamed Madhani Advocates since 2006, and their involvement in the matter began after the sale agreement had already been signed; that the company initially had two founding directors, Jackson Kahungura Kariuki and Pemhiwa Hardy Ndojzi, as reflected in its Articles of Association and that on 1<sup>st</sup> September 2006, two additional directors, Ibrahim Rafiki and PW1, joined the company.
- 81.** He explained that the transaction had two components, being the purchase of the land and the acquisition of shares in the company by incoming investors, who were to take over control and complete payment for the property. The incoming investors were clients of the firm, known as the Mini Bakeries group.
- 82.** It was his testimony that the transfer of shares of the Plaintiff was registered on 14<sup>th</sup> December 2006; that on the same date, Zainash Registrars were appointed as company secretaries, while Amin Manji, Shamesh Manji, and Mohammed Islam joined as directors and were allotted shares and that thereafter, Ibrahim Rafiki and PW1 joined the initial directors. This was done on 1<sup>st</sup> September, 2006.

- 83.** PW2 confirmed that the sale agreement related to parcels L.R. 214/20/2 and 214/20/1/1, purchased at a consideration of Kshs. 130,000,000 and that the vendors were Arthur and Margaret Magugu, represented by Chege Wainaina and Mbugua Advocates, while the Plaintiff was the purchaser.
- 84.** PW2 testified that the Mini Bakeries group approached their firm to take over the transaction and finalize the purchase by paying off the balance of the purchase price and that as part of due diligence, they conducted searches, confirmed that the land was registered under the Government Land Act, and reviewed past conveyances to trace the root of title from 1915 to the Magugus' ownership.
- 85.** He explained that in 1980 the late President Moi purchased the land and later charged it to secure a loan; that the mortgage was discharged on 1<sup>st</sup> April 1982 simultaneously with the conveyance of the land to Mr. and Mrs. Magugu and that the Magugu's subsequently charged the property to the National Bank of Kenya.
- 86.** PW2 stated that the purchasers were required to clear the outstanding loan with NBK to secure a discharge of charge and effect transfer of the property to the Plaintiff and that their due diligence confirmed a clear chain of title from 1915 up to 1987, when the land was charged to NBK, which held the original title. He also referred to a court order obtained as part of this process, assuring that NBK consented to the property being sold by way of private treaty.

- 87.** During cross-examination, he admitted that he did not personally conduct the search, instead, his clerk handled it. He further confirmed that although the agreement indicated that Kshs. 5 million had already been paid, they made no effort to verify that payment.
- 88.** PW2 also conceded that the court order was not authenticated by their firm but was handed to them by their client; that after registration, they did not undertake a further search, explaining that the conveyance itself served as confirmation and that he did not visit the Surveys of Kenya.
- 89.** Upon being re-examined, he stated that whereas it was necessary to correspond with Mbugua Advocate, there was no need to write directly to NBK. He stated that they handled the reconveyance, which was duly signed by NBK, and that payment to NBK was effected through a banker's cheque of Kshs. 70,000,000/= and an additional cheque of Kshs. 15,000,000/=, thereby discharging the land. He clarified that conveyancing is a process and that he would draft letters, which were then signed by Mr. Madhani, Advocate.
- 90.** He confirmed that the letter at page 189 was signed by him on behalf of his principal; that he was aware that their client took possession, and maintained that if possession had not been effected, the matter would have been raised with them.

- 91.** PW3, Michael Kagwe Ndungu, the Chief Security Officer of Mini Group of Companies, adopted his affidavit sworn on 22<sup>nd</sup> November, 2022 as his evidence in chief. He testified that he was responsible for deploying private security to safeguard the property. According to him, the company took full possession of the property in July 2007 and remained in occupation until July 2010, when strangers appeared claiming an interest in purchasing the land. He stated that on 30<sup>th</sup> March, 2013, the private security guards stationed at the premises were arrested and taken to Muthaiga Police Station.
- 92.** It was the evidence of PW3 that on 15<sup>th</sup> June, 2020, the OCS, Muthaiga, arrived at the premises and forcefully evicted all the guards; that his security team resumed occupation on 22<sup>nd</sup> May, 2020 and remained there until 29<sup>th</sup> October, 2022, when about fifteen Administration Police officers, including members of the Rapid Deployment Unit, again evicted the guards.
- 93.** It was his evidence on cross-examination that by the time he joined the security group in 2019, it had been guarding the property. He stated that he was not on the ground during the eviction of 15<sup>th</sup> June, 2020 and did not record any statement. He stated that on the 22<sup>nd</sup> May, 2022, they were given the go ahead to return the guards by the legal department and that they were not shown any court orders during the eviction.

- 94.** During re-examination, he testified that following the eviction in 2013, one Mr. Birech produced a title deed purporting ownership of the property; that upon investigations, the title was found to be fraudulent, leading to criminal charges against him and that thereafter, the company resumed possession of the land and maintained control until 2020.
- 95.** DW1 was James Mwangi, the Manager of Equity Group Holdings. He stated that he has the authority of the 2<sup>nd</sup> Defendant to testify. He adopted his witness statement dated 28<sup>th</sup> February, 2022 as his evidence in chief. He produced the bundle of documents dated 22<sup>nd</sup> December, 2022 as DEXHB1, except the documents at pages 182 and 183, which were marked for identification as 1DM2. He also produced the bundle dated the 14<sup>th</sup> March, 2023 as 1DEXHB3.
- 96.** He testified that in December 2012, he entered into an agreement with the late President Daniel Toroitich Arap Moi for the purchase of the property; that prior to execution, they conducted a search, verified all the details, and carried out a valuation and that by April 2013, the sale agreement had been completed.
- 97.** DW1 recalled meeting the late President at his home in Kabarnet Garden, Nairobi, where the former President personally blessed him with the land. Thereafter, the agents took him to the property, which at the time was covered with mature trees and bushes. It was his evidence that he took possession and engaged Magnet Security Services to guard

it. During this period, he stated, they enjoyed quiet possession of the property, paying both rent and security expenses.

- 98.** It was his evidence that in 2019, he was informed that a Mr. Adalla had expressed interest in purchasing the property; that it later emerged, however, that it was Amin Manji, a director of the Plaintiff who was claiming that the land was his and that a meeting was convened in which Mr. Amin appeared accompanied by his lawyer.
- 99.** He testified that the land was invaded by goons and he reported the incident at Muthaiga Police Station; that the police intervened, removed the intruders, and, after examining his documents, confirmed his right to remain in possession and that the late President Moi never raised any objection to the sale paid a deposit of Kshs. 32, 060,000 and the balance being Kshs. 200,000,000, and retains the original conveyance that was handed to him by the late President.
- 100.** He added that he applied for consolidation of the two parcels, which was granted and the same were amalgamated and that with the County approval, he constructed a boundary wall and continued to pay for security services. He emphasized that the property holds deep sentimental value, describing it as a privilege to have acquired it directly from the former President.

- 101.** DW1 stated that the land was not intended for commercial development but for the construction of a family home. He further explained that the purchase of the land was a special gift to his wife in commemoration of their 25<sup>th</sup> wedding anniversary.
- 102.** During cross-examination, he testified that he first came to know about the property through the late President, with whom he had prior dealings and that the initial negotiations for the sale began at a family level. According to DW1, when he visited the land, he found it already fenced, with neighboring plots developed. He stated that the agreement was executed between the late President on one hand and Muthaiga Luxury Homes on the other although the cover page states that the agreement is between the late President and himself.
- 103.** DW1 stated that he was not aware that his advocate had gone to the police in 2013 or had recorded a statement at Muthaiga Police Station. He added that he had no knowledge of the property having been charged to Standard Chartered Bank and or NBK or transferred to the Magugu family. Likewise, he was unaware that one Mr. Birech had produced fake titles or that he had faced criminal charges in relation to the said titles.
- 104.** DW2, was Emmanuel Karisa Kenga, a forensic document examiner with over 30 years of experience. He testified that he retired from the police in 2015 and now practices

privately as a document examiner. He stated that he received instructions from Messrs. Kiarie Advocates through a letter dated 20<sup>th</sup> December, 2012. He produced his report dated 25<sup>th</sup> January, 2023, which was marked as 1DEXHB2

- 105.** He noted that his instructions were to examine the questioned signatures and determine their authenticity. He explained that the questioned signatures indicated by a red arrow at pages 2, 23, and 26 were made by the same author, while the signature at page 26(c) was made by a different author.
- 106.** According to him, the signatures marked “A” at page 2, “B” at page 22, and “B” at page 23 were of good quality and consistently written, whereas the signature marked “C” at page 26 was of poor quality and inconsistent. He added that the letter “C” in page 26 signature differed in formation from the comparable signatures in exhibits “A” at page 2, “B” at page 22, and page 23.
- 107.** He testified that the signatures marked in red ink on exhibit “C” at page 26, exhibit “D” at page 50 and 51, and exhibit “E” at page 56 and 57 were made by the same author. However, the signature on exhibit “C” at page 77 was written by a different author. He noted that the signatures on exhibit “C” at page 26, exhibit “D” at pages 50 and 51, exhibit “E” at pages 56 and 57, and exhibit “F” at page 72 and “C” at page 77 were by the same author. He referred to the comparison chart at page 5 of his report in support of these findings.

- 108.** He explained that the documents marked with red arrows were purportedly signed by the late President H.E Daniel Moi, and he compared them against the conveyancing documents contained at page 86 of the Plaintiff's bundle.
- 109.** According to DW2, at page 4 of his report, he marked document "B," which corresponds to a mortgage document found at page 88 of the Plaintiff's bundle. He examined the signature marked with a red arrow, which was attributed to President Moi. Document "C" was the agreement at page 25, involving the Magugu's and Moi, which appears at page 111 of the Plaintiff's bundle. All three documents carried red arrows.
- 110.** He explained that the signatures enclosed in red ink, specifically, the one at page 26 of the agreement attributed to Arthur Magugu's and the one in the mortgage marked "D", were made by different authors. The blue arrows referred to the signatures of Wairimu Magugu, and he concluded that all her signatures in the bundle were made by the same person.
- 111.** He added that when he first received the documents, he was not aware of the nature of the dispute, did not know any of the parties involved, and was under no limitations in carrying out his examination.
- 112.** It was his evidence on cross-examination that he retired from the police service following allegations that he had submitted a report whose findings were disputed. He confirmed that

both President H.E. Daniel Moi and Arthur Magugu were deceased as at the time he authored his report. He explained that he was provided with only photocopies for examination and did not see any original documents. He noted that photocopies carry inherent risks since the best documents for analysis are the originals. DW2 stated that he did not investigate the source of the documents he was given.

- 113.** DW2 testified that he was paid Kshs. 30,000 for preparing the report and Kshs. 15,000 for attending court. He emphasized that his report amounted to an expert opinion, acknowledging that experts can sometimes be wrong. It was his evidence that he used a microscope and a magnifying glass but had no access to specialized equipment such as the Video Spectral Comparator (VSC) or Electro-Static Detection Apparatus (ESDA), which are only available at the DCI.
- 114.** He further explained that while signatures generally remain consistent, they may vary due to factors such as age, drug use, or intoxication. He added that when examining photocopies, it is impossible to determine writing pressure, the color of the pen, or the texture of the paper.
- 115.** Upon re-examination, he maintained that he conducted his examination professionally. He added that he had been exonerated by the vetting report and was cleared vide **ELRC Petition No. 13 of 2014**, in which he and others had sued the National Police Service. The court found the allegations against him to be false, and no appeal was ever filed.

- 116.** He clarified that the absence of original documents does not prevent an examination, provided that the copies supplied are clear enough for analysis. In this case, he was given clear and satisfactory documents and set out in detail the methodology he employed. His conclusion was that all of Mrs Wairimu Magugu's documents were signed by the same author, despite the passage of time. He added that when experts use the same tools and methods, they should not arrive at different opinions.
- 117.** DW3, Omwanza Ombati, an Advocate of the High Court with twenty-one years' experience and a Commissioner at the Judicial Service Commission, testified that he has been practicing at the firm of Messrs. Nchogu, Mwanza & Nyasimi Advocates since 2005.
- 118.** It was his evidence that, acting on the personal instructions of the vendor, the late President, H.E Daniel Toroitich Arap Moi, he drafted the sale agreement dated December 2012 and that the agreed consideration was Kshs. 320,600,000 and that the purchasers duly executed the agreement and that the deposit of Kshs. 32,060,000 was paid, with the balance being paid on 23<sup>rd</sup> March 2013.
- 119.** DW3 stated that upon receipt of completion documents from the vendor, he forwarded them to his client as required. He confirmed that the vendor executed the documents in his

presence, and that he witnessed the execution of the agreement and conveyance.

**120.** It was his evidence that he also received the vendor's identification card, PIN certificate, the original rates clearance certificate, and the original conveyance. According to him, the late President sent someone to collect the documents from his residence and hand them over to him.

**121.** He noted that a statement from Equity Bank confirmed the payment of Kshs. 47,810,000 made on 20<sup>th</sup> December 2012, which was duly received by his law firm; that by a letter dated 20<sup>th</sup> November 2013, his firm confirmed to the Survey Department that they acted for the vendor and that the purchasers sought to amalgamate the properties and therefore required the vendor's consent.

**122.** DW3 stated that the conveyance was completed, and possession was granted through the agents of 1<sup>st</sup> and 2<sup>nd</sup> Defendants sometime in 2013; that at the time of sale, the vendor had people who were managing the land, which was undeveloped and that after completion, there was no dispute between his client and the purchasers.

**123.** He added that when he was summoned by the investigating officer, he availed all the relevant information regarding the transaction. He emphasized that none of the documents executed between his client and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had ever been impeached by the police and that the late

President himself confirmed receipt of the purchase price, and neither him nor his family has ever questioned the transaction.

- 124.** It was his evidence on cross-examination that there was no formal letter of offer; that the vendor and the purchaser agreed on the purchase price and that they were dealing with three properties although the conveyance was with respect to two properties, the suit parcels of land. DW3 stated that the property had a live fence with a gate and that he could not recall if there was a guard house on the land.
- 125.** It was the evidence of DW3 that he does not know when the amalgamation was done and has never come across the conveyance from H.E Daniel Moi to Arthur Magugu nor the mortgage to Standard Bank. He stated that as per the conveyance, there is no indication of any transaction between 1980-2013. It was his evidence on re-examination that his role was to act for the vendor and that he executed his instructions to completion and that he received the full purchase price from the purchaser.
- 126.** DW4 was Mary Wangui Kiarie, an Advocate of the High Court of Kenya, admitted to the Bar in 1991 and practicing under the firm name Kiarie Kariuki & Associates Advocates. She adopted her witness statement dated 9<sup>th</sup> June 2020 as her evidence in chief.

- 127.** In her testimony, she stated that she was summoned by the DCI to give evidence concerning the transaction relating to the sale of the suit properties by H.E. Daniel Arap Moi to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, whom she represented in the transaction. She confirmed that she acted as the Advocate for the purchasers. According to her, her clients entered into a sale agreement with H.E. Daniel Moi on 19<sup>th</sup> December 2012.
- 128.** DW4 stated that the said agreement had been drawn by the vendor's Advocate and was duly executed; that she witnessed the execution of the agreement by the Defendants and confirmed that her, and Mr. Omwanza Advocate, acting for the vendor, agreed on the terms of the agreement. She noted that by the time the document was availed to her, it had already been executed by the vendor.
- 129.** DW4 further testified that by the time she met the 1<sup>st</sup> Defendant, he had already consented to the terms of the agreement; that the deposit of 10% amounted to Kshs. 32,060,000, with the balance of Kshs. 320,600,000/= payable within 10 days of successful registration of the transfer and that prior to this transaction, her client had engaged in a separate transaction with the late President.
- 130.** According to DW4, she conducted an official search and examined the conveyance documents, although she did not personally visit the property. She explained that her client, the 1<sup>st</sup> Defendant, was already familiar with the location, having passed by the plot before.

- 131.** DW4 stated that the initial deposit that she paid on behalf of her client was Kshs 32, 060,000 while the second deposit was Kshs 47, 810,000 and that the bank generated the RTGS confirmation, a copy of which was also availed to the police.
- 132.** She testified that after payment of the deposit, she was notified that the completion documents were ready; that she later received them from the vendor's advocates under cover of a letter dated 30<sup>th</sup> January 2013; that the 1<sup>st</sup> Defendant instructed her to include his wife as a co-purchaser in the conveyance and that among the documents she received were copies of the late President's national identity card, his PIN certificate, original rates clearance certificate, and the original conveyance dated 12<sup>th</sup> September 1980 between the former President and the previous owner.
- 133.** She testified that these documents were submitted for valuation to facilitate assessment of stamp duty, and that stamp duty in the sum of Kshs. 12,824,040 was thereafter paid through RTGS. The conveyance was duly stamped and presented for registration, which was completed on 1<sup>st</sup> March 2013.
- 134.** Once the conveyance was returned, DW4 stated that her client instructed the bank to release the balance of the purchase price to Omwanza Advocate on the 27<sup>th</sup> March 2013 and that the sum of Kshs. 288,540,000 was transmitted to the

said advocate supported by RTGS confirmation and the bank remittance advice.

- 135.** According to DW4, in April 2013, her clients were granted possession of the properties. She testified that she attended the handover together with Hezron Muriithi, the 1<sup>st</sup> Defendant's caretaker; that on arrival, they were received by an individual who was introduced as Sunkuli, who opened the gate and that at the time, a young man was tending the land, which measured 4.5 acres and had indigenous trees, a temporary structure, and some debris and that the caretaker then asked the young man to leave, after which possession was formally taken.
- 136.** She further testified that invoices for guarding the property were subsequently issued and that Mr. Muriithi of Magnet Security was placed in charge; that she revisited the land during the commencement of the amalgamation process and that by a letter dated 20<sup>th</sup> November 2013, Messrs Omwanza Advocates confirmed the conveyance to the Director of Surveys, as the survey office required official confirmation of the transaction.
- 137.** It was the evidence of DW4 that the amalgamation application, dated 26<sup>th</sup> March 2013, was lodged by a planner, and was duly approved upon payment of the requisite fees, and that a deed plan for L.R. No. 214/832 was subsequently issued with no objection from the Ministry of Lands.

- 138.** She explained that after collecting the deed plans in 2014, the process of title issuance continued until 2019, when the title was eventually released. She confirmed that she paid the fees for amalgamation and personally surrendered the conveyance in 2013. She also noted that before the late President's acquisition, there had been earlier attempts to subdivide the land, and that indeed L.R. No. 214/20/2 had been subdivided to create L.R. Nos. 214/20/2/1 and 214/20/2/2.
- 139.** DW1 testified that when the process of amalgamation commenced, they were given a letter by H.E. Daniel Moi dated 1<sup>st</sup> March 2013. She stated that a land officer visited the property prior to the issuance of the grant. She further referred to correspondence from the National Land Commission confirming that her client was the registered owner of the land.
- 140.** DW4 stated that when this dispute arose, they observed inconsistencies in the signatures appearing on the Plaintiff's title, particularly in the alleged transfer between H.E. Daniel Moi and the Magugu's; that they submitted their titles to the Police who wrote a letter confirming their ownership and that her client applied for and obtained authority to construct a permanent building, after which they erected a wall along the frontage of the property.
- 141.** She emphasized that she did not know the Magugus' and had never interacted with them at any point. In her view, they

had undertaken proper due diligence in their dealings with the seller.

- 142.** It was her evidence on cross-examination that the purchase involved a GLA title. She admitted that she did not personally peruse the file at the Lands Office, as this was done by her clerk and that she did not have with her the search documents that the clerk had provided. It was her testimony that no official search had been produced in evidence.
- 143.** DW5 was Wilfred Muchai, the Deputy Director of Surveys at the Ministry of Lands, Public Works and Housing. He adopted his witness statement dated 22<sup>nd</sup> July 2022 and produced the bundle of documents of even date as DEXHB31.
- 144.** Regarding the suit properties, DW5 testified that the records maintained at the Survey Records Office in Nairobi reveal that L.R. No. 214/20/1/1 and L.R. No. 214/20/2 originated from the subdivision of L.R. No. 214/20, as per Cadastral Plan No. F/R 5/98, measuring approximately 6.7175 acres. The same was surveyed and subdivided around August 1913 into two parcels: L.R. No. 214/20/1, measuring about 2.8675 acres, and L.R. No. 214/20/2, measuring about 3.8501 acres.
- 145.** It was his evidence that the survey registration copy of Cadastral Plan No. F/R 5/98 (Deed Plan No. 10721), relating to the subdivisions of parcels L.R. No. 214/18, L.R. No. 214/19, and L.R. No. 214/20, was forwarded to the Land Registration Department on 18<sup>th</sup> June 1919. These

subdivisions gave rise to parcel numbers L.R. No. 214/18/1, L.R. No. 214/18/2, L.R. No. 214/19/1, L.R. No. 214/19/2, L.R. No. 214/20/1, and L.R. No. 214/20/2.

- 146.** DW5 testified that on 5<sup>th</sup> June 1919, a re-survey of L.R. No. 214/20/1 was carried out, as reflected in Cadastral Plan No. F/R 16/19. The plan indicated that the parcel measured approximately 2.8682 acres. The records were subsequently approved and authenticated by the Director of Surveys on 26<sup>th</sup> July 1919, and Deed Plan No. 10728 was prepared and issued on 2<sup>nd</sup> September 1919 in support of the registration of title for L.R. No. 214/20/1.
- 147.** On 7<sup>th</sup> November 1921, a subdivision survey was undertaken in respect of L.R. No. 214/20/2/1, as captured in Cadastral Plan No. F/R 16/323. The plan reflects that the parcel measured approximately 1.81 acres. These records were approved and authenticated by the Director of Surveys on 11<sup>th</sup> January 1922. Thereafter, the subdivision of L.R. No. 214/20/2/1 was approved on 15<sup>th</sup> February 1922, and Deed Plan No. 14474 was issued by the Director of Surveys in support of the registration of title to L.R. No. 214/20/2/1.
- 148.** On 21<sup>st</sup> April 1922, a subdivision survey was undertaken resulting in the creation of parcels L.R. No. 214/20/1/1, L.R. No. 214/20/1/2 (later renumbered as L.R. No. 214/107), and L.R. No. 214/20/2/2. This is reflected in Cadastral Plan No. F/R 16/375, which shows that L.R. No. 214/20/1/1 measured approximately 0.733 acres, L.R. No. 214/20/1/2 (now L.R. No.

214/107) measured approximately 2.13 acres, and L.R. No. 214/20/2/2 measured approximately 2.03 acres.

**149.** According to DW5, the survey records under Cadastral Plan No. F/R 16/375 were approved and authenticated by the Director of Surveys on 20<sup>th</sup> December 1922. Thereafter, the subdivision of parcels L.R. No. 214/20/1/1, L.R. No. 214/20/1/2 (new number 214/107), and L.R. No. 214/20/2/2 was approved on 2<sup>nd</sup> October 1922.

**150.** He stated that the deed plans issued by the Director of Surveys in respect of L.R. No. 214/20/1/1 and L.R. No. 214/20/2/2 (the suit properties) are as follows:

L.R No 214/20/1/1	Deed Plan no 16686	Issued on 30 <sup>th</sup> December, 1922
L.R No 214/20/1/2(new number L.R No 214/107)	Deed Plan no 15187	Issued on 18 <sup>th</sup> June, 1928
L.R No 214/20/2/2	Deed Plan no 15188	Issued on 18 <sup>th</sup> June, 1928

**151.** DW5 stated that on or about 26<sup>th</sup> November 2012, the Director of Surveys received a subdivision survey prepared by M/s O.M. Wainaina, a licensed land surveyor, acting on the instructions of M/s Kabarak Limited, in respect of parcel L.R. No. 214/20/2/1. In his survey report, M/s O.M. Wainaina indicated that the purpose of the subdivision was to create an

access road, noting that parcel L.R. No. 214/20/2/2 had been left without access during the earlier survey reflected in Cadastral Plan No. 16/375. He further noted that the registered proprietors of L.R. Nos. 214/20/1/1 and 214/20/2/2 had, by agreement, sanctioned the subdivision.

- 152.** DW5 stated that the subdivision survey of L.R. No. 214/20/2/1 was duly registered by the Director of Surveys as Cadastral Plan No. F/R 536/146, Survey Computations No. 62908. This survey resulted in the creation of two parcels, namely L.R. No. 214/829 and a surrender road parcel, L.R. No. 214/20/2/1/1, measuring approximately 0.7199 hectares and 0.0146 hectares respectively.
- 153.** It was his evidence that the survey records were approved and authenticated by the Director of Surveys on 26<sup>th</sup> November 2012, and Deed Plans Nos. 345927 and 345928 were subsequently issued on 4<sup>th</sup> December 2012 in respect of L.R. Nos. 214/20/2/1/1 and 214/829 respectively.
- 154.** It was DW5's evidence that notably, the subdivision survey of L.R. No. 214/20/2/1 submitted by M/s O.M. Wainaina to the Director of Surveys was not accompanied by any subdivision approval from the Nairobi City County Planning Authority, nor any authorization from the Commissioner of Lands and that the only correspondence attached in support of the subdivision was an unreferenced and undated letter from M/s Kabararak Limited, and a letter from the Commissioner of

Lands dated 19<sup>th</sup> November 2012 under reference number 18566.

- 155.** According to DW5, following the approval and authentication of Cadastral Plan No. F/R 536/146 (Survey Computations No. 62908) relating to the subdivision of L.R. No. 214/20/2/1, the Director of Surveys received a letter dated 1<sup>st</sup> March 2013, allegedly authored by former President H.E. Daniel Moi.
- 156.** In that letter, the former President allegedly indicated that he was in the process of transferring parcel L.R. No. 214/20/2 to James Njuguna Mwangi and Jane Wangui Mundia. He further stated that he had acquired L.R. Nos. 214/20/2 and 214/20/1/1 through purchase in 1980, and that he had not commissioned any subdivision of either parcel.
- 157.** Upon receipt of the letter dated 1<sup>st</sup> March 2013, and in light of an independent request for comments regarding the proposed amalgamation of parcels L.R. Nos. 214/20/2/1, 214/20/2/2, and 214/20/1/1, the Director of Surveys, by a letter dated 8<sup>th</sup> August 2013, under reference AC/CAD/46/Vol. VII/22, wrote to the Chairman of the National Land Commission seeking clarification.
- 158.** Specifically, it was stated by DW5, the Director of Surveys requested: confirmation of the ownership of parcel L.R. No. 214/20/2; verification of the authenticity of the Commissioner of Lands' letter Ref. No. 18566 dated 19<sup>th</sup> November 2012, which had been submitted in support of the subdivision of

L.R. No. 214/20/2/1; and guidance on whether to defer the registration of, or recall for cancellation of Deed Plans Nos. 345927 and 345928 issued in respect of parcels L.R. Nos. 214/20/2/1/1 and 214/829.

- 159.** He stated that by its response dated 28<sup>th</sup> August 2013, the National Land Commission advised that the registered proprietors of L.R. No. 214/20/2 were James Njuguna Mwangi and Jane Wangui Mundia and that it further confirmed that no title had ever been registered in respect of L.R. No. 214/829.
- 160.** DW5 informed the court that following the said response, it became evident that the subdivision survey (Survey Computations No. 62908) of L.R. No. 214/20/2/1 had been undertaken by M/s O.M. Wainaina under the instructions of an entity that may have lacked the requisite legal standing to commission such a survey.
- 161.** Consequently, the Director of Surveys, by a note contained in letter Ref. No. CT 123/122/128, cancelled the survey records relating to the subdivision of L.R. No. 214/20/2/1 as contained in Cadastral Plan No. F/R 536/146 and Deed Plans Nos. 345927 and 345928 on 30<sup>th</sup> October 2013.
- 162.** The court was informed that meanwhile, on 1<sup>st</sup> October 2013, the Director of Surveys received an amalgamation survey prepared by M/s B.M. Okumu, a licensed surveyor, in respect of parcels L.R. Nos. 214/20/1/1, 214/20/2/1, and 214/20/2/2;

that the survey was registered as Cadastral Plan No. F/R 552/18, Survey Computations No. 64629, and created a new amalgamated parcel, L.R. No. 214/832, measuring approximately 1.850 hectares and that the records of this amalgamation survey were approved and authenticated by the Director of Surveys on 7<sup>th</sup> November 2013, and Deed Plan No. 360673 was issued on 18<sup>th</sup> November 2013 in support of the registration of title to L.R. No. 214/832.

- 163.** It was the evidence of DW5 that upon further scrutiny of the approvals and supporting documents submitted to the Director of Surveys by M/s B.M. Okumu in respect of the amalgamation survey of L.R. Nos. 214/20/1/1, 214/20/2/1 and 214/20/2/2 as depicted on Cadastral Plan No. F/R 552/18 certain discrepancies were noted.
- 164.** According to DW5, specifically, the font used for condition (iii) in the Notification of Approval for Development Permission dated 18<sup>th</sup> April 2013, is markedly different from that used in conditions (i) and (ii) as well as in the rest of the document, strongly suggesting that condition (iii) may have been inserted as an afterthought, and raising doubts as to the authenticity and integrity of the entire approval document.
- 165.** Further, DW5 stated that questions have arisen regarding the authenticity of the provisional approval issued by the National Land Commission dated 19<sup>th</sup> November 2013. Specifically, it requires investigation whether the purported signatory, one Mr. B. Limo, was duly authorized by the

Commission to issue such an approval, and whether he was, at the time, a serving officer of the Commission.

- 166.** Additionally, one of the certificates of postal search presented as proof of common ownership relates to L.R. No. 214/20/1, a parcel not subject to the amalgamation; that the parcels under amalgamation were L.R. Nos. 214/20/1/1, 214/20/2/1, and 214/20/2/2 and that reliance on a parcel outside the amalgamation undermines compliance with the requirement of establishing common ownership, thereby rendering the proof deficient.
- 167.** Moreover, the certificates of postal search for L.R. Nos. 214/20/1 and 214/20/2, together with the conveyance document for L.R. Nos. 214/20/2 and 214/20/1/1, were all purportedly executed by the Registrar of Government Lands, one P.M. Ng'ang'a. However, the signature attributed to the Registrar varies significantly across the three documents. Such glaring inconsistency raises serious concerns as to the authenticity of the documents presented to the Director of Surveys.
- 168.** DW6 was Senior Sergeant Gilbert Okello, Force No. 81416, currently attached to the DCI Embu Sub-County where he performs investigative duties. Previously, he served at the DCI Headquarters within the Land Fraud Investigations Unit. He adopted his witness statement dated 28<sup>th</sup> November 2023 as his evidence in chief and produced the exhibit at page 78 of 3DEXHB32.

- 169.** His evidence, as contained in the said statement, was that he conducted investigations into allegations of procuring or obtaining registration by false pretenses and conspiracy to defraud, contrary to **Sections 320 and 317** of the **Penal Code** respectively. The investigations arose from a complaint lodged at the DCI Regional Office, Nairobi, in April 2019 by James Njuguna Mwangi, the CEO of Equity Bank.
- 170.** DW6 stated that the complaint was to the effect that, although he was the registered owner of L.R. No. 214/832, I.R. No. 207119 (formerly L.R. No. 214/20/1/1 and L.R. No. 214/20/2), having purchased the same from the late Hon. Daniel Toroitich Arap Moi in 2012 at a consideration of Kshs. 320,600,000, the legitimacy of the process had been brought into question.
- 171.** It was his testimony that during the transaction, the late President Moi was represented by Advocate Samson Omwanza Ombati, who confirmed that the sale took place, and that Advocate Mary Wangui Mundia, acting for the purchasers, corroborated the evidence of Mr. Omwanza Advocate.
- 172.** Having obtained copies of documents from all parties, DW7 stated that according to the records, the reconveyance and conveyance documents, both dated 17<sup>th</sup> September 2007, together with the indemnity, are consistent with the records

held at Ardhi House, thereby supporting Mount Pleasant's claim of ownership.

**173.** He stated that on the other hand, while referring to the conveyance dated 20<sup>th</sup> February, 2013 between James Mwangi and H.E the late Daniel Moi, Mr. Nyambaso disputed having enclosed/approved the document for valuation terming the signature and handwriting a forgery, and that although both folios 207 and 208 contain surrenders in consideration of amalgamation of L.R 214/20/2, and were signed by a registrar, there are no documents in the parcel file to support entries numbers 25 folio 207, 208 and 209 or records to confirm the conversion from GLA to **Registration of Titles Act.**

**174.** According to DW6, the statement of Margaret Wairimu Magugu, wife to Arthur Magugu, was recorded and she averred that they jointly bought the land in contention vide the indenture of conveyance dated 1<sup>st</sup> April, 1982 for a consideration of Kshs 3,000,000. It was his evidence that he fully supported the acquisition of the properties and documentation by Mount Pleasant.

**175.** It was his evidence that during the course of investigations, the Directorate of Criminal Investigations (DCI) received a court order in **ELC Petition No. 12 of 2022**, which restrained the ongoing investigations and that the order was premised on allegations of partiality, undue advantage, and

attempts to influence the outcome of **Nairobi ELC Case No. E038 of 2020.**

- 176.** According to Mr Ochieng, DW6, based on the evidence already gathered, the DCI's preliminary findings established that the properties in question undoubtedly belonged to H.E. Daniel Toroitich arap Moi, being the common denominator in transactions between both parties, and that in 1982, H.E. Daniel Moi sold the property to Hon. Arthur Magugu and his wife, a transaction corroborated by the statements of Registrars David Nyambaso Nyandoro and Kamuru, who confirmed that ownership later changed hands to Mount Pleasant Limited in 2007.
- 177.** Further, it was his evidence that another set of records obtained from the lands office showed that the late President subsequently sold L.R. No. 214/20/2, L.R. No. 214/20/1/1, new L.R. No. 214/832 to James Mwangi in 2012, and that payment for the same was made through his lawyer, Samson Omwanza.
- 178.** He stated that in view of the fact that separate ownership records are maintained at Ardhi House under different names, and considering that the late President's family or executrix has not taken a definitive position on who the rightful purchaser is, the DCI recommended that the issue can only be conclusively resolved through a civil process, such as the present case.

- 179.** He testified that he had interviewed Margaret Magugu and recorded her statement, in which she affirmed the transaction. However, he did not complete the process of verifying the signatures.
- 180.** During re-examination, he stated that the Ministry of Lands favoured the Plaintiff's title and that he made efforts to involve all relevant parties in the investigation process but was unable to subject the disputed signatures to forensic examination owing to the existing court orders.
- 181.** DW7 was Mr. Nyandosho David, the Chief Land Registrar. He adopted his witness statement dated 17<sup>th</sup> December, 2021 as his evidence-in-chief and produced the bundle of an even date as 3DEXHB3.
- 182.** DW7 emphasized that deed files are maintained by the Chief Land Registrar and contain copies of all documents relating to transactions on land registered under the repealed Registration of Titles Act and the Government Land Act. However, the land registers relating to L.R No. 214/20/1 (Volume N8 Folio 342 File 1555) and L.R No. 214/20/1/1 (Volume N7 Folio 466 File 6050) are missing and cannot be traced.
- 183.** He testified that from the available parcel files (deed files), it is recorded that L.R No. 214/20/2 measures 3.3730 acres and was first registered in Volume N8 Folio 342 File 1555 pursuant to an Indenture of Conveyance dated 19<sup>th</sup>

September, 1927. Similarly, L.R No. 214/20/1/1 measures 0.733 acres and was first registered in Volume N7 Folio 466 File 6050 under an Indenture of Conveyance dated 10th January, 1923.

**184.** DW7 further testified that over time, these properties were exchanged between various parties. Notably, by an Indenture of Conveyance dated 12<sup>th</sup> September, 1980, Ferdinand William Cavendish Bentinck transferred the properties to H.E. Daniel Toroitich Arap Moi for a consideration of Kshs. 3,000,000 and that the conveyance was registered on 24<sup>th</sup> December, 1980 under Volume N51 Folio 60/24 File 6050 and Volume N8 Folio 421/28 File 1555.

**185.** It was his evidence that on 12<sup>th</sup> September 1980, the late Daniel Arap Moi mortgaged the suit properties to Standard Bank Limited for a consideration of Kshs. 3,100,000; that the mortgage was duly registered on 24<sup>th</sup> December 1980 in Volume N51 Folio 60/25 File 6050 and Volume N8 Folio 421/29 File 1555 and that the mortgage was re-conveyed through a re-conveyance dated 1<sup>st</sup> April 1982, which was registered on 2<sup>nd</sup> April 1982 in Volume N52 Folio 66/30 File 1555 and Volume N51 Folio 60/26 respectively.

**186.** It was the evidence of DW7 that a copy of the conveyance dated 1<sup>st</sup> April 1982 shows that Daniel Arap Moi transferred the two parcels, namely L.R. No. 214/20/2 and L.R. No. 214/20/1/1, to Arthur Kinyanjui Magugu and Margaret Wairimu Magugu for a consideration of Kshs. 3,000,000 and

that the conveyance was registered in Volume N52 Folio 66/31 File 1555 and Volume N51 Folio 60/27 File 6050.

- 187.** Subsequently, by a mortgage dated 15<sup>th</sup> July 1987 and a further mortgage dated 17<sup>th</sup> June 1987, the two parcels were charged to National Bank of Kenya Limited for Kshs. 8,000,000 and Kshs. 2,500,000, thereby securing an aggregate sum of Kshs. 10,500,000 and that the mortgages were registered in Volume N51 Folio 60/29 File 6050 and Volume N52 Folio 66/33 File 1555.
- 188.** DW7 stated that the same deed file also contains a conveyance dated 20<sup>th</sup> February 2013 between H.E. Daniel Arap Moi and James Njuguna Mwangi together with Jane Wangui Mundia, purporting to transfer the property for a consideration of Kshs. 320,600,000 and that the said conveyance was purportedly registered in Volume N104 Folio 208/25 File 6090 and Volume N104 Folio 208/29 File 1555.
- 189.** According to DW7, the aforesaid entries are inconsistent and conflict with those appearing in the further mortgage. Notably, as at 14<sup>th</sup> July 1988, the further mortgage is recorded as having been registered in Volume N52 Folio 66/33 File 1555 in respect of L.R. No. 214/20/2. However, the conveyance to James Njuguna Mwangi and Jane Wangui Mundia purports to have been registered in Volume N104 Folio 209/29 File 1555, creating a direct contradiction.

- 190.** Another glaring inconsistency, according to DW7, arises in the said conveyance, which cites File No. 6090 in relation to parcel L.R. No. 214/20/1/1. It was his testimony that according to the official records, File No. 6090 corresponds to L.R. No. 2/300, registered in the names of Rosemary Omwono and Michael N. Ogolla.
- 191.** Furthermore, he stated, the entries purporting to convey the properties to James Njuguna Mwangi and Jane Wangui Mundia, as reflected in Volume N104 Folio 207/25 and Volume N104 Folio 209/29, are unsigned and thereby invalid.
- 192.** DW7 informed the court that there is also no documentation in the parcel files evidencing the surrender of the two parcels in exchange for their alleged amalgamation into L.R. No. 214/832; that despite of this, a lease over L.R. No. 214/832 was prepared pursuant to the purported amalgamation in favour of James Njuguna Mwangi and Jane Wangui Mundia, registered on 16<sup>th</sup> May 2019, and a certificate of title I.R. No. 217119 was issued on the same date.
- 193.** Significantly, he stated, having conveyed the two parcels, namely L.R. No. 214/20/2 and L.R. No. 214/20/1/1, to Arthur Kinyanjui Magugu and Margaret Wairimu Magugu vide the conveyance dated 1<sup>st</sup> April 1982, H.E. Daniel Moi no longer retained any proprietary interest capable of being conveyed to James Njuguna Mwangi and Jane Wangui Mundia as alleged in the conveyance dated 20<sup>th</sup> February 2013.

- 194.** He testified during cross-examination that a volume in the land registry contains records of several properties, whereas a folio pertains to a specific property. In the case of the suit properties, the corresponding folio could not be traced. He explained that where a folio is missing, documents within the parcel file can be used to reconstruct the missing file.
- 195.** He testified that he did not sign the document appearing on page 292 and subsequently reported the matter to the DCI; that entry number 26 in the register relates to a surrender made pursuant to the amalgamation of two parcels, and that it was endorsed by the Lands Registrar and that the registrar who made the endorsement is no longer in public service, having been dismissed for involvement in fraudulent transactions.
- 196.** It was the evidence of DW7 that this same officer had also signed and registered the transfer in favour of James Mwangi and executed the certificate of title. However, despite these findings, the said officer has not been charged.
- 197.** He conceded that the folio in Volume 104 is not properly bound and that the available copy is not a certified one. He further explained that under entry number 5, a stamp should have been affixed and registered by the Registrar, as every instrument is required to bear both a presentation number and a date. DW7 pointed out that entries 25 and 26 lack these essential details.

- 198.** He confirmed that while the register for the folio concerning the suit properties is missing, they still retain the register relating to James Mwangi's title. He further explained that every document received at the registry must bear a presentation book number shown on the received stamp, which is missing from the Defendants' documents. Additionally, each document should be dated, drawn by an advocate, and signed by the registrar upon registration all of which are absent from the impugned documents.
- 199.** He explained that, ordinarily, once a conversion is effected, an entry is made indicating the property's conversion, the original register is closed, and a cross-reference is inserted in the new register for historical continuity which is lacking in the Defendants amalgamated file.

### **Submissions**

- 200.** The Plaintiff's Counsel filed submissions on 19<sup>th</sup> August, 2025. Counsel submitted that the law is well settled that where two parties claim title from the same source, the party who acquires first legal title has the superior claim.
- 201.** In any event, it was submitted, and as stated in **Munyu Maina vs Hiram Gathiha Maina [2013] eKLR**, and affirmed in **Dina Management Ltd vs County Government of Mombasa & 5 Others [2023] KESC 30 and Torino Enterprises Ltd vs Attorney General [2023] KESC 79** and **Sehmi & Anor vs Tarabana Company Limited & 5**

**Others [2025] KESC 21 (KLR)**, a proprietor whose root is challenged is mandated to prove the legality thereof.

**202.** In establishing the root of title, Counsel urged the court to be guided by the expositions in **Daudi Kiptugen vs Commissioner of Lands & 4 Others [2015] eKLR** and **Presbyterian Foundation vs Kibera Siranga Self Help Group Nursery School [2023] KECA 371**, wherein it was asserted that the court must look beyond the face of the documents to the chain of ownership and ensure the process was lawful and unbroken.

**203.** In this respect, it was asserted that the Plaintiff has succinctly laid out the entire chain of ownership spanning from the original 1915 Crown Land allocation to the Plaintiff's registration in 2007, fully corroborated by the lands registry.

**204.** Counsel contended that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' purported title only emerged after crucial documents went missing from the land registry and following irregular surveys and amalgamation. They further argued that the Defendants' sale agreement contained major inconsistencies, including lacking the required signatures, contrary to **Section 35(1)** of the **Land Registration Act**.

**205.** It was submitted regarding the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title that, as held in **Funzi Development Ltd & Others vs County Council of Kwale [2014] eKLR**, a court cannot,

under the guise of indefeasibility of title, sanction or legitimize an illegality or irregularly obtained title. Counsel also relied on *Arthi Highway Developers Ltd vs West End Butchery Ltd & 6 Others [2015] eKLR, Republic vs Minister for Transport & Communication & 5 Others Ex-parte Waa Ship Garbage Collector & 15 Others [2006] 1 KLR (E&L) 563, Alberta Mae Gacii vs Attorney General & 4 Others [2006] eKLR,* and *Iqbal Singh Rai vs Mark Lechini & Registrar of Titles [2013] eKLR,* all underscoring that courts must not uphold tainted titles.

- 206.** Counsel further submitted that under **Sections 108** and **109** of the **Evidence Act**, the burden of proof lies with the party who would fail if no evidence were adduced, and specifically, with the person who asserts the existence of any fact.
- 207.** This position was reaffirmed in *Dr. Samson Gwer & 5 Others vs Kenya Medical Research Institute & 3 Others [2020] eKLR* and *Rhesa Shipping Co. SS vs Edmunds (1955) 1 WLR 948.*
- 208.** It was argued that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants cannot qualify as bona fide purchasers for value without notice, as they failed to exercise due diligence. Citing the Supreme Court of Uganda in *Lwanga vs Mubiru & Others [2024] UGSC 7,* counsel emphasized that land transactions demand thorough investigation into both ownership and title as “*lands are not vegetables.*”

209. Reliance was further placed on **National Land Commission vs Afrison Export Import Ltd & 10 Others [2019] KEELC 2851, Gitwany Investment Ltd vs Tajmal Ltd & 3 Others [2006] eKLR, and Maalim vs Alio & Another [2024] KEELC**, all reinforcing the duty of a purchaser to verify title authenticity.
210. Regarding the Plaintiff's entitlement to damages, mesne profits, and injunctive relief, counsel cited **Park Towers Ltd vs John Mithamo Njihia & 7 Others [2021] eKLR** and **Avid Developers Ltd vs Blue Horizon Properties Ltd & 2 Others [2021] eKLR**, where it was held that once trespass is established, specific proof of loss is unnecessary for an award of damages. Having demonstrated trespass, the Plaintiff was said to be entitled to compensation.
211. On general damages, it was submitted that the Defendants' occupation was forceful and fraudulent, warranting an award of Kshs. 200,000,000/=, being 20% of the market value of the property, as reasonable compensation.
212. As to mesne profits, counsel referred to **Section 2** of the **Civil Procedure Act**, defining them as profits actually received or that could have been received with ordinary diligence, together with interest. Citing **Peter Mwangi Mbuthia & Another vs Samow Edin Osman [2014] eKLR** and **Mistry Valji vs Janendra Raichand & 2 Others [2016] eKLR**, counsel submitted that the Plaintiff had demonstrated entitlement and urged the court to award

Kshs. 500,000/= per month from the date of unlawful occupation to the present, considering the property's prime location and value.

- 213.** The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed submissions on the 6<sup>th</sup> October, 2025. Counsel submitted that the Court of Appeal in the case of **Munyu Maina vs Hiram Gathiha Maina [2013] KLR** was categorical that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title. 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.
- 214.** It was stated that in the circumstances, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have duly shown their acquisition of the suit properties from the late H.E Daniel Moi. Counsel urged that they hold a legitimate title having purchased the suit property as a bona fide purchaser for value from the late president Daniel Moi whose title has not been contested.
- 215.** Reliance in this regard was placed on the Ugandan Case of **Katende vs Haridar & Company Ltd [2008] 2 EA 173**, as cited in **Lawrence P. Muriki Mungai and Others vs Attorney General & Four Others (2017) eKLR**. Reference was also made to the Court of Appeal case of **Samuel Kamere vs Lands Registrar, Kajiado Civil Appeal No 28 of 2005 [2015] eKLR**.

**216.** On the other hand, it was submitted, the Plaintiff's title is tainted with irregularities including lost land registry records which had to be reconstructed which demonstrates a clear break in the trace of title; that the Plaintiff further failed to secure the attendance and/or testimony of the Magugu's from whom they allegedly purchased the property or the Advocate who represented them in the alleged transaction to testify to the veracity of the transaction and the validity of the title thereof.

**217.** It was submitted that as rightly cited by the Plaintiff, the court of Appeal in **Funzi Island Development Limited & 2 Others vs County Council of Kwale & 2 others [2014] KECA 882 (KLR)** was clear that a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. Reference was also made **to Dina Management Limited vs County Government of Mombasa & 5 Others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)**.

**218.** In this instance, it was submitted, the irregularities alluded to, mounted by the inconsistencies of the Plaintiff's witnesses lead to a conclusion that the Plaintiff is not the legitimate owner. Counsel urged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants ought not be associated with the loss of the title records.

**219.** According to Counsel, there being no evidence of the Magugu's acquisition of the property, they cannot be said to have had any title to transfer to the Plaintiff. This embodies

the *nemo dat* principle which as explained in **Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina [2019] KEELC 842 (KLR)**, is that one cannot give what he does not have.

**220.** Accordingly, it was submitted, an unauthorized transfer of the title by any person other than the owner generally has no legal effect. Counsel also referred to the case of **Haul Mart Kenya limited vs Tata Africa Kenya limited (2017) eKLR** and **Katana Kalume vs Municipal Council of Mombasa (2019) eKLR.**

**221.** It was urged that the Plaintiff having failed to establish its title, it follows that any prayer tied to the title is invalid and unwarranted and should be dismissed with costs. The 3<sup>rd</sup> Defendant did not file submissions.

### **Analysis and Determination**

**222.** Having considered the pleadings, evidence, testimonies and the submissions, the issues that arise for determination are:

- i. Whether the Amended Plaint is competent?*
- ii. Who between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is the legitimate proprietor of the suit properties?*
- iii. What are the appropriate reliefs to issue?*

**223.** The Plaintiff instituted this suit against the Defendants seeking *inter-alia*, declarations that L.R numbers 214/20/2 and 214/20/1/1 belong to it; that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant's

title over the aforesaid parcels are null and void; and that the purported amalgamation of the properties into L.R No 214/832, and registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is null and void.

**224.** They also seek mandatory injunctive orders directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to immediately vacate the properties and/or surrender vacant possession of the properties to the Plaintiff and permanent injunctive orders restraining the aforesaid Defendants from any interference with the property.

**225.** Further still, they seek mandatory injunctive orders directed to the 3<sup>rd</sup> Defendant requiring it to rectify the Land Register for L.R No 214/20/2 and Land Reference No 214/20/1/1 to reflect the Plaintiff as the registered owner, to call and expunge the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' titles in respect thereof and to nullify the amalgamation of Land Reference No 214/20/2 and Land Reference No 214/20/1/1 into Land Reference No 214/832.

**226.** Lastly, they seek general damages from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for trespass and illegal eviction, and mesne profits to the tune of Kshs 500,000 per month from the date of illegal occupation and costs of the suit.

**227.** The Plaintiff asserts that it is the legitimate owner of the parcels of land originally known as L.R. 214/20/1/1 and L.R. 214/20/2, later amalgamated into L.R. 204/832, having purchased them in 2006 from Arthur and Margaret Wairimu

Magugu. The Plaintiff states that it took possession of the properties sometime after purchase and enjoyed possession until 2010 when multiple claims began to be made on the parcels.

**228.** It was stated by the Plaintiff's Director that amongst the parties laying claim to their parcel are the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whom in 2013 and later on in 2020 invaded the parcels and evicted their guards who were on the premises.

**229.** The aforesaid 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim to have purchased the property from the late President, H.E Daniel Moi. The Plaintiffs maintain that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' claim in this regard is fraudulent and forms part of a broader scheme by the said Defendants involving similar disputes over other Muthaiga properties.

**230.** On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are categorical that they are the legitimate proprietors of L.R 214/832 previously known as L.R 214/20/2 and L.R 214/20/1/1 having purchased them from the late President, H.E Daniel Moi, sometime in 2012.

**231.** It was their case that upon completion of the requisite payments, the former President granted them vacant possession of the suit property, and that upon perfection of the sale, they lodged an application for amalgamation of the two parcels which was duly undertaken and the two parcels were amalgamated to form L.R No 214/832.

- 232.** According to the Defendants, they enjoyed peaceful possession until sometime in 2019 when a group of strangers invaded their land; that the matter was reported at Muthaiga Police station and thereafter escalated to the Regional Criminal Investigations Department which carried out investigations that affirmed their proprietorship, and that the Plaintiff has no proprietary rights over the land at all as alleged.
- 233.** On its part, it is the 3<sup>rd</sup> Defendant's case that the land registers volume 8 folio 342 file 1555 and volume N7 folio 466 file 6050 both in respect of L.R 214/20/2 and 214/20/1/1 are missing and cannot be traced. The 3<sup>rd</sup> Defendant concedes to have in their files the contested conveyances alluded to by the parties being the conveyances between H.E Daniel Moi and Arthur and Margaret Magugu and thereafter from the Magugu's to the Plaintiff and between the late President Moi and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- 234.** The 3<sup>rd</sup> Defendant however takes the position that as between the two, the conveyance to the Plaintiff is the legitimate one.
- 235.** It is apparent from the foregoing narration that the present dispute involves competing claims of ownership of the suit properties. Both the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are obligated to prove their respective claims. This requirement is anchored on the fundamental principle of law that he who alleges must prove.

**236.** This legal maxim is enshrined in **Section 107(1) and (2)** of the **Evidence Act**, which provides as follows:

*“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*

*(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”*

**237.** The majority decision of the Supreme Court in **Presidential Election Petition No. 1 of 2017 - Raila Amolo Odinga & Another vs IEBC & 2 Others (2017) eKLR** had the following to say on the evidential burden of proof:

*“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.”*

**238.** It is also noted that the Plaintiff has set out allegations of fraud. The **Black’s Law Dictionary** defines fraud thus:

***“Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientiously advantage is taken of another.”***

**239.** It is trite law that fraud must not only be pleaded and particularized, but strictly proven. This position was affirmed by the Court of Appeal in **Demutilla Nanyama Pururmu vs Salim Mohamed Salim [2021] eKLR** relying on an earlier exposition by **Vijay Morjaria vs Nansingh Madhusingh Darbar & Another[2000]eKLR** thus:

***“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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”***

**240.**As regards the standard of proof in respect of fraud, the Court of Appeal in ***Demutilla Nanyama Pururmu vs Salim Mohamed Salim (supra)*** looked to its earlier decision in ***Kinyanjui Kamau vs George Kamau [2015] eKLR*** wherein it held as follows:

***“...It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo vs Ndolo (2008) 1 KLR (G & F) 742 wherein the Court stated that: “...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”...In***

*cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”*

**241.** The court will be so guided.

**Whether the Amended Complaint is competent?**

**242.** The court observes that during cross-examination, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, through their Counsel, questioned the validity of the suit on the ground that the amended Complaint was not accompanied by a Verifying Affidavit. PW1 conceded that the amended Complaint indeed lacked such an affidavit. Although this issue was not subsequently addressed in the Defendants’ written submissions, the court considers it necessary to determine it for completeness.

**243.** **Order 4 Rule 1** of the **Civil Procedure Rules** requires that a Complaint be accompanied by a Verifying Affidavit sworn by the Plaintiff to confirm the correctness of the averments, particularly that there are no pending or previous suits over the same subject matter. The record shows that the original Complaint was duly accompanied by a Verifying Affidavit.

**244.** The court is persuaded that once a Verifying Affidavit has been filed with the initial Complaint, it satisfies the statutory requirement under **Order 4 Rule 1**. The Legislature did not expressly require a fresh Verifying Affidavit to accompany every amended Complaint. The rationale is that the Verifying Affidavit serves to confirm the good faith and accuracy of the

initial pleadings, and the suit, already properly instituted, remains valid despite subsequent amendments.

**245.** Accordingly, the court finds that the absence of a Verifying Affidavit to the amended Plaint is not fatal to the proceedings. The defect, if any, is procedural rather than substantive, and does not prejudice the Defendants or affect the legitimacy of the suit.

**Who between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is the legitimate proprietor of the suit properties?**

**246.** At the onset, the court notes that the Plaintiff while asserting ownership of the property by virtue of purchase, has advanced an alternative claim based on adverse possession. Having regard to the nature of the Plaintiff's pleadings and evidence, this alternative claim cannot stand. Once a party asserts that they are the rightful owner of land by purchase or transfer, a concurrent plea for adverse possession becomes legally incompatible.

**247.** As held in **Njue vs Matiabe & 3 others (ELC E050 & E010 of 2021 (Consolidated)) [2023] KEELC 17361 (KLR)** and **Haro Yonda Juaje vs Sadaka Dzengo Mbauro & Kenya Commercial Bank [2014] eKLR**, a claim founded on ownership and one based on adverse possession cannot co-exist. Consequently, that limb of the claim is hereby dismissed as untenable.

- 248.** The court now turns to the substantive question of ownership, namely, who between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold a valid and lawful title to the suit properties. To effectively address this question, the court must first lay out the factual foundation of the dispute.
- 249.** The Plaintiff lays claim to L.R 214/20/1/1 and L.R 214/20/2, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants assert ownership of L.R 214/832. It is, however, undisputed that these references describe the same parcel of land, since L.R 214/832 is an amalgamation of L.R 214/20/1/1 and L.R 214/20/2. Indeed, the Plaintiff seeks to have this amalgamation declared null and void.
- 250.** Having established that the dispute concerns the same property, the next task is to determine who among the parties holds the rightful claim. This inquiry must begin with the principle firmly enunciated by the Court of Appeal in **Chief Land Registrar & 4 others vs Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR)** where it was observed that:

***“Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or Statute. The***

***condition precedent to taking away anyone's property is that the authority must ensure compliance with the Constitution and Statutory provisions."***

**251.** This principle underscores the constitutional sanctity of title to immovable property, guaranteed under **Article 40** of the **Constitution**, subject to constitutional and statutory limitations.

**252.** From the evidence, it is apparent that the issue before this court is one of competing titles. The Plaintiff holds an Indenture of Conveyance dated 17<sup>th</sup> September, 2007, registered on 3<sup>rd</sup> October, 2007, whereas the 1<sup>st</sup> and 2<sup>nd</sup> Defendants hold a certificate of title in respect of L.R 214/832 registered on 16<sup>th</sup> May, 2019.

**253.** The issue of competing titles remains one of the most enduring and complex challenges within Kenya's land administration system. A title, the document meant to confer security of tenure has, in many cases, become a source of conflict.

**254.** As Kiage, J.A. poignantly remarked in **Gathonde (As Administrator of the Estate of the Late Thumbi Kariuki) vs Registrar & Others [2024] KECA 668 (KLR):**

***"Once upon a time, the holding of a title deed, that treasured document that declared the person named therein as the indisputable owner of the***

*landed property, was a ticket to peace and proprietary security. That it was before a vile mix of greed, rapacity and fraud on one hand and corruption mischief, and tampering of records on the other, increasingly rendered many a title deed worthless papers the holding of which, without more, provided neither certitude nor assurance of safety as courts have had to step in to decipher and determine which among two contending instruments of title is genuine and efficacious. The puzzle of competing title deeds over the same property on the ground in contemporaneous existence is now becoming a contest not of dualities of claims, but, as this case shows, one of multiple contestations, each backed by a title deed.”*

255. The Court of Appeal in *Munyu Maina vs Hiram Gathiha Maina [2013] KECA 94 (KLR)* emphasized that when the validity of a registered proprietor’s ownership is questioned, it is insufficient for that person to simply produce the title deed as proof of ownership. The proprietor bears the duty to go further and show that process through which the title was obtained, was lawful, procedurally sound, and free from fraud or irregularity.

256. Where the acquisition process leading to the issuance of a title is tainted with illegality or non-compliance with the law,

such a title cannot be sustained. This position was affirmed by the Supreme Court in **Dina Management Limited vs County Government of Mombasa & 5 others [2023] KESC 30 (KLR)** where the Apex Court was categorical that:

***“Indeed, the title or lease is an end product of a process. 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....Article 40 of the Constitution entitles every person to the right to property, subject to the limitations set out therein. Article 40(6) limits the rights as not extending them to any property that has been found to have been unlawfully acquired. Having found that the 1<sup>st</sup> registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of the Constitution. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”***

257. The Plaintiff submits, and it is indeed the position, that where there are two competing titles, the first in time will prevail. This position was emphasized in the case of **Wreck Motors**

**Enterprises vs The Commissioner of Lands & 4 Others**  
**[1997] KECA 284 (KLR)** where the court held that:

***“Where there are two competing titles the one registered earlier is the one that takes priority.”***

- 258.** However, this maxim is only applicable where there are equal equities. In the circumstances, each of the titles has been impugned and the court is mandated to investigate their roots.
- 259.** The Plaintiff’s case as presented by its director, who testified as PW1, Mr Anverali Mohamedali Amershi is that it is the registered proprietor of LR No. 214/20/2 and 214/20/1/1 which it purchased from the late Arthur Magugu and Mrs Margaret Wairimu Magugu (the *Magugu’s*) vide a sale agreement dated 21<sup>st</sup> July, 2006.
- 260.** He produced the Conveyance in respect thereof dated 17<sup>th</sup> September, 2007, registered on 3<sup>rd</sup> October, 2007. On the other hand, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants adduced into evidence a lease and certificate of title in respect of L.R 214/832 both registered on 16<sup>th</sup> May, 2019.
- 261.** As aforesaid, it is undisputed that the parcels in dispute were originally L.R 214/20/2 and L.R 214/20/1/1, albeit with one title (conveyance). The Plaintiff has set out a concise history of the parcels dating back to the Crown allocations in the early 1900s and tracing the chain of ownership through subsequent conveyances.

**262.** This history is supported by the 3<sup>rd</sup> Defendant, who in its pleadings and testimony confirmed the records showing ownership by James Archibald Morrison, Donald Farquharson Seth Smith, Eileen Susanha, and Ferdinand William Cavendish Bentinck, before the properties came into the hands of the late President H.E Daniel Toroitich Arap Moi in 1980. The real contention, however, does not lie in the early chain of title, but in what transpired after President Moi acquired the properties in 1980.

**263.** The question in this regard is whether, the late President divested himself of interest in favour of Arthur Kinyanjui Magugu and Margaret Wairimu Magugu in 1982, who eventually sold the land to the Plaintiff. in 2006, thereby forming the root of the Plaintiff's claim, or whether he remained the registered owner until 2012 when he conveyed the properties directly to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**264.** Beginning with the first aspect of the Plaintiff's claim as between the late President and the Magugu's, it has in support thereof adduced into evidence the conveyance between the President and the Magugu's dated 1<sup>st</sup> April, 1982. Also adduced in support is the mortgage by the President dated 12<sup>th</sup> September, 1980 and the reconveyance of the mortgage done simultaneously with the conveyance to the Magugu's on 1<sup>st</sup> April, 1982.

**265.** Further, the Plaintiff adduced into evidence the mortgage and further mortgage by the Magugu's as well as the consent

order in HCCC No. 1022 of 1977 dated 16<sup>th</sup> October, 2002, in which the Magugu's and National Bank of Kenya agreed to have the suit properties sold by private treaty. These set of documents are affirmed by the 3<sup>rd</sup> Defendant who contends that whereas indeed the land registers for the parcels cannot be traced, they have the aforesaid copies of the documents in their deed files.

**266.** This chronology of events was supported by the advocate who acted for the Plaintiff in the conveyance in 2006, PW2, and whose firm conducted a personal search, way before the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered the fray, and more probably, before the documents held at the Ministry of Lands disappeared.

**267.** The evidence of the said advocate, PW2, which was unshaken in cross examination, was that the sale agreement he dealt with related to parcels L.R. 214/20/2 and 214/20/1/1, purchased at a consideration of Kshs. 130,000,000 and that the vendors were Arthur and Margaret Magugu, represented by Chege Wainaina and Mbugua Advocates, while the Plaintiff was the purchaser.

**268.** The Plaintiff's conveyancing advocate, PW2, testified that the Mini Bakeries group, who joined the Plaintiff as shareholders, approached their firm to take over the transaction and finalize the purchase by paying off the balance of the purchase price and that as part of due diligence, they conducted searches, and confirmed that the land was

registered under the Government Land Act, and reviewed past conveyances to trace the root of title from 1915 to the Magugus' ownership.

- 269.** He explained that in 1980, the late President Moi purchased the land and later charged it to secure a loan; that the mortgage was discharged on 1<sup>st</sup> April 1982 simultaneously with the conveyance of the land to Mr. and Mrs. Magugu and that the Magugu's subsequently charged the property to the National Bank of Kenya.
- 270.** The advocate, PW2, stated that the purchasers were required to clear the outstanding loan with NBK to secure a discharge of charge and effect transfer of the property to the Plaintiff and that their due diligence confirmed a clear chain of title from 1915 up to 1987, when the land was charged to NBK, which held the original title. PW2 referred to a court order obtained as part of this process, assuring that NBK consented to the property being sold by way of private treaty.
- 271.** The Investigating Officer, DW6, informed the court that he recorded the statement of Margaret Wairimu Magugu wife to Arthur Magugu (deceased) where she averred that they jointly bought the land in contention vide the indenture of conveyance dated 1<sup>st</sup> April, 1982 for a consideration of Kshs 3,000,000, and that she fully supported the acquisition of the properties and documentation by Mount Pleasant. The said statement was part of the Report that was produced by the witness in evidence.

- 272.** The evidence of the Chief Land Registrar, DW7, was that as at the time the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purported to transact in the suit property with the late President Moi, he was the Collector of Stamp Duty at the Ministry of Lands.
- 273.** The Chief Land Registrar, DW7, referred the court to the conveyance and the instruments that were registered from 1980 under Volume N51 Folio 60/24 File 6050 and Volume N8 Folio 421/28 File 1555, which were in respect of LR Nos 214/20/2 and 214/20/1/1 respectively. It was his evidence that on 12<sup>th</sup> September 1980, the late President Daniel Arap Moi mortgaged the suit properties to Standard Bank Limited for a consideration of Kshs. 3,100,000 which was duly registered on 24<sup>th</sup> December 1980 in Volume N51 Folio 60/25 File 6050 and Volume N8 Folio 421/29 File 1555.
- 274.** According to the witness, the mortgage was re-conveyed through a re-conveyance dated 1<sup>st</sup> April 1982, which was registered on 2<sup>nd</sup> April 1982 in Volume N52 Folio 66/30 File 1555 and Volume N51 Folio 60/26 respectively. He stated that a copy of the conveyance dated 1<sup>st</sup> April 1982 shows that Daniel Arap Moi transferred the two parcels, namely L.R. No. 214/20/2 and L.R. No. 214/20/1/1, to Arthur Kinyanjui Magugu and Margaret Wairimu Magugu for a consideration of Kshs. 3,000,000 and that the conveyance was registered in Volume N52 Folio 66/31 File 1555 and Volume N51 Folio 60/27 File 6050.

**275.** Subsequently, by a mortgage dated 15<sup>th</sup> July 1987 and a further mortgage dated 17<sup>th</sup> June 1987, the two parcels were charged to National Bank of Kenya Limited for Kshs. 8,000,000 and Kshs. 2,500,000, thereby securing an aggregate sum of Kshs. 10,500,000/=. The mortgages were registered in Volume N51 Folio 60/29 File 6050 and Volume N52 Folio 66/33 File 1555.

**276.** The same file, according to the Chief Land Registrar, also contains a conveyance dated 20<sup>th</sup> February 2013 between H.E. Daniel Arap Moi and James Njuguna Mwangi together with Jane Wangui Mundia, purporting to transfer the property for a consideration of Kshs. 320,600,000/=. The said conveyance was purportedly registered in Volume N104 Folio 208/25 File 6090 and Volume N104 Folio 208/29 File 1555.

**277.** According to DW7, the aforesaid entries in respect of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants titles are inconsistent and conflict with those appearing in the further mortgage. Notably, as at 14<sup>th</sup> July 1988, the further mortgage is recorded as having been registered in Volume N52 Folio 66/33 File 1555 in respect of L.R. No. 214/20/2. However, hesitated that the conveyance to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purports to have been registered in Volume N104 Folio 209/29 File 1555, creating a direct contradiction.

**278.** It was his evidence that another glaring inconsistency in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title arises in the said conveyance, which cites File No. 6090 in relation to parcel L.R. No.

214/20/1/1, while, according to the official records, File No. 6090 corresponds to L.R. No. 2/300, registered in the names of Rosemary Omwono and Michael N. Ogolla.

- 279.** Furthermore, it was his evidence that the entries purporting to convey the properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as reflected in Volume N104 Folio 207/25 and Volume N104 Folio 209/29, are unsigned and thereby invalid.
- 280.** The Chief Land Registrar stated that further, there is no documentation in the parcel files evidencing the surrender of the two parcels in exchange for the alleged amalgamation into L.R. No. 214/832; that despite this, a lease over L.R. No. 214/832 was prepared pursuant to the purported amalgamation in favour of James Njuguna Mwangi and Jane Wangui Mundia, registered on 16<sup>th</sup> May 2019, and a certificate of title I.R. No. 217119 was issued on the same date.
- 281.** The witness was categorical that having conveyed the two parcels, namely L.R. No. 214/20/2 and L.R. No. 214/20/1/1, to Arthur Kinyanjui Magugu and Margaret Wairimu Magugu vide the conveyance dated 1<sup>st</sup> April 1982, H.E. Daniel Moi no longer retained any proprietary interest capable of being conveyed to James Njuguna Mwangi and Jane Wangui Mundia as alleged in the conveyance dated 20<sup>th</sup> February 2013.

- 282.** He testified that a volume in the land registry contains records of several properties, whereas a folio pertains to a specific property. In the case of the suit properties, the corresponding folio could not be traced. He explained that where a folio is missing, documents within the parcel file can be used to reconstruct the missing file.
- 283.** He clarified that what was being reconstructed was the register, which was torn, but not the parcel file where copies of documents were held, and that the correct file numbers for the two parcels have always been 1555 and 6050, and that the file number 6090, as referenced in the Defendants' conveyance, pertains to a different property, L.R. No. 2/300 which is not part of the present dispute.
- 284.** In a bid to impeach the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants first relied on the evidence of DW2, a forensic document examiner. It was his evidence that the signatures of the late H.E Daniel Moi on the conveyance dated 12<sup>th</sup> September, 1980, and the mortgage dated the 12<sup>th</sup> September, 1980 were different from his signature on the conveyance dated 1<sup>st</sup> April, 1982 between him and the Magugu's.
- 285.** It was DW2's further finding that the signatures of Mr. Magugu appearing on the conveyance dated 1<sup>st</sup> April 1982, the mortgage dated 15<sup>th</sup> July 1987 between the Magugus and NBK, and the subsequent mortgage dated 17<sup>th</sup> June 1988 were consistent with one another. However, he stated, these signatures differed from the one appearing on the

conveyance to the Plaintiff. On the other hand, he stated, Ms. Magugu's signatures were found to be consistent across all the documents examined.

**286.** It must be stated that a forensic document examination, though representative of an expert opinion, is not binding on the court. It must be weighed against the totality of the evidence and may be accepted or rejected, in whole or in part, depending on its soundness and the surrounding circumstances. In the case of **Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR**, Odunga J. (as he then was) expressed himself on the issue as follows:

***“In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that: “It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-“The evidence of PW1 and the report of Munga were, we agree, entitled***

***to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it"***

**287.** The Court of Appeal in ***Kimatu Mbuvi T/A Kimatu Mbuvi & Bros vs Augustine Munyao Kioko Civil Appeal No. 203 of 2001 [2007] 1 EA 139*** had earlier opined with respect to expert opinions that:

***"... such opinions are not binding on the Court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified although a Court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so."***

**288.** In applying the aforesaid principles, the court finds that DW2's opinion is subject to several material limitations that substantially weaken its probative value. First, DW2 conducted his analysis on photocopies rather than original documents. He conceded during cross-examination that photocopies obscure critical handwriting characteristics,

such as pen pressure, ink flow, and fine line quality making reliable comparison difficult.

- 289.** Second, DW2 admitted that he did not have access to specialized forensic instruments, such as a Video Spectral Comparator or Electrostatic Detection Apparatus, which are essential for detailed examination of ink variations and document impressions. His analysis was therefore limited both in scope and accuracy. Third, DW2 acknowledged that natural variations in a person's signature, influenced by factors such as age, health, or writing conditions, may account for apparent differences without implying forgery.
- 290.** Apart from the foregoing, there is broader transactional and documentary context supporting the conveyance to the Magugu's which have not been impugned by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. These include, the mortgage and further mortgage executed by the Magugus, as well as the consent order dated 16<sup>th</sup> October, 2002, in which the Magugu's and the National Bank of Kenya agreed to have the suit properties sold by private treaty.
- 291.** These documents are critical because they show that the two properties actually belonged to the Magugu's, way before the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants acquired them in 2007 and 2012 respectively, and that the conveyance by the Magugu's was used as security to borrow money from the NBK.

**292.** The evidence that indeed the NBK had charged this property, and advanced a loan to the Magugu's by the Plaintiff was not rebutted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The easiest way of rebutting this evidence was for the Defendants to have had an official of NBK summoned to testify, and deny the existence of such a mortgage, or that it was not paid a whopping Kshs. 90,000,000 by the Plaintiff to redeem the alleged mortgage, an exercise that they did not do.

**293.** To the contrary, the Advocate who was engaged in discharging the property that had been charged by NBK was candid on how the bank allowed the property to be sold to the Plaintiff by way of private treaty, and how the purchase price was distributed between the Bank and the vendors, the Magugus. This was in 2007, way before the 1<sup>st</sup> and 2<sup>nd</sup> Defendants purported to buy the same property from the late President Moi in 2012 or thereabouts.

**294.** There is also the correspondence of 1<sup>st</sup> July, 2010 from Messrs Ochieng, Onyango, Kibet and Ohaga and Company Advocates referencing the conveyance between the late President Moi and the Magugu's. In the said letter, which was authored way before the 1<sup>st</sup> and 2<sup>nd</sup> Defendants bought the suit property, confirmed that President Moi had sold the two parcels of land to the Magugu's. Again, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not controvert the said correspondence.

**295.** These transactions, spanning several years and involving a reputable financial institution (NBK) and law firm (Triple OK)

reflect consistent recognition of the Magugus' ownership by independent third parties.

**296.** The alarming aspect of this dispute was the fact that the Advocates who represented the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the purchase of the land did not present to this court an official search that was conducted before they commenced the transaction in 2012, a critical misstep on their part.

**297.** The said advocate, DW4, admitted in cross examination that she did not personally peruse the file at the Lands Office, as this was done by her clerk and that she did not have with her the search documents that the clerk had provided. It was her testimony that no official search had been produced in evidence.

**298.** In the absence of an official search, which would have revealed if indeed the former President was the registered owner of the land in 2012 or not, renders the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' plea of being innocent purchasers for value unsustainable.

**299.** The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also questioned the absence of a written sale agreement or direct proof of payment between the late President and the Magugus. However, as DW7 correctly stated vide his testimony, a formal sale agreement, though desirable, is not a statutory prerequisite for registration of a transfer under the law then applicable, the **Government Lands Act.**

- 300.** This would only be in issue if a party to the agreement was contesting the same, alleging absence of a sale agreement. In any event, Mrs. Magugu, in her statement taken by DW5 affirmed the transaction's legitimacy, and there is no evidence to show that that the late President ever disowned or challenged it during his lifetime. Even upon his death, his Estate has never refuted the sale of the two parcels of land to the Magugus.
- 301.** In light of these considerations, the court finds that the forensic evidence presented by DW2 does not dislodge the documentary, transactional, and testimonial evidence supporting the 1982 conveyance between the former President Moi and the Magugus. Taken together, these materials establish a coherent and credible chain of ownership. Accordingly, the court is persuaded that the Magugus' ownership has not been impeached.
- 302.** It having been demonstrated on a balance of probabilities that the root of title lawfully passed from the late President Moi to Arthur Kinyanjui Magugu and Margaret Wairimu Magugu through the 1982 conveyance, it follows that the late President Moi's proprietary interest was fully extinguished.
- 303.** In law, therefore, the late President Moi could not have conveyed a valid interest in the suit properties in 2012 to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The doctrine of *nemo dat quod non habet*, that one cannot give what one does not have applies squarely in this instance. Once the late President Moi had

divested himself of ownership, no residual interest remained capable of lawful transfer. This position is buttressed by the decision in **Daniel Kiprugut Maiywa vs Rebecca Chepkurgat Maina [2019] KEELC 842 (KLR)** where the court explained:

***“The nemo dat principle means one cannot give what one does not have. This principle is intended to protect the title of the true owner. The rationale behind this principle is that whoever owns the legal title to property holds the title thereto until he or she decides to transfer it to someone else.”***

- 304.** A natural consequence of the *nemo dat principle* as hereinabove found is that the doctrine of bona fide purchaser cannot avail to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, as one cannot derive good title from a party who had none to convey.
- 305.** Indeed, the Court of Appeal in **Mwangi James Njehia vs Janetta Wanjiku Mwangi & Another [2021]KECA 768,** observed that the principle laid out in **Katende v Haridar & Company Ltd (2008) 2 EA 173,** particularly the requirement that a vendor must have apparent valid title was no longer good law. It accordingly held that the fifth requirement in **Katende (supra)** be revisited, and the term “apparent” omitted altogether. This means only one who acquires a valid title can be a bona fide purchaser.

- 306.** The next point of consideration, concerns the validity of the subsequent transfer from the Magugus to the Plaintiff. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants raised several issues in this respect, namely, whether the Plaintiff was a duly incorporated entity capable of owning property, whether there existed a valid company resolution authorizing the purchase, and whether there was evidence of any advertisement for the intended sale.
- 307.** Questions also arose regarding the source of the purchase price and evidence thereof and whether valuations were conducted prior to the sale and evidence of fencing the property.
- 308.** As regards its legal personality, and corporate capacity, the Plaintiff adduced its certificate of incorporation, MEMOARTS and particulars of shareholding. The certificate shows it was incorporated on 7<sup>th</sup> June, 2006. The MEMOARTS of an even date reference J.K. Kariuki and Hardy Pemhiwa H. Ndojzi. Indeed, as at the date of the sale on 21<sup>st</sup> July 2006 between the Magugus and the Plaintiff, these were the officials of the Plaintiff.
- 309.** This being so, they are presumed to have had ostensible authority to act for and bind the company in the transaction, absent evidence to the contrary. The doctrine of ostensible authority was articulated in **Freeman and Lockyer (A Firm) vs Buckhurst Park Properties (Mangal) Ltd & Another [1964] 1 All ER 630**, where the court held:

***“An 'apparent' or 'ostensible' authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority so as to render the principal liable to perform any obligations imposed on him by such contract.”***

**310.** Where a party challenges this authority, the burden rests on them to demonstrate it. This principle was restated in ***Fubeco China Fushun vs Naiposha Company Limited & 11 Others [2014] eKLR***, where the Court, citing the Supreme Court of Uganda in ***United Assurance Co. Ltd vs Attorney General, Seca No. 1 of 1998***, observed as follows;

***“Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”***

**311.** The Plaintiff also tendered documentary proof of payment of the purchase price. Forwarding letters for cheque no. 027268 for Kshs 75,000,000, cheque no. 025599 for Kshs 15,000,000, and cheque no. 027899 for Kshs 27,000,000

were produced in evidence. The Plaintiff further exhibited the stamp duty declaration, assessment, and pay-in slip evidencing compliance with statutory requirements under the **Stamp Duty Act**.

- 312.** The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that there was no evidence of payment of Kshs 5,000,000, which PW1 admitted he was not privy to. However, Mrs. Magugu, in her statement to DW5, and which DW5 testified to, confirmed that the transaction was duly completed and that all payments were received as agreed.
- 313.** In any event, the issue of consideration, the precise nature of NBK's involvement and indeed valuation fall within the contractual matrix between the vendor and purchaser, to which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are strangers to.
- 314.** As to the question of an advert for the sale, nothing much falls on this. The properties were admittedly sold by private treaty to the Plaintiff. With respect to the lack of evidence of fencing, DW1 conceded that the property was already fenced when he went to take possession, which fact supports the Plaintiff's claim that it fenced the same. In any event, this is in itself insufficient to dislodge the Plaintiff's ownership claims.
- 315.** Ultimately, the Plaintiff has on a balance of probabilities demonstrated its acquisition of the suit properties from the Magugu's and that the same was lawful.

- 316.** Notwithstanding the foregoing, and for completeness, the court will now examine the other irregularities alleged against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' titles. Beyond the application of the *nemo dat quod non habet* principle already discussed, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title has been challenged on several additional grounds, which the court will now consider in turn.
- 317.** First, with respect to the alleged conveyance of December 2012 from the late President Moi to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, The Chief Land Registrar, DW7 noted that the same was purportedly registered in N104 Folio 208/29 yet the further mortgage was registered in Volume N52 Folio 66/33 File 1555 for L.R 214/20/2.
- 318.** He noted that the file number 6090 for parcel 214/20/1/1 is with respect to another parcel, L.R 2/300 registered to one Rosemary Omwono and Michael N Ogolla and that the entries conveying the properties to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were not signed rendering them invalid. It was also his testimony that there are no documents in the parcel files in support of the consideration of the surrender of the two properties for amalgamation. He also denied having endorsed the conveyance between the late President and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for stamp duty purposes.
- 319.** DW5 on his part noted several discrepancies in respect of the amalgamation. Specifically, he pointed to the font used for condition (iii) showing it was different from that used in

conditions (i) and (ii) as well as in the rest of the document. He also raised questions about the authenticity of the provisional approval issued by the National Land Commission under Ref. No. 17603/6 dated 19<sup>th</sup> November 2013. Specifically, whether one Mr. B. Limo, was duly authorized by the Commission to issue such an approval, and whether he was, at the time, a serving officer of the Commission.

- 320.** Additionally, he noted that one of the certificates of postal search presented as proof of common ownership relates to L.R. No. 214/20/1, a parcel not subject to the amalgamation. It was his evidence that reliance on a parcel outside the amalgamation undermines compliance with the requirement of establishing common ownership, thereby rendering the proof deficient.
- 321.** He added that despite the certificates of postal search for L.R. Nos. 214/20/1 and 214/20/2, together with the conveyance document for L.R. Nos. 214/20/2 and 214/20/1/1, being purportedly executed by the Registrar of Government Lands, one P.M. Ng'ang'a, his signature varied significantly across the three documents.
- 322.** Apart from the foregoing inconsistencies in the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title, it is undisputed that the registration regime of the suit properties was the Government Lands Act. DW2, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counsel in the transaction conceded as much. On the other hand, the title held by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is registered under the **Registration**

**of Titles Act.** Admittedly, there was no evidence showing the surrender of the title, and the conversion of the same from the GLA to the **Registration of Titles Act** before and after amalgamation.

**323.** The court has carefully weighed the foregoing. Although no conclusive forensic or investigative determination was made by the Directorate of Criminal Investigations (DCI) as admitted by DW6, the documentary record, when assessed on a balance of probabilities, discloses significant anomalies.

**324.** While the court stops short of finding fraud attributable to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the requisite standard of proof, which, as aforesaid must be proved to a standard higher than the ordinary civil threshold, it nonetheless holds that even if the *nemo dat quod non habet* principle were found inapplicable, the numerous procedural and documentary irregularities surrounding the conveyance, amalgamation, and registration of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title would, on their own, suffice to impeach it under **Section 26(1)(b)** of the **Land Registration Act**

**325.** Ultimately, it is the finding of the court that as between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiff has on a balance of probabilities established that it is the legitimate proprietor of the suit properties.

**What are the appropriate orders to issue?**

- 326.** As aforesaid, the Plaintiff seeks several reliefs, including a declaration that it is the legitimate proprietor of the suit property and cancellation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants title, permanent injunctive orders restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from dealing with the suit property and a mandatory injunction directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to vacate the suit property. It also seeks general damages for trespass and mesne profits.
- 327.** The court has found that between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, the Plaintiff has established that it is the legitimate proprietor of the suit properties. It is therefore entitled to a declaration in that respect, as well as vacant possession of the suit property and injunctive orders restraining interference with its property. The Plaintiff has also established a case for cancellation of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title pursuant to **Section 64** of the repealed **Registration of Titles Act** and **Section 80(1)** of the **Land Registration Act**.
- 328.** The Plaintiff also seeks general damages for trespass as well as mesne profits. In this respect, it is worthy to take cognizance of the holding in the case of **Christine Nyanchama Oanda vs Catholic Diocese of Homa Bay Registered Trustees [2020] [2020] KECA 536 (KLR)** where the Court of Appeal stated and held thus:

***“It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black's Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR, this Court held as follows:***

***“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”***

***In the case of Inverugie Investment v Hackett (Lord Lloyds [1995]3 ALL ER 842 it was held thus:***

***“Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead “mesne profits” there was no justification for him awarding a further Kshs.10 million under the subhead “trespass” since both mean one and the same thing...”***

- 329.** The Plaintiff cannot be granted mesne profits and at the same time damages for trespass. The plea for mesne profits is not available to the Plaintiff considering that the sum for the same was not specifically pleaded and strictly proved. In the circumstances, the court will consider the plea for general damages for trespass only.
- 330.** The evidence by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was that they took possession of the suit land in 2013, immediately after the title was issued in their names. On the other hand, the Plaintiff's case was that its guards were arrested in the year 2013, but released, and continued guarding the suit property until March, 2020, when they were evicted from the suit land by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
- 331.** In this regard, taking into account the acreage of the suit property, the location thereof, the duration of trespass complained of, and the value of the property estimated at Ksh 1 Billion as per the valuation reports of 2022, the court comes to the conclusion that an award of the sum of Ksh.10, 000, 000, would suffice, as appropriate recompense to and in favor of the Plaintiff as damages for trespass.
- 332.** In the end, it is the finding of the court that the Plaintiff has established its case on a balance of probabilities and grants the following reliefs:
- i. A declaration does hereby issue that the Plaintiff is the sole legal and registered proprietor of**

**Land Reference Numbers 214/20/2 and 214/20/1/1, now L.R 214/832.**

- ii. A declaration does hereby issue that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title over L.R 214/832, original numbers 214/20/2 and 214/20/1/1, is null and void ab initio.**
- iii. An order does hereby issue directing the 3<sup>rd</sup> Defendant to expunge and cancel all entries, conveyances and titles relating to the purported ownership by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, and to nullify the amalgamation of L.R. Nos. 214/20/2 and 214/20/1/1 into L.R. No. 214/832.**
- iv. An order does hereby issue directing the 3<sup>rd</sup> Defendant to rectify the land registers for L.R. Nos. 214/20/2 and 214/20/1/1 to reflect the Plaintiff as the registered proprietor thereof.**
- v. A permanent injunction does hereby issue restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, their servants, agents, employees or any persons acting under their authority from entering upon, occupying, subdividing, leasing, transferring, charging, developing or in any manner interfering with the Plaintiff's quiet possession, ownership and use of Land Reference Nos. 214/20/2 and 214/20/1/1 now L.R 214/832.**

- vi. A mandatory injunction does hereby issue directing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to vacate and surrender vacant possession of L.R 214/20/2 and 214/20/1/1, now L.R 214/832 to the Plaintiff within thirty (30) days from the date of this judgment, failing which eviction shall issue.**
- vii. An order does hereby issue that the Officer Commanding Station (OCS), Gigiri Police Station, and or Muthaiga Police Station, to provide assistance in the enforcement of the orders for vacant possession and in securing the Plaintiff's quiet and peaceful occupation of the suit properties.**
- viii. An award does hereby issue of general damages for trespass, assessed at Kenya Shillings Ten Million (Kshs. 10,000,000/=), payable jointly and severally by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.**
- ix. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay interest on the above amount at court rates from the date of this Judgment until payment in full.**
- x. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Counterclaim is dismissed with costs.**
- xi. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants to pay the Plaintiff the costs of the suit.**

**Dated, signed and delivered virtually in Nairobi this 23<sup>rd</sup> day of October, 2025.**

**O. A. Angote  
Judge**

**In the presence of;**

Ms Ndurea holding brief for Hassan and Rimui for Plaintiff

Mr. Kago for 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Allan Kamau for 3<sup>rd</sup> Defendant

Mr. Munene for Rimui

Court Assistant: Tracy

ORIGINAL