

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELC NO. 431 OF 2008
(Consolidated with ELC NO. 88 OF 2013)

EDWARD MACHARIA KIBE NJAU	-	1ST PLAINTIFF
MARGARET WAMBUI MBUGUA	-	2ND PLAINTIFF
JACINTA NJOKI KANYI	-	3RD PLAINTIFF
MAGDALINE NJERI NDUNGU	-	4TH PLAINTIFF
GRACE MUMBI KANYI	-	5TH PLAINTIFF
VS		
BENARD KUNGU MAINA	-	1ST DEFENDANT
JAMES W. MUNGAI	-	2ND DEFENDANT
ELIUD P. NJOROGE	-	3RD DEFENDANT
KAMUTHI FARMERS COOPERATIVE SOCIETY LIMITED	-	4TH DEFENDANT
NATIONAL LAND COMMISSION	-	5TH DEFENDANT
LAND REGISTRAR DEFENDANT	-	6TH
HON. ATTORNEY GENERAL DEFENDANT	-	7TH
KIMANI MWANGI	-	8TH DEFENDANT
LABAN TOLE MWAIENGO	-	9TH DEFENDANT

JUDGMENT

The Pleadings

1. The Plaintiffs commenced this suit via the Plaint dated 18/8/2008 and filed on 9/9/2008. The Plaintiffs' case is that they are the registered owners as tenants in common with equal shares for a term of 99 years commencing on 1/12/1994 for the parcels of land known as LR No. 21024/2; 21024/3

and 21024/4. The said parcels are neighbouring each other. The Plaintiffs aver that, sometime in July and August 2008, the 1st to 4th Defendants wrongfully entered their parcel of land known as LR 21024/4, deposited construction materials thereon, and began erecting structures. That the 1st to 4th Defendants have further threatened to use physical violence against the Plaintiffs should they attempt to enter the suit lands.

2. The Plaintiffs assert that the 1st to 4th Defendants' entry or threatened entry onto the parcels of land is wrongful, and despite repeated requests from the Plaintiffs for them to remove the materials, the 1st to 4th Defendants have failed to do so. They argue that the actions of the 1st to 4th Defendants have prevented the Plaintiffs from enjoying the use of their property. They contend that unless the 1st to 4th Defendants are restrained, they intend to remain there unlawfully. That although intention to sue has been served upon the Defendants, they have not removed their building materials and have actually threatened to commence construction.
3. The Plaintiffs therefore urge the court to enter Judgment against the 1st - 4th Defendants jointly and severally as follows;
 - a. An order directing the 1st -4th Defendants to remove the building materials deposited and the structures erected on the Plaintiffs' parcels of land LR Nos. 21024/4, 21024/2 and 21024/3 and more particularly LR No. 21024/4 and give vacant possession thereof to the Plaintiffs.
 - b. A permanent injunction to restrain the 1st -4th Defendants by themselves, their servants or agents or otherwise howsoever from entering into, remaining on, continuing in occupation, depositing building materials, erecting any structures on or in any other way interfering with the Plaintiffs' ownership and possession of the parcels of land known as LR Nos. 21024/2, 21024/3 and 21024/4.
 - c. Costs of and incidental to this suit.
 - d. Interest on (c) above at court rates.

- e. Any other or further relief that this Honourable Court may deem fit to grant.

The 1st -4th Defendants' Defence and Counterclaim

4. The suit is vehemently contested by the 1st to 4th Defendants through their Amended Defence and Counterclaim dated 7/11/2013. The 1st, 2nd, and 3rd Defendants state that they are officials of the 4th Defendant and have been wrongly sued. They assert that the 4th Defendant is the registered owner of LR No. 71/7, a property comprising 415 acres, which was acquired from Kahawa Farmers' Co-Operative Society Limited in 1989.
5. The 1st to 4th Defendants assert that they obtained the necessary approvals for the subdivision of the subject property. They state that the Commissioner of Lands approved the subdivision with conditions, including the surrender to the City Council of land for road reserves, public purpose plots, and open spaces, all free of charge. They contend that the Plaintiffs have never been in occupation or possession of the subject property as alleged. They also claim that the 4th Defendant has always been in possession of the property, and the allegations of wrongful entry or illegal construction are unfounded.
6. The 1st - 4th Defendants argue that the parcels allegedly owned by the Plaintiffs were fraudulently, irregularly, and illegally obtained because these parcels were secretly carved out of the 4th Defendant's property LR 71/7 during the subdivision process. They assert that due to the illegal and irregular acquisition, the Commissioner of Lands has instructed the Plaintiffs to surrender the titles for cancellation. They also claim that the subject property has been developed and construction is complete, therefore there is no cause of action against them. They urged the court to dismiss the Plaintiffs' suit with costs.
7. In their counterclaim, the 1st to 4th Defendants assert that the subdivision of the 4th Defendant's property, LR No. 71/7, was subject to

the surrender of public utility plots to the City Council of Nairobi. The plots are listed thereon, alongside the respective purposes for surrender.

8. The 1st to 4th Defendants allege that the 1st Plaintiff, the former Assistant Manager of the 4th Defendant, wrote to the Commissioner of Lands without the knowledge or consent of the members, falsely claiming that the 4th Defendant was allocating plots to its members. They argue that the Plaintiffs' registration of the title was fraudulent.
9. The particulars of fraud concerning LR No. 71/7/4 are that although the plot was reserved for the construction of public utility facilities upon surrender, it was nonetheless allocated to the Plaintiffs. Moreover, the Plaintiffs were not members of the 4th Defendant, except for the 1st and 2nd Plaintiffs. When the fraud was uncovered, the 4th Defendant lodged a complaint with the Commissioner of Lands, who, through its Letter dated 21/5/1997, notified the 4th Defendant that the plots had been unlawfully allocated to the Plaintiffs, who claimed to be former members of the 4th Defendant. The members of the 4th Defendant opposed the Plaintiffs' attempt to sell the plots and caused the Police Post and the offices of the 4th Defendant to be constructed thereon.
10. The counter-claimants assert that the Commissioner of Lands (COL), through its letter dated 19/10/2000, annulled the allocations and the corresponding titles for LR Nos. 21024/1-5 (which relate to the 4th Defendant's LR No. 71/7/4) and LR Nos. 14220/1-5 (which relate to the 4th Defendant's LR No. 71/7/5), and instructed that they be surrendered to COL for cancellation. They argue that failure to comply would lead the 4th Defendant to seek cancellation in court. Furthermore, the Ministry of Co-operative Inquiry Report, dated July 2003, concluded that the allocation was unlawful.
11. Regarding parcel LR No. 71/7/5, the 1st to 4th Defendants claim that the allocation to the Plaintiffs, pursuant to the Letter dated 3/10/1994, was fraudulent, as the 4th Defendant never consented. They also assert that the Plaintiffs' claim that Bima Women's Group was part of the 4th

Defendant is false. The Commissioner's Letter dated 1/11/1994, addressed to the 4th Defendant and claiming to allocate the parcel to the Plaintiffs, specified that the land's use was to be commercial. However, contrary to this condition, Bima Women's Group subdivided the land into multiple parcels and offered them for sale, including the parcel known as LR 14220/1, which was sold and transferred to the 8th and 9th Defendants. These allocations were also rescinded via the Commissioner's letter dated 19/10/2000.

12. The 1st - 4th Defendants further state that the County Government of Nairobi, to whom the plots were to be surrendered, is not aware of the allocations and continues to bill the 4th Defendant for rates payment. It is contended that the 4th Defendant has suffered loss and damage due to the illegalities perpetrated by the Plaintiffs.
13. It is on that basis that the 1st - 4th Defendants pray that the Plaintiffs' suit be dismissed with costs and Judgment entered against the Plaintiffs, the 8th and 9th Defendants as follows;
 - a. A declaration that the allocation of Land Reference Number 71/7/4 to the Plaintiffs and subsequent subdivision of the land by the Plaintiffs into five portions namely Land Reference Numbers 21024/1 (I.R. unknown), 21024/2 (IR No. 76448), 21024/3 (IR No. 76450), 21024/4 (IR No. 76449) and 21024/5 (IR No. 76451) was illegal, ultra vires and therefore null and void.
 - b. A declaration that the allocation of Land Reference Number 71/7/5 to the 2nd, 3rd, 4th and 5th Plaintiffs as officials and or members of Bima Women Group and subsequent subdivision of the land by the 2nd, 3rd, 4th and 5th Plaintiffs into five portions namely Land References Numbers 14220/1 (IR No. 72354), 14220/2 (IR No. unknown), 14220/3 (IR No. 78391), 14220/4 (IR No. 78392), 14220/5 (IR No. 78778) was illegal, ultra vires and therefore null and void.
 - c. A declaration that the sale and transfer of Land Reference Number 14220/1 by the 2nd, 3rd, 4th and 5th Plaintiffs to Kimani Mwangi and

Laban Tole Mwailengo was illegal, ultra vires and therefore null and void.

- d. An order directing the 8th and 9th Defendants namely, Kimani Mwangi and Laban Tole Mwailengo to surrender all the Title Deeds erroneously and illegally obtained and in their custody being Title Deeds in respect of Land References Numbers 2102421024/1 (I.R. unknown), 21024/2 (IR No. 76448), 21024/3 (IR No. 76450), 21024/4 (IR No. 76449) and 21024/5 (IR No. 76451) and Land References Numbers 14220/1 (IR No. 72354), 14220/2 (IR No. unknown), 14220/3 (IR No. 78391), 14220/4 (IR No. 78392), 14220/5 (IR No. 78778) as directed by the Commissioner of Lands (now National Land Commission) forthwith and in default, the Commissioner of Lands (now National Land Commission) be and is hereby directed to cancel the said titles and nullify the Plaintiffs, Kimani Mwangi and Laban Tole Mwailengo's registration as owners thereof forthwith;
- e. The Land Registrar be and is hereby directed to delete and or remove the names of the 8th and 9th Defendants, Kimani Mwangi and Laban Tole Mwailengo from the Land register in respect of the subject properties herein as hereunder.
- f. Orders directing the Commissioner of Police for the immediate arrest and prosecution of the Plaintiffs in view of the fraud perpetuated against the Defendants.
- g. A permanent injunction against the 8th and 9th Defendants, Kimani Mwangi and Laban Tole Mwailengo, by themselves, agents or anyone working under their direction, from entering, trespassing and or otherwise interfering with the Defendants' quiet possession of the subject properties.
- h. An order that the Commissioner of Lands proceed to process and issue Titles for LR 71/7/4 and 71/7/5 in the name of the 4th Defendant.
- i. Costs of the suit, Counterclaim and interest.

- j. Such further or other relief as this Honourable Court may deem fit and just.

The 8th & 9th Defendant's case

14. The 8th and 9th defendants, who are the Plaintiffs in ELC 88 of 2013, as per the Amended Plaint filed on 22/7/2013 and dated 11/6/2013, assert that they are the registered owners of all that parcel of land known as LR No. 14220/1 (IR 72354), having acquired the title on 25/2/1997. They claim that after registering as owners, they took possession and continued using the land until 2001, when members of the 4th Defendant began trespassing and encroaching upon it. They further state that, through a letter dated 24/2/2001, they wrote to the 1st and 4th Defendants requesting them to cease trespassing and encroaching on their land.
15. They claim that upon receiving the said letter, the 1st Defendant and the members of the 4th Defendant temporarily ceased trespassing on their land but have since resumed encroachment on the said parcel of land. They allege that the 1st Defendant and members of the 4th Defendant damaged the boundary and their fence, as well as destroyed crops and beacons indicating the extent, size, and location of the said parcel of land.
16. It is on that basis that they pray for Judgment against the 1st and 4th Defendants in the following terms;
 - a. An order of permanent injunction restraining and stopping the 1st Defendant and members of the 4th Defendant, their servants or agents from encroaching upon, trespassing on Land Parcel Number LR 14220/1 Nairobi or in any manner whatsoever interfering with their quiet possession, use and enjoyment of the said land.
 - b. Damages for illegal trespass, occupation and destruction of the land and developments thereon.

- c. An order that the Defendants do return and restore the beacons for the said piece of land at their own costs.
- d. Costs of the suit.

1st & 4th Defendants response to the 8th and 9th Defendants' case

17. The Defendants in ELC 88 of 2013, who are the 1st and 4th Defendants herein, filed a conditional Defence and Counterclaim dated 16/6/2014, which contain assertions similar to those stated in the Plaintiff herein. To avoid repetition, the 1st and 4th Defendants affirm that the suit property forms part of Land Reference No. 71/7/5, which was set aside by the 'Society' for public utilities for the benefit of its members.
18. That sometime in 1994, a group called Bima Women Group, comprising Jacinta Njoki Kanyi, Margaret Wambui Mbugua, and Magdaline Njeri Ndungu, was fraudulently allocated Land Reference No. 71/7/5 by the then Commissioner of Lands. The said Bima Women Group then subdivided the land, LR No. 71/7/5, into five parcels, with the suit premises being one of the resultant parcels.
19. The 1st and 4th Defendants argue that the Commissioner of Lands, as he was then, lacked the legal or statutory authority to allocate the larger parcel known as LR No. 71/7/5 to Bima Women Group. Therefore, any title derived from this allocation is void from the onset as the subdivision and the purported transfer are invalid from the very beginning and have no legal effect. Consequently, the titles held by the 8th and 9th Defendants have no legal validity. They assert that the suit premises and all land formerly designated as LR No. 71/7/5 have always been in the possession or use of the 4th Defendants' members and the public.

1st & 4th Defendants' Counterclaim to the 8th and 9th Plaintiffs' claim

20. The 1st and 4th Defendants contend that, at all material times, the 'Society' was the registered owner of LR No. 71/7, measuring 415 acres. That, sometime in the 1980s, the 'Society' obtained approval to subdivide the said parcel on the condition that it surrendered LR 71/7/5, measuring 2 acres, as a public utility for the construction of a commercial centre.
21. They allege that in 1994, the Bima Women Group, through their officials, exploited the Society and colluded with officials of the Ministry of Lands and Settlement, who allocated Parcel No 71/7/5 to the members of the Bima Women Group via a Letter of Allotment dated 20/12/1994. They also state that the members of the Bima Women Group falsely claimed to be members of the Society in their application for allocation.
22. Subsequently, the members of Bima Women Group, after fraudulently obtaining the title to the land, subdivided it into five separate plots and acquired new titles issued in the names of Jacinta Njoki Kanyi, Margaret Wambui Mbugua, and Magdaline Njeri Ndungu. The new titles were: LR No. 14220/1 (IR No. 72354), LR No. 14220/2, LR No. 14220/3 (IR No. 78391), LR No. 14220/4 (IR No. 78392), and LR No. 14220/5 (IR No. 78778).
23. That LR NO. 14220/1 (IR No. 72354) was later sold to the 8th and 9th Defendants in 1996, in a clandestine transaction only uncovered in 2000. They reaffirm their claim that the Commissioner of Lands, as he was then, lacked the authority to allocate parcel 71/7/5. Consequently, the subsequent subdivision and transfer of the resulting titles were null and void.
24. Reasons whereof the 1st and 4th Defendants pray that;
 - a. A declaration that the allocation of Land Reference Number 71/7/5 to Jacinta Njoki Kanyi, Margaret Wambui Mbugua and Magdaline Njeri Ndungu and the subsequent sub-division into five parcels namely LR NO. 14220/1 (IR No. 72354), LR No. 14220/2, LR No. 14220/3 (IR No. 78391), LR No. 14220/4 (IR No. 78392) and LR No. 14220/5 (IR No. 78778) is illegal, ultra vires and therefore null and void.

- b. An order that the title deeds in respect of namely LR NO. 14220/1 (IR No. 72354), LR No. 14220/2, LR No. 14220/3 (IR No. 78391), LR No. 14220/4 (IR No. 78392) and LR No. 14220/5 (IR No. 78778) be and is hereby cancelled and/or revoked.
- c. The 8th and 9th Defendants' suit be dismissed and the Counterclaim be allowed with costs to the 1st and 4th Defendants herein.

The 8th and 9th Defendants' Reply to Defence and Defence to Counterclaim (Plaintiffs in ELC 88/2013)

25. In response to the 1st and 4th Defendants' assertions herein, the 8th and 9th Defendants assert that they possess an indefeasible title to LR No. 14220/1, which title has never been cancelled or restrained through any lawful and recognised legal process. They claim that after acquiring the title to the land in 1997, they took possession, fenced it, and began cultivating crops there before the 1st and 4th Defendants invaded the land, destroyed the fence, and evicted their servants.
26. As a Defence to the Counterclaim, the 8th and 9th Defendants merely deny the Plaintiffs' assertions and state that the allegations are untrue, subjecting the 1st and 4th Defendants to strict proof. They urged that the Counterclaim be dismissed and that judgement be entered in their favour.
27. The 5th, 6th, and 7th Defendants did not respond or attend the hearings of the suit, despite Mr. Allan Kamau, State Counsel, attending some court sessions.

Evidence adduced by Parties

28. The matter proceeded to hearing. The parties called their respective witnesses to support their cases.

Evidence adduced by the Plaintiffs

29. Grace Mumbi Kanyi testified as PW 1. She relied on her witness statement dated 21/10/14 as her main evidence. She also submitted the documents listed at pages 20-21 of the Bundle - PEX No. 1-14, along with the Supplementary list of documents dated 21/10/14 marked as PEX No. 15-19. She testified on her own behalf and on behalf of the other

Plaintiffs, pursuant to their authority to act, as shown at Page 15 of the Plaintiffs' Bundle of Documents dated 18/8/2008.

30. In cross-examination by Mr Ochwo, Counsel for the 1st to 4th Defendants, PW1 stated that she is a member of the Bima Women Group. She confirmed that the application was made by the Bima Women Group, but they indicated in the application that they were members of the 4th Defendant. She referred to their Letter of Allotment dated 20/12/94 and their acceptance dated 22/12/94. She averred that they applied for plot No. 71/7/5. She stated that the plots were part of public open spaces. She denied knowledge of the 4th Defendant's complaint concerning the allocation of the open space. The witness was shown the Letter dated 21/5/1997 by the 4th Defendant, as well as the Letter dated 4/6/2001 by the District Officer Kasarani, recommending that the titles be cancelled. She denied receiving the Letter dated 30/3/2006 and that of 19/10/2000 calling for the surrender of the title for cancellation.
31. PW1 denied receiving the letter dated 26/6/2003 as well as the letter dated 13/5/2003, which invited them to a meeting on 21/5/03. She stated that she was not aware of the investigations by the Ministry of Cooperatives and had never seen the report. She noted that on pages 40-41 of the report, it was recommended that titles be surrendered for cancellation. She confirmed that Bima sold the land to the 8th and 9th defendants. The land they sold was a subdivision and an allocation to them by the Commissioner of Lands.
32. It was her testimony that the 1st Plaintiff died. She could not confirm whether he surrendered the plot to the 4th Defendant before his death. Nor was she aware if the 2nd Plaintiff surrendered the land. She stated that she was not privy to any surrender of land. She mentioned that there is a Police Station on parcel 21024/1, which was surrendered due to insecurity. She maintained that she obtained the title legally and that she could not be held responsible for the Plaintiffs, who purported to return the titles.

33. During cross-examination by Mr. Keyonzo, Counsel for the 8th and 9th Defendants, she stated that Bima Women Group sold the plot to the 8th-9th defendants in 1986. She affirmed that the plot had a title, was paid for, and they still hold Title No. LR 14220/1 to this day.
34. During re-examination by Mr. Kyule, Counsel for the Plaintiffs, PW 1 stated that she was unaware of the Letter dated 18/5/19 and the surrender of the land. She clarified that her case concerned LR No. LR 71/7/4, a subdivision of LR No. 21024/2/3/4, and that she had no claim regarding LR 71/7/5. The Plaintiffs' counsel then concluded the Plaintiffs' case.
35. DW 1 was Eliud Perminus Njoroge, the Secretary to the 4th defendant, the successor of Kamuthi Co-operative, and the 3rd Defendant herein. He relied on his witness statement dated 10/5/22 as his evidence-in-chief. He also produced the documents listed in the List of Documents dated 16/6/14, marked as DEX Nos. 1-20. Additionally, he presented documents contained in the List of Documents dated 11/5/22, marked as DEX Nos. 21-27.
36. When cross-examined by Counsel for the plaintiffs, he stated that the 4th defendant subdivided parcel 71/7/R, with some plots reserved as open spaces for specific purposes. He also noted that not all the plaintiffs were former members of the 4th defendant. He maintained that the plots were not available for allocation because the 4th defendant surrendered them to the commissioner of lands to hold in trust for the intended public purposes.
37. DW1 stated that Duncan Muriuki Weru is a former Chairman of the 4th Defendant. He was not aware that he had surrendered the land to the Commissioner of Lands. He averred that they paid rates for the plot, although he had not produced the receipts to that effect. He was not aware if the Plaintiffs had been paying the rates either. He stated that the land is rated to them. The police station is situated on parcel 5 and not parcel 1.

38. DW 1 asserted that the letter dated 18/5/19 shows that the actual surrender was made in the original title No. 21024 (LR No. 71/7/4) by the 2nd and 4th Plaintiffs. It was his evidence that the land had been set aside for a police post, among other public utility purposes. He stated that parcel No 71/7/5 was subdivided to create parcel Nos. 21024/1-4.
39. He stated that he was aware of the report by the Ministry of Cooperatives and that some members returned the titles following initiatives carried out by the 4th Defendant. He added that they had possessed the land for 30 years, asserting that their possession was based on the Commissioner of Land's cancellation of the title, as evidenced by the Letter dated 19/10/2000, which recommended cancelling the land, and therefore they are not trespassers.
40. During cross-examination by Counsel representing the 8th and 9th Defendants, DW1 stated that the original land 71/7 was 415 acres. After the subdivision of the main title, the remaining land was named Parcel 71/7 R, which measured 238 acres. The original members numbered 152. Further subdivision was carried out on parcel No. 71/7/R, though he had not filed the subdivision scheme. One condition for approving the subdivision plan was setting aside plots for public purposes, which were surrendered to the Nairobi County Council then for public purposes. He added that some members of the Bima Women Group were also members of the 4th Defendant. He stated that the 5th Defendant was not a member of the 4th Defendant, but her parents were.
41. DW 1 asserted that the Plaintiffs sold the land to third parties who were not members of the 4th Defendant. They applied for letters of allocation under Kamuthi Farmers Company, the predecessor of the 4th Defendant, without the 4th Defendant's approval. The Plaintiffs obtained titles and sold the land without involving them. He stated that they lodged a complaint when they noticed activities on the land. They were unaware they held titles; however, they did not lodge a caution on the said titles. He claimed they took possession of the land after the invasion by the 8th

and 9th Defendants and warned innocent members of the public that the land belonged to the 4th Defendant. He stated that the Commissioner of Lands informed them that the titles had been cancelled because the allocation was erroneous.

42. In re-examination, DW 1 testified that there were open spaces designated for intended uses such as a police post, social hall, administrative centre, and dispensary on parcel No. 71/7/4. Parcel No. 71/7/5 was allocated for a shopping centre for the benefit of all members of the 4th Defendant. He stated that he was not aware if the 8th and 9th Defendants were innocent purchasers. He stated that their Counterclaims in both cases seek the cancellation of titles arising from parcels 71/7/4 and 71/7/5, which had been surrendered for public utility and not private use as intended by the 8th and 9th Defendants.
43. With that the case of the 1st to 4th Defendants was closed.
44. DW2 was Mr. Kimani Mwangi John, the 8th defendant in the consolidated case and the first plaintiff in ELC 88/2013. He relied on his witness statement dated 16/1/2013 as his primary evidence. He stated that the plaintiffs sold the land to him and that he took possession of the land despite interference from the co-defendants. He also submitted the documents from pages 22 to 50 of the trial bundle.
45. During cross-examination by counsel for the 1st to 4th Defendants, DW 2 stated that he conducted a search on the suit land and carried out due diligence, but not on the root of the title. He did not find out how the vendors acquired the land. He averred that he was shown a Deed Plan but could not say how it was procured. It was his testimony that the Plaintiffs sold the land to him under the name Bima Women Group, but he could not explain how Bima Women Group acquired the land. He confirmed that he had not filed any case against the Plaintiffs.
46. During cross-examination by Counsel for the Plaintiff, the witness stated that he holds a title for LR No. 14220/1, jointly owned with the 9th Defendant. He confirmed that, to date, they are occupying the property,

although they have not developed it. He asserted that they have no claim against the Plaintiffs.

47. The 8th and 9th Defendants then closed their case.

48. The 5th - 7th Defendants did not defend the suit.

The written submissions

49. At the conclusion of the hearing, the court directed the parties to submit their respective written submissions. The parties complied. The Plaintiffs' submissions are dated 22/9/2025, while the submissions from the 1st to 4th, and the 8th and 9th Defendants, are dated 16/10/2025 and 15/10/2025 respectively. The Court has considered the submissions and taken them into account in its decision, which is submissions are summarized as follows:-

50. The Plaintiffs identified three main issues for determination: firstly, who between the plaintiff and the 1st to 4th defendants is the legal and bona fide owner of the suit property. The Plaintiffs assert that they followed the correct procedure to acquire the suit properties after they were declared open spaces. They state that the suit properties were carved out from Land Reference Number 71/7, which was then subdivided. After subdivision, Land Reference Numbers 71/7/1, 71/7/2, 71/7/3, and 71/7/4 were declared open spaces and surrendered back to the government by Kamuthi Farmers' Cooperative Society, the 4th Defendant herein. This surrender was confirmed by a letter dated 15/9/1981, marked as Exhibit 3 in the list of documents of the 1st, 2nd, 3rd, and 4th Defendants, dated 4/5/2009. They further aver that the Plaintiffs, members of Bima Women Group and also of Kamuthi Farmers' Cooperative Society, applied to the Commissioner of Lands for the allocation of the property known as Land Reference Number 71/7/4. Following allocation, the property acquired Land Reference Number 21024. The suit properties were also never re-issued to Kamuthi Farmers' Cooperative Society Limited by the

Commissioner of Lands. Therefore, the suit properties rightfully belong to the Plaintiffs.

51. The second issue pertains to whether the Defendants possess any lawful rights or claims over the suit property. The Plaintiffs cite Sections 24(a), 25(1), and 26(1) of the Land Registration Act, 2012, and contend that the 1st to 4th Defendants did not submit any evidence before this Honourable Court to prove that the Plaintiffs' titles were obtained through fraud or misrepresentation. Consequently, in the absence of any proof, this Honourable Court should determine that the certificates of title issued to the Plaintiffs are conclusive evidence of ownership, affirming that the Plaintiffs are the absolute and indefeasible owners of the suit land. The 1st to 4th Defendants failed to provide any title documents registered in their names or substantiate the alleged fraud by the Plaintiffs in their counterclaim. As a result, the 1st to 4th Defendants are trespassers who should be ordered by this Court to vacate the suit properties and permit the Plaintiffs to enjoy quiet use and occupation of the land.
52. The final issue to be determined, according to the Plaintiffs, is whether they are entitled to the reliefs sought in the Plaint. They contend that the 1st to 4th Defendants reported on different occasions to the District Officer and Kasarani Police Station that the Plaintiffs should be ordered to return their titles for cancellation of the suit properties. In both instances, the government officers upheld the Plaintiffs' ownership of the suit properties, and the 1st to 4th Defendants were ordered to vacate the properties. This Honourable Court should grant the Plaintiffs' prayers as outlined in the Plaint dated 18/8/2008, since the 1st to 4th Defendants have not proven their claim set out in the counter-claim.
53. The 1st to 4th Defendants identified seven issues for determination. The first and second issues, which were argued jointly, are: whether LR No. 71/7/4 and 71/7/5 were set aside by the 4th Defendant for public utilities, and whether the Commissioner of Lands (as he then was) had the legal powers to allocate land set aside for such purposes. The 1st to 4th

Defendants contend that the 4th Defendant subdivided the original land and designated LR No. 71/7/4 and 71/7/5 for public utilities for the benefit of its members. They argue that these parcels were unlawfully allocated to the Plaintiffs, who subdivided them, resulting in LR No. 21024/1, 21024/2, 21024/3, 21024/4, and 21024/5. They assert that land designated for public utility was not available for allocation by the Commissioner of Lands. They refer to the Supreme Court decision in **Dina Management Limited -vs- County Government of Mombasa & Others [2023] KESC 30 (KLR)**, where the apex court ruled that land designated as open space could not be classified as unalienated public land and was not available for alienation.

54. The third issue identified concerns the procedure for allocating public land. They contend that LR No. 71/7/4 and 71/7/5 were reserved for public utilities and, therefore, were not available for allocation to the Plaintiffs. However, even if the land had not been formally surrendered, the Plaintiffs did not follow the correct process for allocating unalienated public land. They merely submitted, before this court, an application for allotment, along with the letter of allotment and the title deed, without demonstrating that they complied with the legal process. They refer to the case of **Munyu Maina vs. Hiram Gathiha Maina (2013) EKLR**. Having failed to prove that they adhered to due process by submitting an approved Part Development Plan [PDP] prior to the issuance of the Letter of Allotment, the titles derived from it are invalid. As a result, the Plaintiffs did not acquire a good title capable of transfer to the 8th and 9th Defendants.

55. The fourth issue concerning whether the Plaintiffs and the 8th and 9th Defendants are entitled to the orders sought is addressed as follows: the 1st to 4th Defendants argue that the Plaintiffs are not entitled to the orders sought, and that the 8th and 9th

Defendants are also not entitled to the orders sought, as they are not bona fide purchasers.

56. Finally, regarding whether the 1st to 4th Defendants are entitled to the prayers sought in the counterclaim, the 1st to 4th Defendants submit that, having proved the suit property was set aside for public utility, as evidenced by the letter dated 19/10/2000, the land was not available for allocation. They therefore urge the court to grant the orders sought in the counterclaim.
57. The 8th and 9th Defendants agree with the Plaintiffs' submission and identify four main issues for determination. These are: whether the 8th and 9th Defendants are bona fide owners of land parcel number 14220/1 and whether they acquired it lawfully; whether the 1st to 4th Defendants have any lawful claim to land LR No. 14220/1; whether the 8th and 9th Defendants are entitled to the reliefs they seek against the 1st to 4th Defendants in their Plaint; and whether the 1st to 4th Defendants are entitled to the reliefs sought in their counterclaim against the 8th and 9th Defendants. However, these issues were not argued as identified.
58. The 8th and 9th Defendants contend that the Plaintiffs have demonstrated that they legally acquired the property, purchased part of it after a search, and obtained a valid title in 1997, subsequently taking possession. They argue that since the title is in their name, they are the rightful owners of the land.
59. Regarding the claim by the 1st to 4th Defendants, the 8th and 9th Defendants argue that, since the Society surrendered the land to the government, the government was free to allocate the land to any applicant deemed deserving by the Commissioner of Lands. They maintain that because the land was allocated to the Plaintiffs, who are members of the public and the Society, no irregularity occurred. Even if there were irregularities, the 5th Defendant is the

party responsible for reviewing public land allocations, not the 1st to 4th Defendants.

60. The 8th and 9th Defendants further submit that the 1st to 4th Defendants' suit is time barred under Section 7 of the Limitation of Actions Act. They argue that they have been in possession for over 29 years, yet the 1st to 4th Defendants only filed their counterclaim in 2014 seeking to recover the land.

Analysis and determination

61. Having considered the pleadings, the evidence and submissions by counsel for the parties, I am of the view that the issues for determination that arise are as follows:

- a. Whether the 1st to 4th Defendants' claim is time- barred.
- b. Whether the allocation of the suit premises to the Plaintiffs herein was lawful.
- c. Whether the title issued to the Plaintiffs as well as that transferred to the 8th and 9th Defendants should be revoked and or cancelled.
- d. Whether the 1st to 4th Defendants' counterclaim is merited.
- e. Who should bear the costs of the suits and the counterclaim?

62. All parties involved agree that the original land LR No. 71/7 belonged to the 4th Defendant, which was subdivided. The subdivision was contingent on surrendering public utility plots to the City Council of Nairobi. After the subdivision, LR No. 71/7/4 and 71/7/5 were allocated for public utilities. The Plaintiffs, along with the 8th and 9th Defendants, have not challenged this claim and have confirmed both during trial and in their submissions that these parcels were indeed surrendered for public utility and are now public land.

Whether the 1st to 4th Defendants' claim is time- barred.

63. On the time bar, the 8th and 9th Defendants argued that they took possession of the land in 1997 and made developments without any challenge or protest from members of the 4th Defendant. They contend that they have been in possession for over

29 years, yet the 1st to 4th Defendants only filed their counterclaim in 2014 seeking to recover the land. They stated that, in accordance with Section 7 of the Limitation of Actions Act, a suit for the recovery of land after a period of 12 years is inadmissible and urged the Court to so find.

64. Section 7 of the Limitation of Actions Act states as follows;

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

65. The purpose of the Law of Limitation was stated in the case of **Mehta vs. Shah [1965] E.A 321**, as follows;

“The object of any limitation enactment is to prevent a Plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a Defendant after he has lost evidence for his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case.”

66. A suit barred by limitation is a claim barred by law, hence by operation of law, the Court cannot grant the relief sought. In the case of **Iga vs. Makerere University [1972] EA**, cited in the case of **Wanjugu v Ngugi (Environment & Land Case 153 of 2018) [2024] KEELC 5649 (KLR)**, the Court had this to say on the Law of Limitation;

“ A Plaint which is barred by limitation is a Plaint barred by law.

Reading these

Provisions together it seems clear that unless the Applicant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption, the Court shall reject his claim. The Limitations Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time barred the Court cannot grant the remedy or relief sought.”

67. Section 42 (d) of the Limitation of Actions Act which states as follows;

Proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expenses in connection with any such recovery.

68. It follows that the provisions of Section 42(d) of the Act exempt all Government land from statutory limitations. In this case, it is widely acknowledged by both parties that the suit properties were surrendered for public utility to be held in trust by the COL and the County Council for the benefit of the public. The suit properties have become public land and are therefore exempt under the provisions outlined above. Additionally, Section 42(c) of the said Act also exempts an action to recover possession of Trust land. Since the land was surrendered, designated for public purposes, and placed in the hands of COL, it was therefore trust land. It is my finding that the 1st to 4th Defendants' counterclaim is not time-barred.

Whether the allocation of the suit premises to the Plaintiffs herein was lawful.

69. The dispute in this case is whether the re-allocation of the surrendered land to the Plaintiffs was lawful.

70. The Plaintiffs argue that they duly applied for the allotment of plot No. 71/7/5 as members of Bima Women Group to the Commissioner of Lands. They were subsequently issued a Letter of Allotment dated 20/12/94, which they accepted by letter dated 22/12/94. They then processed the titles legally and later subdivided the land.

71. The 1st to 4th Defendants, on the other hand, argue that the allocation of the land to the Plaintiffs was fraudulent and illegal. They contend that once the land had been surrendered for public utility, the Commissioner of Lands lacked the authority to re-allocate it. In fact, the Commissioner of

Lands, upon receipt of their complaint, via the letter dated 19/10/2000, cancelled the allocations and the respective titles; LR Nos. 21024/1-5 (being the 4th Defendant's LR No. 71/7/4) and LR Nos. 14220/1-5 (being the 5th Defendant's LR No. 71/7/5) should be surrendered. Failing this, the 4th Defendant was to seek court intervention for cancellation. Additionally, the Ministry of Co-operative Inquiry Report dated July 2003 also concluded that the allocation was illegal.

72. The 8th and 9th Defendants, on the other hand, support the Plaintiffs' case and justify that allocation on the basis that once the land was surrendered, it became public land and was available for re-allocation to the members of the public. The land was simply not available to the Society.
73. The definition of public land is found in article 62(1) of the Constitution and includes; "unalienated government land and land which no individual or community ownership can be established by any legal process."
74. Article 62(2) thereof stipulates that: "Public land shall vest in and be held by a county government in trust for the people resident in the county, and shall be administered on their behalf by the National Land Commission."
75. Article 62(4) provides that;
"Public land shall not be disposed of or otherwise used except in terms of an Act of Parliament specifying the nature and terms of that disposal."
76. The above-cited law encompasses the current legal framework established by the 2010 Kenya Constitution. The previous legal regime governing public land was outlined in the now repealed Government Lands Act (GLA), which stipulated as follows.
"Under section 2 of GLA, unalienated land was defined as Government land which is not for the time being leased or which the Commissioner of Lands has not issued any letter of allotment"

77. Under section 3 of the GLA, the President had the power to make grants or dispositions of any estates, interests, or rights in or over unalienated government land, subject to any other written law. Section 9 of the GLA empowered the Commissioner of Lands “to cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner.” Further, under section 10 of the GLA, the leases of town plots could only be granted for a term not exceeding one hundred years.
78. It is established law that land reserved for public utility cannot be further alienated. Furthermore, such land held for public utility is considered to be held in trust for the people, as was noted in the case of **Dorcas Atieno Rajoru & 145 Others -vs- Mjahid, Sub-chairman Harambee Maweni Committee SHG & 2 Others (2016) ECLR**. The court stated that,
- “indeed it is trite law that plots for public utilities and open spaces are usually surrendered to either the council, the county government or the national government that is required to hold plots meant for public utilities on behalf of the residents of the place where such plots are situated.”
79. The Court of Appeal in the case of **Kipsirgoi Investments Ltd -vs- Kenya Anti-Corruption Commission [2011] KECA 326 (KLR)**, while interpreting section 2 of the Government Land Act [GLA] and section 3 of the Physical Planning Act, held that the allocation of the suit premises in that case, which had been planned as open space, was irregular as the land had already been alienated. The land was not available for further alienation.
80. The apex Court in the case of **Dina Management Limited -vs- County Government of Mombasa & Others(Supra)**, held that;

“The suit property was at the time designated as an open space. Having been designated as such, it was rendered a public utility and could not be described as unalienated public land as urged by the appellant. It was therefore not available for alienation to HE Daniel T Arap Moi or for further alienation.”

81. I concur with the findings in the authorities cited above. Land designated for public utility cannot be further alienated. Public land is held in trust for the people of Kenya.

82. Furthermore, Section 3 of the GLA reserved the right to allocate unalienated government land to the President of the Republic of Kenya. Therefore, even if the suit premises were unalienated government land, only the President could have alienated it. The authority of the President under section 3 of the GLA was delegated to the Commissioner of Lands only in cases for religious, charitable, educational, or sporting purposes.

83. In the case of **James Joram Nyaga & Another -vs- Hon. Ag (2007) eKLR**, the court held that:

“The above section (section 3 of the GLA) clearly limits the power of the commissioner to executing leases or, conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate un-alienated land to the president.”

84. This court finds that the Commissioner of Lands lacked the authority to alienate the suit premises to the Plaintiffs. The allocation of the suit premises to the Plaintiffs was therefore not only irregular but also unlawful. It is possible that this is the reason why the Commissioner of Lands, upon receiving their complaint, cancelled the said allocation via the Letter dated 19/10/2000. It is generally accepted that some of the plots were surrendered by some of the Plaintiffs in recognition that they were public utility plots.

Whether the title issued to the Plaintiffs as well as that transferred to the 8th and 9th Defendants, should be revoked and or cancelled

85. Title in Kenya is protected by law as long as it is procured legally. Article 40 (6) of the Constitution of Kenya states that any title that is tainted is not protected by law.

86. Indefeasibility of the title is provided for in Section 26 (1) (b) of the Land Registration

Act which states;

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner ... and the title of that proprietor shall not be subject to challenge, except -

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

87. Section 26 of the Land Registration Act is explicit that a title of a proprietor may be challenged where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

In the case of **Elijah Makeri Nyangw’ra -vs- Stephen Mungai Njuguna & Another**

(2013) eKLR, the court elaborating on the provisions of section 26 held that: -

“.....the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

88. The Court of Appeal in the case of **Munyu Maina vs. Hiram Gathiha Maina (2013) EKLR** pronounced itself as thus;

“we state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is challenged and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances.”

89. The Court of Appeal in **Chemey Investments Ltd -vs- Attorney General & 2 Others (2018) eKLR** categorically stated that sanctity of title was never intended or understood to be a vehicle for fraud and illegalities or an avenue for unjust enrichment at public expense.

90. Section 80(1) of the Land Registration Act comes into play. It provides:

-

“Subject to subsection (2), the Court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.”

91. Having established that the suit properties were irregularly and unlawfully allocated to the Plaintiffs, it follows that they should and must be revoked or cancelled. All titles derived from the said allocation, including LR No. 21024/1, 21024/2, 21024/3, 21024/4 & 21024/5 and LR No. 14220/1 (IR No. 72354), LR No. 14220/2, LR No. 14220/3 (IR No. 78391), LR No. 14220/4 (IR No. 78392) and LR No. 14220/5 (IR No. 78778), were procured illegally and, as such, are impeachable and ought to be cancelled and/or revoked.

Whether the 1st to 4th Defendants’ counterclaim is merited.

92. The burden of proof is always on he who alleges to prove. This position is well captured

under Section 107 of the Evidence Act which provides that: -

“Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

93. Having now carefully read and considered the pleadings, the exhibits before the Court, and the written submissions by the parties, the Court finds that the 1st to 4th Defendants have proved their case beyond the required standard of balance of probabilities and that the prayers as sought in the Counterclaim is merited.
94. Consequently, the Court enters judgment for the 1st to 4th Defendants against the Plaintiffs, and the 8th and 9th Defendants jointly and severally, as prayed in the Amended Counterclaim in terms of prayers (a), (b), (c), (d), (e), (g), (h) & (i).
95. The prayer to direct the Commissioner of Police, now the Director of Public Prosecutions, to arrest and prosecute the Plaintiffs for fraud is denied. The Director holds an independent office under Article 157 of the Constitution. Consequently, this Court cannot issue an order instructing him to perform his duties. The law outlines procedures through which the 1st to 4th Defendants can pursue such a remedy, which is beyond the jurisdiction of this Court.

Who should pay costs of this suit?

96. The Court has discretion under Section 27 of the Civil Procedure Act to award costs. Clearly, costs generally follow the event unless special circumstances arise.
97. The 1st and 4th Defendants are entitled to costs. I am inclined to order the Plaintiffs, the 8th and 9th Defendants, to pay the 1st and 4th Defendants' costs of the suit jointly and severally.

Final orders for disposal

98. From the foregoing, the court enters judgment in favour of the 1st and 4th Defendants against the Plaintiffs, the 8th and 9th Defendants jointly and severally and I issue the following orders:

- a. A declaration is hereby issued that the allocation of Land Reference Number 71/7/4 to the Plaintiffs and subsequent subdivision of the land by the Plaintiffs into five portions namely Land Reference Numbers 21024/1 (I.R. unknown), 21024/2 (IR No. 76448), 21024/3 (IR No. 76450), 21024/4 (IR No. 76449) and 21024/5 (IR No. 76451) was illegal, ultra vires and therefore null and void.
- b. A declaration is hereby issued that the allocation of Land Reference Number 71/7/5 to the 2nd, 3rd, 4th and 5th Plaintiffs as officials and or members of Bima Women Group and subsequent subdivision of the land by the 2nd, 3rd, 4th and 5th Plaintiffs into five portions namely Land References Numbers 14220/1 (IR No. 72354), 14220/2 (IR No. unknown), 14220/3 (IR No. 78391), 14220/4 (IR No. 78392), 14220/5 (IR No. 78778) was illegal, ultra vires and therefore null and void.
- c. A declaration is hereby issued that the sale and transfer of Land Reference Number 14220/1 by the 2nd, 3rd, 4th and 5th Plaintiffs to Kimani Mwangi and Laban Tole Mwilengo was illegal, ultra vires and therefore null and void.
- d. An order is hereby issued directing the Plaintiffs, Kimani Mwangi and Laban Tole Mwilengo to surrender all the Title Deeds erroneously and illegally obtained and in their custody being Title Deeds in respect of Land References Numbers 21024/1 (I.R. unknown), 21024/2 (IR No. 76448), 21024/3 (IR No. 76450), 21024/4 (IR No. 76449) and 21024/5 (IR No. 76451) and Land References Numbers 14220/1 (IR No. 72354), 14220/2 (IR No. unknown), 14220/3 (IR No. 78391), 14220/4 (IR No. 78392), 14220/5 (IR No. 78778) forthwith to the Land Registrar and in default, the Land Registrar is hereby directed to cancel the said titles and delete the names of the Plaintiffs, Kimani Mwangi and Laban Tole Mwilengo's as owners thereof forthwith;

- e. The Land Registrar is hereby directed to delete and or remove the names of the Plaintiffs, Kimani Mwangi and Laban Tole Mwailengo from the Land register in respect of the subject properties herein as hereunder.
 - f. A permanent injunction is hereby issued against the Plaintiffs, Kimani Mwangi and Laban Tole Mwailengo, by themselves, agents or anyone working under their direction, from entering, trespassing and or otherwise interfering with the subject properties.
 - g. An order is hereby issued directing the 5th, 6th, and 7th Defendants to register Titles LR 71/7/4 and 71/7/5 under the Nairobi County Government to be held for the intended public purposes for the benefit of the members of the 4th Defendant and the public.
 - h. The Plaintiffs and the 8th and 9th Defendants shall bear costs of the suit, Counterclaim and interest in favour of the 1st - 4th Defendants.
 - i. For avoidance of doubt, the Plaintiffs' and the 8th and 9th Defendants' suit is dismissed in its entirety.
99. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI
THIS 11TH DAY OF DECEMBER 2025 VIA MICROSOFT TEAMS.**

**J G KEMEI
JUDGE**

Delivered online in the presence of;

1. Mr Mwaure Wahiga for the Plaintiffs
2. Mr Ochwo for the 1st -4th Defendants
3. N/A for the 5th -7th Defendants
4. Mr Keyonzo for the 8th -9th Defendants
5. C/A – Ms. Yvette Njoroge

ORIGINAL FILE COPY