

**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 508 OF 2010**

**JARED ODUOR OSODO.....1<sup>ST</sup>**  
**PLAINTIFF**

**JESSE MBURU GITAU.....2<sup>ND</sup>**  
**PLAINTIFF**

**CRISPUS KINENE.....3<sup>RD</sup>**  
**PLAINTIFF**

**JULIUS NDERITU MITII.....4<sup>TH</sup>**  
**PLAINTIFF**

**VERSUS**

**HABIB OMAR KONGO.....1<sup>ST</sup>**  
**DEFENDANT**

**AVITON ENTERPRISES.....2<sup>ND</sup>**  
**DEFENDANT**

**MARGARET NYAMBURA.....3<sup>RD</sup>**  
**DEFENDANT**

**CHIEF LAND REGISTRAR.....4<sup>TH</sup>**  
**DEFENDANT**

**AND**

**DAVID TONY OWINO OLENGO**  
**& 12 OTHERS.....INTERESTED**  
**PARTIES**

**JUDGMENT**

**The Pleadings**

1. The Plaintiffs instituted this suit against the Defendants on 25<sup>th</sup> October 2010. The plaint was amended on 21<sup>st</sup> February 2014, and further amended on 20<sup>th</sup> July 2015. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>

Plaintiffs are the Secretary, Chairman and Patron, respectively, of a group known as Wazee Makadara Self Help Group registered under the Ministry of Gender, Children & Social Development (hereinafter referred to only as “the group” where the context so permits). The 4<sup>th</sup> Defendant is described in the further amended plaint as an interested party in the suit.

2. The Plaintiffs averred that the group, which had 200 members, was registered as the leasehold proprietor for a period of 99 years with effect from 1<sup>st</sup> January 1994, of all that parcel of land known as Nairobi/Block 83/893 situated at Umoja Innercore Sector IV, within Makadara Constituency, Nairobi County (hereinafter referred to as “the suit property”). The Plaintiffs averred that the suit property was allocated to the group by the Nairobi City Council through a letter of allotment dated 5<sup>th</sup> September 1998. The Plaintiffs averred that the group was issued with a Beacon Certificate by the Nairobi City Council Surveyor.

3. The Plaintiffs averred that the suit property was created from the then larger parcel of land known as Nairobi/Block 83. The Plaintiffs averred that the Nairobi City Council subdivided

Nairobi/Block 83, which measured approximately 9.7 hectares, into four (4) blocks, which were assigned Map Sheet numbers 1, 2, 3 and 4. The Plaintiffs averred that the suit property was in Map Sheet number 3. The Plaintiffs averred that the group subdivided the suit property into 324 plots, namely, Plot Nos. 899 to 1222. The Plaintiffs averred that the suit property was planned for the construction of flats and a school.

4. The Plaintiffs averred that the 1<sup>st</sup> Defendant was a politician and a former chairman of the defunct Nairobi City Commission. The Plaintiffs averred that it was during the 1<sup>st</sup> Defendant's tenure at the Commission, particularly in 2001, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants began to interfere with the group's ownership of the suit property, which they claimed to be Nairobi/Block 83/530. The Plaintiffs averred that the suit property was separate and distinct from Nairobi/Block 83/530 (hereinafter referred to only as Plot No. 530), both on ground position and size. The Plaintiffs averred that Plot No. 530 measured 1.5 acres and was in Map Sheet number 1, while the suit property measured approximately 24 acres and was in Map Sheet

number 3. The Plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold Plot No. 530 to the Kenya Assemblies of God in 2000.

5. The Plaintiffs averred that on 23<sup>rd</sup> February 2004, the Defendants engaged a surveyor, one Maina Kariuki, who happened to be a member of the group, to visit the suit property and establish the boundary beacons of the various plots within the property. The Plaintiffs averred that they were informed of the Defendants' intention, and their plan failed. The Plaintiffs averred that after the group subdivided the suit property into 324 plots upon obtaining all the requisite approvals, the group presented the documents to the Land Registry in Nairobi on 15<sup>th</sup> November 2005, so that the Land Registrar could issue titles for the subplots to the members of the group.
6. The Plaintiffs averred that on 27<sup>th</sup> February 2006, the Defendants engaged another surveyor to establish the beacons on the suit property, although the property had already been subdivided into 324 plots. The Plaintiffs averred that they reported the encroachment on the group's land to the police and were advised to seek the court's intervention. The Plaintiffs

averred that they filed a suit against the Defendants, which their advocates withdrew without their authority. The Plaintiffs averred that the group owned the suit property and that the Defendants had no interest in the property, legal or beneficial. The Plaintiffs averred that the Defendants' actions aforesaid amounted to trespass on the suit property.

7. The Plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants caused the suit property to be subdivided into 208 portions and the 3<sup>rd</sup> Defendant issued to them certificates of lease in respect of the subdivisions namely; Nairobi/Block 83/952, 955, 958, 959, 960, 962, 963, 964, 965, 966, 967, 968, 972, 974, 975, 977, 978, 979, 980, 981, 984, 985, 988, 989, 991, 992, 994, 995, 1012, 1013, 1069, 1080, 1104, 1105, 1106, 1113, 1116, 1128, 1131, 1182, 1176, 1177, 1178, 1179, 1181, 1108, 1114, 1115, 1117, 1118, 1119, 1122, 1129, 1160, 1158, 1150, 1157, 1146, 1144, 1142, 1121, 1181, 1163, 1164, 1165, 1166, 1168, 1169, 1170, 1171, 1172, 1173, 1110, 1111, 1112, 1103, 1120, 1123, 1162, 1161, 1126, 1127, 1107, 1109, 1125, 1130, 1149, 1175, 1174, 1167, 1148, 1147, 1145, 1143, 1147, 1143, 1200, 1201, 1202, 1203, 1204, 1205, 1206, 1207, 1208, and 1209. The Plaintiffs

averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, having illegally and fraudulently obtained the said certificates of leases for the said subdivisions, proceeded to sell the same to third parties.

8. The Plaintiffs averred that the suit property had permanent buildings at various stages of construction in breach of the court order issued on 14<sup>th</sup> June 2011, restraining the Defendants from entering, occupying, trespassing on, constructing upon or in any manner interfering with the suit property pending the determination of the suit. The Plaintiffs averred that the subdivision of the suit property was illegal as the property did not belong to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiffs prayed for judgment against the Defendants for;

(a) A temporary injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their servants and/agents from entering, utilising, occupying, trespassing or in any other manner whatsoever interfering with the suit property.

(b) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their servants and/agents from entering, utilising, occupying, trespassing or in any

other manner whatsoever interfering with the suit property.

- (c) A permanent injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants by themselves, their servants and/agents from entering, utilising, occupying, trespassing or in any other manner whatsoever interfering and/or dealing with the remainder of the subdivided plots within the suit property, and in particular the 106 subdivisions, which the Defendants were unable to dispose of.
- (d) An order compelling the 3<sup>rd</sup> Defendant to cancel the certificates of lease in respect of the parcels of land enumerated in paragraph 27 of the plaint.
- (e) An order directing the OCPD and PCIO Buruburu to effect and enforce the orders issued against the Defendants on 14<sup>th</sup> June 2011.
- (f) An order compelling the 3<sup>rd</sup> Defendant to issue certificates of lease in respect of the parcels of land enumerated in paragraph 27 of the plaint in the names of the members of Wazee Makadara Self Help Group (the group).
- (g) The costs of the suit.

9. The 1<sup>st</sup> Defendant filed an amended statement of defence on 4<sup>th</sup> August 2015. The 1<sup>st</sup> Defendant averred that the 4<sup>th</sup> Defendant was improperly joined in the suit without leave of the court. The 1<sup>st</sup> Defendant averred that he was a stranger to the group and its registration status. The 1<sup>st</sup> Defendant denied that the group was the registered proprietor of the suit property. The 1<sup>st</sup> Defendant averred that the suit property did not exist and had never existed. The 1<sup>st</sup> Defendant averred that the suit property was a fabrication coined by the Plaintiffs to defraud members of the public.

10. The 1<sup>st</sup> Defendant averred that the Plaintiffs acquired a certificate of lease for the suit property using forgery and fraud, on account of which they were charged at Kibera Chief Magistrate's Court in Criminal Case No. 2168 of 2006 and Kibera Chief Magistrate's Court Criminal Case No. 2055 of 2015. The 1<sup>st</sup> Defendant averred that the Plaintiffs' claim that they were allocated and/or issued with a lease over the suit property by the Nairobi City Council/Commission was pretentious, spurious, and a fabrication. The 1<sup>st</sup> Defendant

averred that the claim was contrary to the Plaintiffs' initial position that the 1<sup>st</sup> Defendant sold the suit property to them.

11. The 1<sup>st</sup> Defendant denied that he had at any time interfered with the suit property or claimed that the suit property was Plot No. 530. The 1<sup>st</sup> Defendant denied that the suit property was situated in Map Sheet number 3, while Plot No. 530 was situated in Map Sheet number 1. The 1<sup>st</sup> Defendant denied that he had at any time engaged a surveyor to enter the suit property and establish its boundary beacons. The 1<sup>st</sup> Defendant reiterated that the suit property was non-existent and, as such, he could not have engaged a surveyor to establish its beacons.
12. The 1<sup>st</sup> Defendant averred that he had no interest in the suit property and had never raised a claim in respect thereof. The 1<sup>st</sup> Defendant averred that he had never owned the suit property and had never sold it to the Plaintiffs or anyone else. The 1<sup>st</sup> Defendant denied that he had been issued with certificates of leases for the subdivisions of the suit property by the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant averred that following the subdivision of Mombasa/Block 83/530 owned by the 2<sup>nd</sup> Defendant into Plot Nos. 899 to 1222, the 2<sup>nd</sup> Defendant had

sold most of the plots to third parties. The 1<sup>st</sup> Defendant averred that he was wrongly joined in the suit and that the suit was time-barred under Section 4 (2) of the Limitation of Actions Act. The 1<sup>st</sup> Defendant urged the court to dismiss the suit with costs.

13. The 2<sup>nd</sup> Defendant filed an amended statement of defence and a counterclaim against the Plaintiffs on 9<sup>th</sup> September 2015. The 2<sup>nd</sup> Defendant averred that the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiff had no locus standi to maintain an action against the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant denied that the 3<sup>rd</sup> Plaintiff was an interested party to the suit and that he was joined to the suit through a court order. The 2<sup>nd</sup> Defendant also denied that the 4<sup>th</sup> Plaintiff was an interested party in the suit. The 2<sup>nd</sup> Defendant denied that the 4<sup>th</sup> Defendant was a party to the suit. The 2<sup>nd</sup> Defendant averred that the Plaintiffs did not obtain leave of the court to join the 4<sup>th</sup> Defendants to the suit. The 2<sup>nd</sup> Defendant averred that it was a stranger to the group and its registration. The 2<sup>nd</sup> Defendant averred that the Plaintiff failed to comply with the procedure for instituting a representative

suit and, as such, had no authority to represent the group or its alleged members.

14. The 2<sup>nd</sup> Defendant averred that the suit property did not exist and that the Plaintiffs obtained a certificate of lease in respect thereof through forgery and fraud, which led to the Plaintiffs being charged in Kibera Chief Magistrate's Court Criminal Case No. 2168 of 2006 and Kibera Chief Magistrate's Court Criminal Case No. 2055 of 2015 with forgery and related offences. The 2<sup>nd</sup> Defendant averred that the suit property was unknown to it and it had no interest in the same. The 2<sup>nd</sup> Defendant averred that it could not have engaged surveyors to establish the beacons of the suit property.

15. The 2<sup>nd</sup> Defendant averred that the Plaintiffs' claim that the measurement of the suit property changed from 8.67 hectares to 9.7 hectares was an afterthought raised only to create a similarity between the suit property and the 2<sup>nd</sup> Defendant's parcel of land, Nairobi/Block 83/530 (Plot No. 530). The 2<sup>nd</sup> Defendant averred that the land parcel No. Nairobi/Block 83/530, referred to in the plaint as measuring 1.5 acres, was different from the land parcel No. Nairobi/Block 83/530 (Plot

No. 530), previously registered in the name of the 2<sup>nd</sup> Defendant.

16. The 2<sup>nd</sup> Defendant averred that it surrendered its title to Nairobi/Block 83/530 to the Land Registrar, Nairobi Land Registry, and if the Land Registrar reissued the land reference number to another parcel of land owned by another person, that was an issue that did not concern the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant denied that the parcel of land it sold to Kenya Assemblies of God Church was Nairobi/Block 83/530 (Plot No. 530). The 2<sup>nd</sup> Defendant averred that the Plaintiffs' plaint disclosed no cause of action against the 2<sup>nd</sup> Defendant.

17. The 2<sup>nd</sup> Defendant averred that Nairobi/Block 83/530 (Plot No. 530) was lawfully subdivided and titles for the subdivisions issued to various persons who had not been joined in the suit. The 2<sup>nd</sup> Defendant averred that the non-joinder of the said parties rendered the suit fatally defective. The 2<sup>nd</sup> Defendant denied that it breached the order issued by the court in this suit. The 2<sup>nd</sup> Defendant averred that the order did not refer to Nairobi/Block 83/530 (Plot No. 530). The 2<sup>nd</sup> Defendant averred further that if any construction was being undertaken, the

same was being carried out by legitimate proprietors of the parcels of land in issue who were not parties to the suit. The 2<sup>nd</sup> Defendant averred that the Plaintiffs' suit was time-barred and the prayers sought were incapable of being granted.

18. In its counterclaim, the 2<sup>nd</sup> Defendant reiterated the contents of the defence. The 2<sup>nd</sup> Defendant averred that it was at all material times the registered proprietor of the leasehold interest in Nairobi/Block 83/530 (Plot No. 530) measuring approximately 9.7 hectares located at Innercore in Umoja. The 2<sup>nd</sup> Defendant averred that it acquired the property from the Government of Kenya in 1992. The 2<sup>nd</sup> Defendant averred that Plot No. 530 was not related to the suit property, Nairobi/Block 83/893, which the Plaintiffs claimed to have acquired from the City Council of Nairobi. The 2<sup>nd</sup> Defendant averred that it successfully applied for the subdivision of Plot No. 530 into 319 portions with reference numbers 899-1222. The 2<sup>nd</sup> Defendant averred that it was issued with all the titles for the subdivisions of the said parcel of land. The 2<sup>nd</sup> Defendant averred that it sold and transferred most of the subdivisions to new owners who

had taken possession and developed the same with homes, schools, churches, and other structures.

19. The 2<sup>nd</sup> Defendant averred that the Plaintiffs had on numerous occasions trespassed or threatened to trespass on the said subdivisions of Plot No. 530 (Plot Nos. 899-1222). The 2<sup>nd</sup> Defendant averred that the Plaintiffs had continuously laid a claim to the land comprised in Plot No. 530, asserting that it was their parcel of land, Nairobi/Block 83/893, and had even obtained forged documents of title for its purported subdivisions.

20. The 2<sup>nd</sup> Defendant sought judgment against the Plaintiffs for;

- (a) A permanent injunction restraining the Plaintiffs and the members of Wazee Makadara Self Help Group (the group) from trespassing, interfering, claiming or dealing in any way with the 2<sup>nd</sup> Defendant's parcels of land known as Nairobi/Block 83/899-122.
- (b) A permanent injunction restraining the Plaintiffs and the members of Wazee Makadara Self Help Group (the group) from publishing in the press, newspaper or any other media adverse notices or features relating to the 2<sup>nd</sup>

Defendant's properties known as Nairobi/Block 83/899-122.

(c) General damages.

(d) Costs of the suit.

21. The Plaintiffs filed an amended reply to the 1<sup>st</sup> Defendant's amended defence on 18<sup>th</sup> August 2015, in which they joined issue with the 1<sup>st</sup> Defendant in his defence save for the admissions. The Plaintiff averred that the 3<sup>rd</sup> Defendant should be joined in the suit in the spirit of Article 159 of the Constitution. The Plaintiffs averred that the suit property was in existence and denied having been involved in forgery and fraud in acquiring a title in respect thereof. The Plaintiffs averred that the criminal charges preferred against them amounted to an abuse of the process of the court.

22. The Plaintiffs filed an amended reply to the 2<sup>nd</sup> Defendant's amended defence and a defence to the 2<sup>nd</sup> Defendant's counterclaim on 30<sup>th</sup> September 2015. The Plaintiffs joined issue with the 2<sup>nd</sup> Defendant in its defence, save where the same consisted of admissions. The Plaintiffs averred that paragraphs 2, 3, 4, 5, 6, 8 and 9 of the defence raised issues

which were contrary to the parties' agreement, directions, and leave granted by the court and Article 159 of the Constitution. The Plaintiffs urged the court to determine the dispute on its merits rather than indulging the 2<sup>nd</sup> Defendant's sideshows.

23. In response to the 2<sup>nd</sup> Defendant's counterclaim, the Plaintiffs reiterated that the 2<sup>nd</sup> Defendant had owned Plot No. 530, which measured 0.6212 hectares (1.5 acres), and that it sold the same to Kenya Assemblies of God. The Plaintiffs averred that it was inconceivable that land measuring 1.5 acres could have given rise to 324 parcels upon subdivision. The Plaintiffs averred that the 2<sup>nd</sup> Defendant's counter-claim was frivolous, vexatious, and was meant to subvert the cause of justice.

### **The Evidence presented by the Plaintiffs**

24. The hearing of the suit commenced on 3<sup>rd</sup> October 2016 with the evidence of the 1<sup>st</sup> Plaintiff, **JARED ODUOR OSODO(PW1)**. PW1 told the court that he was an evangelist and a contractor. He stated that he was the secretary of Wazee Makadara Self Help Group (the group). He stated as follows in his evidence in chief: The dispute before the court was over L.R No. Nairobi Block

83/983 Umoja Inner Core (the suit property). The title of the suit property was at page 8 of the Plaintiffs' list of documents. According to the certificate of lease at page 8 of the Plaintiffs' list of documents, the property was registered in the name of Jared Oduor Osodo, Julius Nderitu Mitei and John Wachira Macharia. There was another certificate of lease for the suit property at page 9 of the Plaintiffs' list of documents. According to this certificate of lease at page 9 of the Plaintiffs' list of documents, the suit property was registered in the name of Wazee Makadara Self Help Group. This certificate was issued on 27<sup>th</sup> October 2015.

25. The certificate of lease at page 8 of the Plaintiffs' list of documents was also issued on 27<sup>th</sup> October 2005. The certificate of lease at page 9 of the Plaintiffs' list of documents was the first to be issued. The certificate of lease at page 8 of the Plaintiffs' list of documents was issued subsequently when it was realised that "Wazee Makadara Self Help Group" was not a legal person and as such could not hold land in its own name. The second certificate of lease was issued in the name of the group's trustees. The group acquired the suit property in 1997.

26. At the time, the 1<sup>st</sup> Defendant had won a seat at the Nairobi City Council. As a way of showing his appreciation, he gave the members of the group the suit property. He showed the members of the group the land. The members formed the group and opened an office on the suit property. The group then started processing the title for the suit property. The members of the group elected the officials of the group. The 4<sup>th</sup> Plaintiff was elected as the chairman. Jane Karoki was elected as the secretary. James Machayo as the treasurer and Mr. Muturi as the Organising Secretary. The 1<sup>st</sup> Defendant then came to the group's office and asked the group to sign an agreement committing that the group would meet the expenses associated with the suit property, such as land rates, which the 1<sup>st</sup> Defendant said would be approximately Kshs.5 million. The members of the group contributed Kshs.6 million. The money was contributed weekly and was being collected by the 1<sup>st</sup> Defendant's manager. The 1<sup>st</sup> Defendant's manager used to sign a voucher each time he received the weekly payment from the group. The contributions were made over a duration of over 2 years.

27. In 2000, the 1<sup>st</sup> Defendant invaded the group's office with hired goons, beat up the officials, and carried away all the documents that the group had in the office. The officials of the group were arrested and taken to Buruburu Police Station. At page 74 of the Plaintiff's bundle of documents was a report prepared by the group's former chairman, Julius Nderitu, which touched on the incident. The chairman reported how they were attacked and all their documents were carried away.
28. After the group was evicted from the suit property, the members regrouped and opened an office in Nairobi. The group then engaged an advocate, R. M. Kimani, to act on its behalf. The advocate wrote to the 1<sup>st</sup> Defendant on 24<sup>th</sup> November 2003 over the suit property. The 1<sup>st</sup> Defendant did not respond to the letter. After 6 months without a response from the 1<sup>st</sup> Defendant, the group engaged surveyors, Nicholas Wahome and Paul Kariuki, to assist it in processing the title for the suit property.
29. The first task for the surveyors was to confirm whether the suit property existed. They were to carry out a number of searches. When the said surveyors reported back to the group, they came with a surveyor from the City Council of Nairobi, Mr.

Kihingo. The surveyors brought with them the allotment letter, beacon certificate, blueprint area map, and computation area list. The land had been subdivided by then. The allotment letter was at page 33 of the Plaintiffs' list of documents, and the beacon certificate was at page 34. He received the documents on behalf of the group. At pages 43 to 45 of the Plaintiffs' list of documents was the computation area list. At page 92 was the subdivision map. The suit property had been subdivided. The subdivision gave rise to L.R Nos. 899 to 1222, a total of 324 plots. The City Council of Nairobi issued the group with a lease for the suit property. This was also given to the group by Mr. Kihingo. He (PW1) was with Ms. Hotensia Wanjiru when he went to collect the lease.

30. After the group was issued with a lease, they started the process of having it registered. For this purpose, they engaged another advocate, Mr. Rioba. Mr. Rioba forwarded their documents to the land office so that individual titles could be processed. Mr. Were, who was the Registrar of Titles in Nairobi, was not present when the documents were presented. The members of the group did not get their individual titles. This was

when the dispute between the group and the 1<sup>st</sup> Defendant broke out. Out of the 324 plots, only one title was processed, namely, L.R No. 952. The 1<sup>st</sup> Defendant came back to the suit property and started subdividing it afresh and allocating portions thereof to his own people. The group's surveyor, Peter Kariuki, found the 1<sup>st</sup> Defendant carrying out the subdivision.

31. The group instructed its advocate to file a suit against the 1<sup>st</sup> Defendant. A suit was filed, namely, Nairobi High Court Civil Case No. 193 of 2006. In that suit, the group sought to restrain the 1<sup>st</sup> Defendant from dealing with the suit property. The court issued an injunction restraining the 1<sup>st</sup> Defendant from interfering with the suit property until that case was heard and determined. The Order was made on 2<sup>nd</sup> March 2006. After the application was heard interpartes, Alnasir Visram J. (as he then was) ordered that the status quo be maintained.

32. While that case was pending, the 1<sup>st</sup> Defendant made a report to the C.I.D that the group had forged documents and wanted to take away his land. The C.I.D started looking for the officials of the group, including him (PW1). He was arrested on 16<sup>th</sup> May 2006 and locked up at Pangani Police Station. The

following day, he was taken to Milimani C.I.D Headquarters, where he met the 1<sup>st</sup> Defendant. The other officials of the group were also arrested. The group's surveyors were also arrested and forced to record statements. The group's advocate and the Land Registrar were not spared either.

33. He stayed at the police station for several days. The police then accompanied his wife to his house and took away all documents that he had at home that concerned Wazee Makadara Self Help Group (the group). He was accused of being the mastermind of the fraud. He was taken to Kibera Law Court and charged. He was released on bond. While the criminal case was ongoing, the 1<sup>st</sup> Defendant enlisted the services of a firm of advocates known as Wamwayi & Co. Advocates, which purported to be the group's advocates, and withdrew the group's civil case together with the orders of status quo that the group had been granted. The suit property then reverted to the 1<sup>st</sup> Defendant. The advocate, Mr. Wamwayi, purported to be acting for the group. The group did not instruct Wamwayi & Company Advocates to act for it in the civil case over the suit property.

34. At the time when the firm of Wamwayi & Co. Advocates purported to act for the group, the group already had advocates acting for it in the civil case. The advocates were J. M. Rioba and R. M. Kimani. The group later added Meshack Okoth Obura advocate. Meshack Okoth Obura & Co. Advocates wrote to Wamwayi & Co. Advocates inquiring as to who had instructed it to act for the group in the civil case, Nairobi HCCC No. 193 of 2006. The group complained against the firm at the Advocates Complaints Commission. The group did not get assistance from the Commission. The group then sought orders to reinstate the civil case. The case was reinstated. The group's then advocate J. M. Kimani, stopped acting for the group without any explanation. The group then decided to file the present suit through another advocate.

35. In the current suit, the court issued an order restraining the 1<sup>st</sup> Defendant from dealing with the suit property. There were, however, people who were still constructing on the land. The order was served upon the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant sought to review the injunction order, but the review

application was dismissed. The 1<sup>st</sup> Defendant appealed to the Court of Appeal. The appeal was also dismissed.

36. The 1<sup>st</sup> Defendant was found making markings on the suit property. It was at that time that the group filed the first case and obtained an injunction to restrain him from dealing with the property. The officials of the group were thereafter arrested and charged. The 1<sup>st</sup> Defendant claimed that the group had forged documents, which it used to acquire the suit property. The 1<sup>st</sup> Defendant claimed that his parcel of land was Nairobi/Block 83/530 (Plot No. 530), and the land the group was claiming was Nairobi/Block 83/893 (the suit property). The 1<sup>st</sup> Defendant claimed that his Plot No. 530 was in the same position on the ground as the suit property.

37. He went to the C.I.D to find out the truth about the plots. He met Peter Kyalo, who was stationed at the C.I.D headquarters. Peter Kyalo obtained a copy of the area map from the Director of Surveys. According to the map, Plot No. 530, which was on the map, measured 0.6212 hectares and was in Section 1. This map was at page 91 of the Plaintiffs' bundle of documents. The 1<sup>st</sup> Defendant claimed that the letter of allotment, beacon

certificate, and the survey computations at pages 33, 34 and 43, respectively, of the Plaintiffs' bundle of documents were forged. It was based on these documents that he was charged. Mr. Kihingo, who had assisted them in getting the documents, was also arrested.

38. At Kibera Law Court, where he was charged, he learnt that Plot No. 530 had been sold by the 1<sup>st</sup> Defendant to Umoja Assemblies of God Church. Plot No. 530 claimed by the 1<sup>st</sup> Defendant was different from the suit property owned by the group. The two parcels of land were in different areas of Umoja. The suit property measured 8.67 hectares, and after a resurvey, the measurement was adjusted to 9.4 hectares.

39. In 2014, the court ordered the City Council of Nairobi (the Council) to prepare and submit a report to the court. The order was complied with. The report was prepared and submitted to the court, and the same was on record. While this case was pending, they were again arrested and charged a fresh in respect of the offences that had been dismissed by the Kibera Court. All the orders issued by the court had been disobeyed

by the 1<sup>st</sup> Defendant. He urged the court to grant the reliefs sought in the re-amended plaint.

40. PW1 produced the following documents in support of the Plaintiffs' case, some of which were marked for identification;

- (a) Letter of allotment dated 5<sup>th</sup> September 1998, marked as P.EXH. 1 (Page 33 of the Plaintiffs' bundle of documents)
- (b) Beacon Certificate dated 24<sup>th</sup> December 2004, marked as P.EXH. 2 (Page 34 of the Plaintiffs' bundle of documents)
- (c) Survey Computation marked as PMFI 3 (Page 43 to 45 of the Plaintiffs' bundle of documents)
- (d) Survey Map marked PMFI 4 (Page 92 of the Plaintiffs' bundle of documents).
- (e) Letter dated 24<sup>th</sup> July 2007, marked P.EXH. 5 (Page 66 of the Plaintiffs' bundle of documents).
- (f) Survey Map marked PMFI 6 (Page 91 of the Plaintiffs' bundle of documents)
- (g) Survey Computation marked PMFI 7 (Page 39 of the Plaintiffs' bundle of documents)

- (h) Certificate of Lease dated 27<sup>th</sup> October 2005, marked as P.EXH. 8 (Page 8 of the Plaintiffs' bundle of documents)
- (i) Certificate of Lease dated 27<sup>th</sup> October 2005, marked P.EXH. 9 (Page 9 of the Plaintiffs' bundle of documents).
- (j) White Card marked as P.EXH. 10 (Page 11 of the Plaintiffs' bundle of documents)
- (k) Letter dated 14<sup>th</sup> November 2005 by J. M. Rioba & Co. Advocates marked as P.EXH. 11 (Page 38 of the Plaintiffs' bundle of documents)
- (l) Letter dated 24<sup>th</sup> November 2003 by R. M. Kimani Advocate marked as P.EXH. 12 (Page 72 of the Plaintiffs' bundle of documents)
- (m) Chairman's Report marked as P.EXH. 13 (Page 74 of the Plaintiffs' bundle of documents).

41. **JARED ODUOR OSODO(PW1)** stated as follows on cross-examination by the advocate for the 1<sup>st</sup> Defendant: They formed Wazee Makadara Self Help Group (the group). The group was registered with the Ministry of Social Services. They had evidence of the registration. The Plaintiffs were the officials of the group. He knew the 1<sup>st</sup> Defendant in 1997 as a

politician who was contesting an elective seat in a ward within Makadara. He did not have a relationship with the 1<sup>st</sup> Defendant as an individual. The 1<sup>st</sup> Defendant was dealing with them as a group. The 1<sup>st</sup> Defendant gave them the suit property in appreciation of the support they gave him during his campaigns. They trusted the 1<sup>st</sup> Defendant when he gave them the land. They did not carry out a search at the time. He came to learn that the 1<sup>st</sup> Defendant was a commissioner in the Nairobi City Council. The 1<sup>st</sup> Defendant won the elections and became a councilor. That was why he was thanking them. He did not know how the 1<sup>st</sup> Defendant became a commissioner of the Nairobi City Commission.

42. In 1998, the Nairobi City Council was a commission. The 1<sup>st</sup> Defendant was the Chairman of the Commission. He was not aware that the Nairobi City Commission was dissolved in 1992. The 1<sup>st</sup> Defendant called them after the elections. At the time, the group had not been registered. The 1<sup>st</sup> Defendant met them at Makadara Social Hall. They were informed by Julius Nderitu, the 1<sup>st</sup> Defendant's chief campaigner, that the 1<sup>st</sup> Defendant wanted to meet them. The 1<sup>st</sup> Defendant showed

them the land and gave it to them. The land was shown to them as a group. They believed that the land belonged to the 1<sup>st</sup> Defendant. The Nairobi City Council granted them a lease over the suit property thereafter. The year 1994 mentioned in his statement as the date when they were allocated the suit property was erroneous. They started the process of acquiring the suit property in 1997. The suit property was allocated to them by the Nairobi City Council. The 1<sup>st</sup> Defendant gave them land which belonged to the Nairobi City Council. They filed this suit after they had been issued with a certificate of lease.

43. Between 1997 and 2000, they paid a total of Kshs. 6 million to the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant carried away all the documents that they could have used as evidence of the payments made to the 1<sup>st</sup> Defendant when he attacked their office with a group of thugs. He was not in the group's office during the attack. He was not aware whether the loss of the documents had been reported. The elected officials of the group were Julius Nderitu, Chairman, Jane Karoki, Secretary, and James Mugeru Machayo, Treasurer. When the 1<sup>st</sup> Defendant asked them to enter into an agreement with him, it

was not an agreement for sale. The agreement was about how they were going to process the titles for the suit property. They obtained the lease at page 6 of the Plaintiffs' list of documents from the City Council of Nairobi. The documents in their possession were obtained from other sources after the documents that were in their possession were taken away, as stated earlier.

44. PW1 stated further as follows in his evidence on cross-examination by the advocate for the 1<sup>st</sup> Defendant: A copy of the agreement between them and the 1<sup>st</sup> Defendant was carried away in the year 2000 when the 1<sup>st</sup> Defendant invaded the group's premises with hired thugs. It was during that invasion that the 1<sup>st</sup> Defendant took away all their documents. They made the payment to the 1<sup>st</sup> Defendant's manager, whose name he could not remember. He was not an official of the group at the time, but saw the officials of the group giving money to the manager of the 1<sup>st</sup> Defendant.

45. As a member of the group, he used to make payments to the group officials, who were then remitting the same to the manager of the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant's manager

used to collect the money weekly. He had nothing to show that the person who used to collect the money was the 1<sup>st</sup> Defendant's manager. The said manager used to sign vouchers each time he received money. The said vouchers were carried away with other documents when the group's office was raided, as stated earlier. They were being told that the monies they were contributing were being collected by the 1<sup>st</sup> Defendant's manager. The 1<sup>st</sup> Defendant told them that the land he was giving the group was Plot No. 83/893. He was present in 1998 when the 1<sup>st</sup> Defendant gave these details. The 1<sup>st</sup> Defendant did not show them the title deed for the property.

46. He stated that Julius Nderitu, who was the Chairman of the group, was the chief campaigner for the 1<sup>st</sup> Defendant. He stated that the 1<sup>st</sup> Defendant started interfering with the suit property in 2000 and continued until 2002. The group did not file a suit against the 1<sup>st</sup> Defendant immediately because the 1<sup>st</sup> Defendant had taken all the documents the group would have used to file the suit. They obtained copies of the documents that had been carried away by the 1<sup>st</sup> Defendant later. They

got a surveyor to assist them in processing the title for the suit property. The instructions to the surveyor were verbal. This was after the 1<sup>st</sup> Defendant had invaded the suit property. It was in the year 2004. He was elected to the office in 2003. The surveyor obtained on their behalf and brought to them several documents, such as the letter of allotment, Beacon Certificate and Blueprint Area Map.

47. When the surveyor brought the documents to them, he was accompanied by an official from the City Council of Nairobi, by the name Mr. Kihingo. The said documents were brought to the group on different dates. He saw the letter of allotment of the suit property for the first time in 2004 when it was brought by the said surveyor. The former officials of the group told him that they had earlier been issued with a copy of this letter of allotment, but the same was carried away when the group's office was broken into. The letter of allotment was dated 5<sup>th</sup> September 1998. He did not know that 5<sup>th</sup> September 1998 was a Saturday. They complied with the terms of the letter of allotment. Evidence of payment was carried away when their

office was invaded by the 1<sup>st</sup> Defendant. They obtained a copy of the letter of allotment from the City Council of Nairobi.

48. When he came to the office, he did not find receipts for the payments that the group made to the City Council for the suit property, as the same had been carried away during the invasion of their office. The payment was, however, made in time. The instrument of lease was brought to them later. The lease at page 21 of the 1<sup>st</sup> Defendant's list of documents was signed by the mayor and the town clerk. He was not aware that the mayor and the clerk had disowned the lease. They trusted Mr. Kihingo, who gave them the lease. Mr. Kihingo called them, and they picked up the lease from his office. Mr. Kihingo later changed the story regarding what happened during their dealings with him.

49. Mr. Kihingo was arrested together with him, and that may have been the reason why he changed the story. A Mr. Were confirmed while in the group's office that the documents they held were valid. Mr. Were was suspended, but he did not know his fate. After the confirmation of the validity of the documents by Mr. Were, they took the documents to their advocates J. M.

Rioba & Company Advocates. On 9<sup>th</sup> November 2005, Mr. Rioba informed them through a letter that the suit property had been registered, and forwarded to them a certificate of lease. Mr. Rioba did not supply them with any other document apart from the said letter. They did a search and confirmed that the property had been registered.

50. The certificate of lease was first issued in the name of Wazee Makadara Self Help Group. It was later changed to the names of the officials of the group. This was because Wazee Makadara Self Group was not a body corporate. They returned the certificate of lease to their advocate for correction. He was not aware when it was amended. The 1<sup>st</sup> Defendant came to the suit property and started subdividing it. He was seen by Mr. Peter Kariuki doing so. Peter Kariuki was a private surveyor. He was the one who told him that he found the 1<sup>st</sup> Defendant surveying the land. The group complained to the police about the activities of the 1<sup>st</sup> Defendant. When they filed HCCC No. 193/2006, they obtained an injunction restraining the 1<sup>st</sup> Defendant from dealing with the suit property. The 1<sup>st</sup> Defendant engaged Mr. Wamwayi Advocate, who went to court

and withdrew the group's case. He did not see the 1<sup>st</sup> Defendant instructing Mr. Wamwayi to withdraw the case. They were not present when the case was being withdrawn. They complained to the Advocates' Complaints Commission about Mr. Wamwayi. He did not follow up on the complaint after they delayed in taking action on the matter.

51. Their new advocate, Mr. R. M. Kimani, made an application to reinstate the case, but he did not prosecute the application. The case remained withdrawn. Their advocate did not tell them why he did not pursue the reinstatement application. They filed the present suit because the other case had been withdrawn. He was not aware that the costs of the withdrawn case were assessed at Kshs.356,956/-. The suit property was surveyed by Mr. Gitau. He did not know when the survey was done, as he was not a member of Wazee Makadara then. He denied that the documents they produced in court were fraudulent.

52. He stated that Plot No. 83/530 was in Sector I, while Plot No. 83/893 was in Sector IV. He stated that the shapes of the two parcels of land were also different. He stated that they made an application for subdivision in 2001, and the same was

approved, but he did not have a copy of the application. He did not have the documents because the same were carried away by the 1<sup>st</sup> Defendant and subsequently by the D.C.I.O, Mr. Karagu. Their title was issued in October 2005. They commenced the sub-division before they were issued with the title for the suit property. They were undertaking the subdivision on the strength of the letter of allotment. The land was surveyed in 1992 and gave rise to Block 83/893.

53. Although the letter of allotment did not bear a land reference, Block 83/893, that was the land which was allocated to them. Their land was in Sector IV. The 1<sup>st</sup> Defendant used to work at the Nairobi City Council and could manipulate records. S. G. Mwangi of the Nairobi City County, who claimed that Block 83/893 did not exist, had written an earlier letter confirming the existence of the land. He stated that the group's land existed on the ground. He stated that he had been charged, but the charge was fictitious.

54. **PW1 JARED ODUOR OSODO** stated as follows on cross-examination by the advocate for the 2<sup>nd</sup> Defendant: He was the secretary of Wazee Makadara Self Help Group. He became the

secretary in 2000. They filed High Court Case No. 193 of 2006 in which he swore some affidavits. He was not the first secretary of the group. The group was registered in 1997. The group had about 200 members. The group was formed to own a property in Nairobi. The former chairman of the group was the chief campaigner for the 1<sup>st</sup> Defendant. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Plaintiffs were members of the group, and they had given him authority to give evidence on their behalf. He had a certificate of lease issued in the name of the trustees of the group. The names of the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs were not in the title because they were just officials of the group.

55. The group came to court because the 1<sup>st</sup> Defendant started interfering with their rights of ownership of the suit property in 2000. It took them some time to file the suit because they were doing investigations. The suit property was allotted to them by the Nairobi City Commission. The letter of allotment was signed by Zipporah Wandera, but a copy of the letter that he had produced had no signature. The land that was allocated to them was at Umoja Innercore Sector IV. The plot number was not indicated in the letter of allotment. They paid a stand

premium of Kshs.43,000/- and Kshs.6,000/- as annual rent. The land measured 8.67 ha. in the letter of allotment. The documents he had produced were obtained from the Nairobi City Council because the 1<sup>st</sup> Defendant confiscated all their documents in 2000. After acquiring the suit property, they applied to the City Council through their advocate for the subdivision of the same.

56. The land was eventually subdivided. The application for subdivision was at page 38 of the Plaintiffs' bundle of documents (P.EXH. 11). They obtained a subdivision certificate from the City Council of Nairobi, which was at page 32 of the 1<sup>st</sup> Defendant's bundle of documents filed on 11<sup>th</sup> May 2015. They got this certificate from Mr. Rioba, who was their advocate. According to the certificate, the subdivision was to be in respect of only one plot. They paid for the plot. Sarah Mwendwa had said that she could not issue a certificate for the other plots because they were not paid for. The 2<sup>nd</sup> Defendant's certificate of subdivision at page 31 of its bundle of documents was in respect of many plots. The subdivisions were approved

and were in respect of Block 83/530 measuring 9.7 hectares.

The number of subplots was given as 319.

57. Their subdivision approval came before they were issued with a certificate of lease. It was their advocate who knew how that came to be. The Chief Land Registrar called upon them to surrender their certificates of leases for the subdivisions they had undertaken on their land. Their land was subdivided into 324 plots. They had paid for one plot. They were to pay for the other plots and have the certificates issued. They did not pay for the other plots because of the dispute that ensued. There was a small plot known as Nairobi/Block 83/530. It measured 0.6212 hectares. It had a mosque on it. It was in Umoja Inner Core Sector I. Their land was in Umoja Inner Core Sector IV. They did not establish when the title for Nairobi Block 83/530 was issued. They were only interested in Nairobi/Block 83/893 (“suit property”).

58. The 1<sup>st</sup> Defendant sold Nairobi Block 83/530 to the Kenya Assemblies of God Church (KAG). KAG was on their land in Umoja Innercore Sector IV. It was when they were filing this suit that they realized that KAG was on their land. The 2<sup>nd</sup>

Defendant's certificate of lease was in respect of Nairobi/Block 83/530. This was not the land that was sold to them by the 1<sup>st</sup> Defendant. Nairobi/Block 83/530 was located in Sector 1, Umoja. The group's land was Nairobi/Block 83/893, which was in Umoja Sector IV. They subdivided their land into 324 portions, 899 to 1222, through a surveyor, L. K. Gitau. He was unsure whether the group paid L.K.Gitau, as he was not in the office at the time. They came to court when Mr. Kariuki, who was their member, found the 1<sup>st</sup> Defendant and other people putting marks on the suit property with a white powder at night. The 1<sup>st</sup> Defendant was in the company of a surveyor named Maina Kariuki, who was not a member of the group.

59. He was not in agreement with the Director of Surveys and the County Government of Nairobi that Nairobi/Block 83/893 did not exist. He was aware of the several buildings that were coming up on the suit property. The buildings were being put up contrary to the orders of the court. They had not sued the developers. They would sue them and have them evicted from the property. They had sued the Defendants who sold the plots to the developers. Some of the titles were issued before they

filed this suit. They were not on the disputed land. They had attempted to enter the land and were prevented by the Defendants from doing so. The 2<sup>nd</sup> Defendant was claiming land that did not belong to it. The 2<sup>nd</sup> Defendant's land was in Umoja Sector I. Mr. Wamwai was not their advocate, and they did not know how he got involved in their case. They made a complaint against him.

60. The Plaintiffs' second witness was **CECILIA WANGARE WAMUTITU ALIAS KOIGU(PW2)**. PW2 stated as follows in her evidence in chief: She was the Nairobi City County Surveyor. She was a licensed surveyor. She started working for the Nairobi City Council in 1990. She was appointed as the County Surveyor in 2013. She wrote a letter dated 5<sup>th</sup> December 2014 forwarding to the court a survey report that was prepared by the Nairobi City County. The Survey Report was on the location of L.R No. Nairobi Block 83/530 and L.R No. Nairobi Block 83/893 (Plot No. 530 and Plot No. 893. The report was prepared pursuant to a court order issued on 14<sup>th</sup> November 2014 in this suit. The order was sent to the office of the Chief

Officer. At the time, the Chief Officer was on leave, and she was the acting Chief Officer.

61. On receipt of the order, she personally visited the ground with some of the Nairobi City County government officers, with the plans which were available in the office. She visited the ground on 1<sup>st</sup> December 2014. The Parcel Numbers 530 and 893 were given by the Director of Survey, who is the Custodian of survey records. In the county, they had development schemes. These were what the surveyors used in the field to carry out surveys and then forward the survey plans to the Director of Surveys to generate parcel numbers. Once the land was earmarked for allocation, a plan was developed by the planning department. This was what the county surveyor used for county land to submit survey records to the Director of Surveys.

62. The survey records were submitted in the form of survey computations, field notes, the negative survey plan, and the linen plan (Hard copy of the negative). The negative and the linen copies of the plan were signed by the County Licensed Surveyor. Once the survey was registered, the licensed

surveyor had to buy the registered survey plan for use in the titling process. In this particular case, they had a survey plan and a development scheme. These documents were referred to in her report. They used the development plan for land allocation, while the survey plan from the Director of Surveys was used for titling. Umoja Inner Core was a development scheme. They had Sector I, Sector II, Sector III, Sector IV and Sector V. These were all in one development plan or scheme, which was annexed to her report. Umoja Housing Estate Inner Core plots scheme was a development scheme that was developed by the Nairobi City Council for Umoja Estate. The scheme was divided into five (5) sectors. This could be seen on the face of the scheme.

63. All the sectors were in Umoja Phase II. Umoja Phase I was a neighbouring scheme. The sectors were in Umoja Inner Core. The Umoja Inner Core scheme was given Block number 83 by the Director of Surveys. There were several survey plans for various sectors. The Development schemes had several plots that could not fit into one survey plan. She found Nairobi Block 83/530 in the survey plan Folio/Register 211/68, which was

approved by the Director of Surveys on 5<sup>th</sup> August 2004. The survey plan was annexed to her report. The survey plan was for land parcel numbers 530 to 618. Anything outside these numbers was not part of this survey plan. The survey plan was for Sector I. In the Development plan (Scheme), Plot No. 530 was denoted as S.P.C.F 16. S. P. means Special Purpose. This was a special-purpose plot. Special-purpose plots were normally allocated to institutions.

64. Plot No. 893 was in Survey Plan Folio/Register 224/20, authenticated by the Director of Surveys on 28<sup>th</sup> May 1992. This survey plan was for Umoja Innercore Sector IV. The survey plan was for Parcel No. 893 only. After identifying the plots in the survey plans and the development schemes, she went to the ground to identify the same. She took photographs using her camera of what she found on the ground. She took one photograph of what she found on plot No. 530. All the other photographs were taken on plot No. 893. The photograph she took on plot No. 530 was that of a mosque. The mosque was standing on plot No. 530. The other structures were all on plot No. 893. She concluded that Nairobi Block 83/530 and Nairobi

Block 83/893 were two (2) distinct parcels of land. One was in Umoja Inner Core Sector I and the other in Umoja Inner Core Sector IV. The document at page 39 of the Plaintiffs' bundle of documents was an area list which accompanies R.I.M. It was an area list for Umoja Sector I. It was supposed to assist in titling. The area list was for registration Block 83, Nairobi Area, Survey Plan F/R 211/68, which she had referred to earlier. From this area list, plot No. 530 measures 0.6212 hectares. Normally, it is not possible to allocate one parcel number to two different plots in different areas. If that happens and it is detected, a correction is done immediately. In this case, she only found one plot No. 530, and one plot No. 893. The land in Nairobi Block 83 belonged to the Nairobi County Government. It was leased to the County Government by the National Government. The land was surveyed by the County Government. It was the County Government that did the allocation after the survey. She produced her report dated 5<sup>th</sup> December 2014 as P.EXH. 13.

**65. CECILIA WANGARE WAMUTITU ALIAS KOIGU(PW2)**

stated as follows on cross-examination by the advocate for the

1<sup>st</sup> Defendant: The court order was served upon the Chief Officer. It was received at the office of the Chief Officer. When the order came, she was acting as the Chief Officer but was sitting in her office. The order was delivered to her by the office of the Chief Officer. The Chief Officer was Stephen Gathuita Mwangi. He was her boss. In preparing her report, she used several documents, which she enumerated in the report. Stephen Gathuita Mwangi was also a licensed surveyor. She consulted him when preparing the report. She was a qualified surveyor. Mr. Mwangi did not direct her on what to do. She only consulted him on how to do the report, more particularly, whether she could sign the report on his behalf. It was normal for surveyors to consult. She got the plans, which she used in her report from their database. She ascertained the authenticity of the maps with the Director of Surveyors. She used what she had in her custody. The Director of Surveys did not certify the maps. She was the one who certified them. The survey map at page 42 of the 2<sup>nd</sup> Defendant's bundle of documents was a survey plan Folio No. 224/20. The survey plan was for plot No. 530. She did not see this survey plan in

their database when she was preparing her report. According to this survey plan, the survey work was received by the Director of Surveys on 27<sup>th</sup> May 1992 and was authenticated on 28<sup>th</sup> May 1992. She could see Parcel No. 530 measuring 0.6212 hectares in the survey plan Folio No. 211/68. It was on this plot that she found a mosque. This survey plan was presented to the Director of Surveys on 10<sup>th</sup> May 1990 by a licensed surveyor, D. Gacanja Kagu. The parcel of land shown in the survey plan at page 42 of the 2<sup>nd</sup> Defendant's bundle was located in Umoja Inner Core Sector IV. The survey plan for parcel No. 893, which she produced, and the survey plan at page 42 of the 2<sup>nd</sup> Defendant's bundle of documents looked the same, but she could not say that they were the same. Survey plan Folio No. 211/68 was authenticated on 5<sup>th</sup> August 2004. There was nothing wrong with the authentication. The survey plan at page 42 of the 2<sup>nd</sup> Defendant's bundle of documents was presented on 27<sup>th</sup> May 1992 and authenticated on the following day, which was unusual. There might have been someone following up on the job.

66. The letter dated 21<sup>st</sup> March 2006 by the City Council of Nairobi at page 42 of the 1<sup>st</sup> Defendant's bundle of documents, was written by Mwai Kariuki, deceased. What he stated in the letter was his opinion based on the documents that were before him. She could not confirm that plot No. 893 did not exist. The letter at page 45 of the 1<sup>st</sup> Defendant's bundle of documents was by S. G. Mwangi. He stated that the Director of Surveys should clarify the duplication of land reference numbers. S. G. Mwangi did not show him this letter. Her report did not contradict this letter. Her report was an independent report following a court order. Mr. Mwangi did not tell her what to put in the report. The letter dated 9<sup>th</sup> April 2015 was to the Governor of Nairobi by the firm of Mwangi & Guandaru Advocates. The letter was not brought to her attention. She was not aware that the complaint was over her report.

67. She prepared her report in 2014. In the letter at page 173 of the 2<sup>nd</sup> Defendant's bundle of documents, S.G.Mwangi referred to investigations by the Public Accounts Committee of the County Assembly. The investigation was being done after her report. She stood with her report despite the contents of the

memo dated 16<sup>th</sup> April 2015 at page 174 of the 2<sup>nd</sup> Defendant's bundle of documents. She was not aware that the Director of Surveys, who is the custodian of survey documents, had denied the existence of Nairobi/Block 83/893. She had not seen the survey plan, F/R No. 313/39. The letter dated 18<sup>th</sup> July 2014 by the Director of Surveys at page 48 of the 1<sup>st</sup> Defendant's bundle of documents disputed their position at the County Government. They requested the Director of Surveys to supply them with the linen copy of the survey plans, which gave rise to plots No. 893 and 530. Without the linen copy of the survey plans, she stood with her report. The linen copy of the survey plan cannot be edited. The same was not supplied.

68. She had stated that the survey plan No. F/R 224/20 was for Nairobi Block 83/893. The Director of Surveys had taken a different view. She believed that he was hiding some information. He had not furnished the court with a linen copy of the survey plan, whereas he was the custodian of the linen copies. The Director of Surveys' claim that L.R No. Nairobi/Block 83/893 did not exist could only be proved by a linen copy. In the absence of a linen copy of the survey plan,

that claim could not be correct, and she stood by her position. Before she prepared her report, she went to the Director of Surveys' office. The Director of Surveys did not inform her that there was a duplication of Nairobi Block 83/530. She did her work as a surveyor.

69. From her investigations, Nairobi Block 83/893 had been subdivided, and it was sparsely developed. She saw the plan, but she could not remember when the subdivision was done. It was not unusual to carry out a subdivision before a title was issued. The County Government could carry out a subdivision of its land before a title was issued for the same. The mother title is surrendered when subtitles are being issued. It is in the subdivision of private land that a title must exist before a subdivision is done.

70. **CECILIA WANGARE WAMUTITU ALIAS KOIGU (PW2)** stated as follows on cross-examination by the 2<sup>nd</sup> Defendant's advocate: Stephen Gathuita Mwangi did not sign her report. She signed the report on his behalf. Her letter forwarding the report was copied to two law firms. She was acting on instructions. She did not know the two law firms. She did not

contact anybody when preparing the report. She did not contact the law firms. She knew there was a dispute between the Plaintiffs and the Defendants. Her report was neutral. She used the documents from the Director of Surveys. The letter dated 9<sup>th</sup> April 2015 from Mwangi & Guandaru Advocates over the survey report on Nairobi Block 83/530 and 893 was not brought to her attention. They had been summoned at one time to shed light on Nairobi/Block 83/530. The summons was from the County Assembly Public Account Committee. She was not aware that it was her department that raised a complaint with the County Assembly.

71. She did not know how the Plaintiffs acquired the land they were claiming. She was at the City Council of Nairobi in 2001 when the subdivision was done on Nairobi Block 83/893. She was a young surveyor in the Housing Department. She could see the survey plan Folio No. 313 Register 39. The same was not legible. The plan did not indicate the original parcel number as 893. She could see the survey plan at page 43 of the 2<sup>nd</sup> Defendant's bundle. The plan was similar to the one she had been shown earlier, which belonged to the Plaintiffs to

the extent that the folio number and register number were the same. She was unable to comment on the other aspects of the two plans. The original number was not indicated in the survey plan at page 43 of the 2<sup>nd</sup> Defendant's bundle of documents. On their face, the two plans looked similar. One of the plans was not genuine.

72. Before a subdivision, approval had to be sought from the City Council. The City Council did not need approval to subdivide its land. The file for L.R No. Nairobi Block 53/893 was missing from their records. She prepared her report based on the available records. She was not aware that the subdivision of L.R No. Nairobi Block 53/530 was approved by the City Council. She did not have the approval in her records. The survey plans that she produced were obtained from the Director of Surveys. The Director of Surveys should produce the linen maps to disprove the maps she had produced in her report. She could see the lease agreement at page 258 of the 2<sup>nd</sup> Defendant's bundle. The lease was in respect of plot No. 16, Umoja Estate, Sector I. There was a mosque on this plot. It was this plot No. 16 which became Nairobi Block 83/530.

73. The owners of plot No. 16 could not get a title because the parcel number had been duplicated. She referred to a development plan in her report, which was used to carry out the survey. It was the Part Development Plan (P.D.P). The land which was allocated to the Plaintiffs was in Sector IV in the development plan. The development plan was prepared by a planner who was contracted by the City Council. The size of Sector IV was not given in the development plan.
74. On re-examination, PW2, when referred to the town planning committee minutes at page 22 of the 2<sup>nd</sup> Defendant's bundle of documents, stated that the minutes referred to the land parcel, Block 83/530, as being in Umoja Inner Core Sector IV. She stated that in her report, she stated that the land parcel Block 83/530 was in Sector I, and what was in Sector IV was land parcel Block 83/893. She stated that in the minutes, the size of the plot is given as 9.7 hectares, while in the survey plan at page 44 of the 2<sup>nd</sup> Defendant's bundle, for land parcel Block 83/530, the size of the land is given as 9.422 hectares. She stated that there was an alteration of the acreage in the plan, which was not countersigned by the surveyor.

75. The Plaintiffs' next witness was **PRISCILA NJERI WANGO (PW3)**. PW3 stated as follows in her evidence in chief: She was a land surveyor working with the Director of Surveys. The office of the Director of Surveys received a summons to attend court and produce the original linen maps for land parcels, Nairobi Block 83/893 and Nairobi Block 83/530. A survey job submitted to the Director of Surveys comprises a computation file, a linen copy, and a tracing copy. For the two parcels, these documents were not in the records of the Director of Surveys. The original records of the computation file, linen copy, and tracing copy were not available.

76. They normally scan documents for backup. From their computer, they managed to get survey plan F/R No.211/68, which was received by the Director of Surveys on 10<sup>th</sup> May 1990. This survey plan was for land Parcel No. 530, and its computation file was number 24666. The area of the land was given as 0.6212 hectares. She also got another scan for survey plan F/R No. 224/20. This was received by the Director of Surveys on 27<sup>th</sup> May 1992, and its computation file was number 27225. The survey plan was also for land parcel No. 530. When

she got two different survey plans for one parcel in the same locality, she thought there was an error.

77. She did further investigation. They had a related office at Ardhi House called SPRO. Initially, they used to send Blueprint copies of survey plans to that office. In that office, she got the survey plan, F/R No. 224/20 for land parcel 893, whose area was given as 9.422 hectares. Survey plan, F/R No. 211/68 was scanned from the original copy, while survey plan No. 224/20 was scanned from a Blueprint. Survey plan, F/R No. 211/68 was for the survey of land parcel numbers 530 to 618. It was submitted to the Director of Surveys on 10<sup>th</sup> May 1990. The Director of Surveys gave the parcel numbers 530 to 618. Survey plan, F/R No. 224/20 was submitted to the Director of Surveys on 27<sup>th</sup> May 1992. It was the survey plan for land parcel No. 530. It was not possible to give this land parcel No. 530 because parcel number 530 had already been assigned to another parcel of land in 1990. The survey plan F/R No. 224/20 was a scanned copy, which she got from the computer. It was not scanned from a linen copy but from a Blueprint. Survey plan F/R No. 224/20, which she got from the SPRO, was for

parcel No. 893. It was similar in all respects to the scanned survey plan F/R No. 224/20, which she got from their computer for parcel number 530, save for the parcel number. From her experience, anytime documents go missing from the records, there is interference. She concluded that land parcel No. 893 existed and was represented by F/R No. 224/20.

78. From their records, they only had survey plan F/R No. 224/20 for land parcel No. 530. Survey plan F/R No. 224/20 for parcel No. 893 did not exist. In their records, land parcel No. 530 was represented in survey plan F/R No. 211/68. This was the first survey plan that generated parcel No. 530. Normally, when the original records were missing, the client could bring the Blueprint, which they would scan for their records. She produced survey plan F/R No. 211/68 as P. EXH. 14, survey plan F/R No. 224/20 for parcel No. 530 produced as P.EXH. 15, and survey plan F/R No. 224/20 for parcel 893 as P.EXH.16. She stated that it was common to have alteration in the parcel areas but in such case a note is made in the computation file. The computation files for parcel Nos. 530 and 893 were not available. There could be a duplication in parcel numbers, but

where the computation files are available, they would know how it came about, and a rectification would be done.

79. The land parcel No. 530 in survey plan F/R No.211/68 had the same area as land parcel No. 530 in survey plan F/R No.224/20. The two parcels of land were in the same area, but the files were different. Only the shapes and the sizes of the files were different. The original land parcel No. 530 was the one represented by survey plan F/R No. 211/68. It was the first to be given the parcel number.

80. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, **PRISCILA NJERI WANGO (PW3)** stated as follows: She was based at the office of the Director of Surveys at Ruaraka. She was a Principal Surveyor. Her role was to undertake investigations and also deal with legal issues. She would carry out investigations where there were queries on the maps and deed plans. She also attended court on behalf of the Director of Surveys. She was served with a summons to attend court to produce maps for two land parcels, Nairobi Block 83/893 and 530. The summons did not indicate the issues in dispute. She was just asked to come and produce the maps. Plot No. 893

existed on the map. For the two parcels, the computation files were not available. They did not have the linen or tracing copy of the map. After a survey job was submitted, it was checked for compliance with their standards. Once it was approved, they would normally scan the linen copy or the tracing copy. For the two parcels, they had the scanned copies of the maps. They were not scanning the computation files. That had changed, and they were scanning the same. The physical maps were not available. She found two (2) documents in the computer, namely, survey plan F/R No. 211/68 for plot No. 530, which was a cadastral map. The plot measured 0.6212 hectares. A cadastral map is drawn using coordinates. They are prepared for a title survey. It is the same as a survey map. It is this map that created plot No. 530. In their computer, she also found the survey plan F/R No. 224/220. This was another map, but for the same parcel number. The parcel number was the same, but the area or acreage was different. The measurement here was 9.422 hectares. The locality of the two maps was Nairobi. She could not pinpoint the locality from the maps. One had to visit the ground to be able to do that. The

coordinates for the survey plan F/R No. 211/68 for plot Nos. 530 to 618, and the coordinates used for survey plan F/R No. 224/20 suggested that the properties were in the same locality. The maps had to be authenticated before they were scanned. That was the procedure. The two maps had been authenticated by the Director of Surveys, but there was a problem because one parcel number could not be given for two properties. Such errors, however, used to occur. They were caused by human error and, at times lack of integrity on the part of the staff processing the documents. The maps she had produced were both certified as true copies of what she got from their computer.

81. Survey plan F/R No. 224/20 was authenticated on 28<sup>th</sup> May 1992, while survey plan F/R No. 211/68 was authenticated on 5<sup>th</sup> August 2004, but it was submitted earlier on 10<sup>th</sup> May 1990. Survey plan, F/R No. 224/20 was received on 27<sup>th</sup> May 1992. Survey plan F/R No. 211/68 was authenticated on 5<sup>th</sup> August 2004, 12 years after the authentication of survey plan F/R No. 224/20 on 28<sup>th</sup> May 1992. The parcel numbers, such as 530 – 618, were being given before authentication. The numbers are

given serially. That meant that although survey plan F/R No. 211/68 was authenticated on 5<sup>th</sup> August 2004, the parcel numbers 530 - 618 were given in 1990 when the job was received. The parcel numbers are given by the Director of Surveys. When a job is received, the numbers are given before the map is authenticated. The maps are submitted without the number. It is the Director of Surveys who inserted the numbers that are in the plans that she produced. The parcel numbers in the survey plan F/R No. 211/68 were given by the Director of Surveys. They had two survey plans where the Director of Surveys gave the same parcel number for two different parcels of land. This was abnormal. She had explained what causes such incidents.

82. A survey plan becomes valid upon authentication. Survey plan F/R No. 224/20 became valid for use on 28<sup>th</sup> May 1992. It was the first in time as far as the validation was concerned. She had not concluded the investigation into what caused the abnormality. She went to the SPRO and found that there was yet another map apart from the two that she had referred to. She did not get a computation file for survey plan F/R No.

224/20 and survey plan No. 211/68. She was therefore unable to know what caused the anomaly. She did not know how the same number was issued for two (2) separate properties. She did further investigations in the SPRO's office just out of curiosity. She asked the SPRO's office whether they had a map for land parcel No. 530. The SPRO consisted of officers from the Director of Surveys who were seconded to the Ministry of Lands to assist the Director of Land Administration with Registry Index Maps, Part Development Plans and such like.

83. The SPRO's office sometimes used to keep copies of the maps. The Director of surveys normally do not work on the basis of Blueprints. Blueprints are copies of tracing passed through dryline print using ammonia paper. Blueprints are the ones that they sell to the public. Blueprints assist them in retracing records when the records are missing. They normally only print the same when clients come for copies. Earlier they used to produce and send Blueprints to the office of SPRO for records. The tracing is the official record that they keep. It is from it that they produce the linen copy and blue copy. The SPRO office had no role in the approval of plans. The office

could not override the decision of the Director of Surveys. She found another copy of survey plan F/R No. 224/20. The only difference in the plan was that the parcel number 893 measured 9.422 hectares. This map was not scanned. It was also not in their computer. The map was a Blueprint which they normally sell to clients. She did not know how the Blueprint ended up in the SPRO's office. It however assisted them as part of the records.

84. She did not know there was a dispute over these parcels of land. The survey plan F/R No. 211/68 for parcel Nos. 530 - 618 and survey plan F/R No. 224/20 for parcel No. 530 were from the records held by the Director of surveys. She obtained the same from their computer. They were copies made from scanned linen copies. A linen copy is more reliable as compared with the Blueprint copy. The maps that she printed out from her computer were more reliable than the Blueprints. Personally, she did not carry out further investigations on the issue. The survey plans produced as P.EXH. 15 and P.EXH. 16 were similar, save for the pens used. She did not doubt that land parcel No. 530 under survey plan F/R No. 224/20 existed.

She was also still convinced that land parcel No. 893 under survey plan F/R No. 224/20 measuring 9.422 hectares, also existed. Her conclusions were based on the Green Card in the office of the Director of Surveys, which had the details of parcel No. 893 under survey plan F/R No. 224/20 measuring 9.422 hectares. The Green Card for land parcel No. 530 had a measurement of 0.6212 hectares. Of the two (2) survey plans for land parcel No. 530, the authentic one was survey plan F/R No. 211/68. This conclusion was also based on the Green Card at the office of the Director of Surveys. She could not bring the Green Card to court because it is not issued to the public. She was not aware that officers from their office had taken different positions regarding the two parcels of land. What she told the court was her opinion from the documents she had produced.

85. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, **PRISCILA NJERI WANGO (PW3)** stated as follows: She was a Principal Surveyor, but had been assigned to do investigations and to attend to legal issues. They had numerous discrepancies that needed investigation. After doing investigations, she normally prepares a report. In this case,

she did not do thorough investigations because she was only required to produce documents. If she had done thorough investigations, she would have come up with more information. She had not gone to the ground. She came across a report to the effect that the smaller parcel 530 had a mosque. She had given her opinion based on the documents that she had produced. The officer in charge of SPRO was a senior cartographer. He reported to the Director of Land Administration. He was the one in charge of the documents. The officer in charge did not certify the documents that she obtained from the SPRO's office. The Blueprint was attached to the Registry Index Map (R.I.M). She did not know who took the documents to that office. She did not know if they were taken there by those who interfered with their processes. Even the Green Card, which she had referred to, was not immune to interference. It could also be interfered with. Scanning of maps started around 2005. There was no scanning in the 1990s. She could recall the letter by P. F. Njoroge dated 3<sup>rd</sup> July 2015, in which he acknowledged that there was duplication of parcel number 530. Where there is a duplication, one must be

cancelled. She did not know who interfered with the process of the survey that led to the duplication. She did not know which parcel number was to be cancelled. She was aware that the small parcel No. 530 had a mosque. She went to the SPRO because that was where she could get a survey map. She did not know of anywhere else where she could get a map. In re-examination, PW3 stated that in their office, the Green Card is used to give parcel numbers. She stated that the numbers are given sequentially, and as such, the parcel No. 530 was given before parcel number 893.

86. The Plaintiff's next witness was **PETER KYALO (PW4)**. PW4 stated as follows in his evidence in chief: He was the Chief Security Officer with the Ministry of East African Community and Regional Development. He had held the position since June 2020. Before that, he was working with the DCI, specialising in Fraudulent Documents. In May/June 2011, a group named Wazee Makadara, the Plaintiffs in the suit, lodged a complaint with the DCI. He was asked by the officer in charge to have a look at the documentation relating to two parcels of land, namely, Nairobi/Block 83/530 and Nairobi Block

83/893. He visited the site of the two parcels of land at Umoja. He found that the first parcel of land, plot No. 530, was in Umoja Sector I Inner Core and it measured 0.6212 hectares. The other parcel, plot No. 893, was in Umoja Sector IV. It measured 9.4 hectares. He requested the Director of Surveys to confirm the location of the two parcels on the map. They complied by issuing him with certified true copies of the two maps. The map F/R No. 211/68 related to plot No. 530 (See page 91 of the Plaintiffs' first bundle of documents). The map F/R No. 313/39 was for plot No. 893. Plot No. 893 had been subdivided into subplots 899 - 1222 (See page 92 of the Plaintiffs' first bundle of documents). One of the subplots from plot No. 893 namely plot No. 952 had been sold. He did not find out to whom the plot was sold. He inquired about the ownership of plot No. 530. He wrote to the Land Registrar on the issue. He left office in 2011 before he got a response to his letter. He never got to know the owner of Plot No. 530. He however got a report on the ownership of plot No. 893. He found that prior to the subdivision of plot No. 893, it was owned by Wazee Makadara Group (The Plaintiffs). He wrote the letter

dated 20<sup>th</sup> June 2011 at page 62 of the Plaintiffs' first bundle of documents to the Director of Surveys seeking particulars/details regarding the two plots. The letter was signed by Mr. Bosire who was in charge of economic crimes. It was signed on behalf of the Director. He was in the team that was carrying out investigations. The documents that he looked at disclosed fraud. Two parcels of land could not be placed on one spot. He had left the DCI at the time the investigation was concluded.

87. On cross-examination by the advocate for the 4<sup>th</sup> Plaintiff, PW4 stated that in his opinion, there was fraud. He stated that the documents relating to plot 893 looked authentic. He stated that he did not get the information on the ownership of plot No. 530.

88. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, PW4 stated that he recorded a witness statement dated 1<sup>st</sup> December 2014 filed in court on 9<sup>th</sup> December 2014. He confirmed that he signed the statement and the content was true. He stated that the complaint was lodged by Wazee Makadara Group. He could not remember all the people who

made the complaint. It was a long time ago. He could remember Mr. Osodo and Mr. Wachira. He was based at the C.I.D headquarters. The complaint concerned the ownership of two parcels of land. The complainants complained that their land had been encroached on by Omar, the 1<sup>st</sup> Defendant. He did not know if the complaint was recorded in the O.B. It was being handled by a group/panel. He was only tasked with looking at the documents. He was part of a team. The complaint must have been recorded in the O.B. The matter was allocated to a team. He was a member of the team. He could not remember all the other team members. He could recollect that there was James Manyuru and others. He acted on the assignment for about 3 months. A police file was opened. Somebody else recorded statements. He could not recall who recorded the statements and from whom. Apart from the complaints, he did not know if any other person had been asked to record statements. Apart from what he did, he did not know the outcome of the other aspects of the investigations. When he visited the site, he was with one of the complainants and another officer, Mr. Manyuru. They were

shown the location of the parcels of land by one of the complainants. He went to the site for corroboration purposes. The sectors were on the maps. The complainants had the maps. He also got the maps from the Director of Surveys. He had a map for the whole of Umoja, which had the two parcels of land. The officers from the Director of Surveys visited the site after he had left the D.C.I. He was told that they did. He was issued with the maps on 21<sup>st</sup> July 2011. He was the one who obtained the maps that he had referred to. He obtained the maps after he had visited the site. There was no reason to visit the site again. The position on the ground tallied with the maps. He was not a surveyor. He was an investigator. He made his conclusion based on his visit to the scene and on the documents. He did not know the outcome of the investigations that the DCI carried out. He had left. He was told that the Defendant sold plot No. 530 to Kenya Assembles of God (KAG). K.A.G stated that it bought the land from the 2<sup>nd</sup> Defendant. They recorded a statement. He was not aware that the complainants were charged in court. He wrote the letter dated 21<sup>st</sup> November 2012, requesting for a caveat to be placed on

the disputed parcels of land. His letter was not a forgery. He was in office and was authorised to put a caveat on the titles.

89. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, PW4 stated as follows: He was trained in general fraud investigation in S. Korea and South Africa. He did not know why the complaint was made at the DCI Headquarters. The complaint was made directly to the economic crimes department, which was also handling land fraud. They had an investigation file and an investigation diary. James Manyuru was their team leader. He was summoned by the Plaintiffs' advocate. He did not know if Mr. Manyuru was still at the DCI. At the time he was doing the investigation, he was a corporal. He did not summon the directors of the 2<sup>nd</sup> Defendant. That was not his line. He made his conclusion from the documents in his possession. The complainants did not tell him that they had been charged in court. He did not carry out a forensic examination on the documents that he received. He left the DCI before doing that. The Ministry of Lands did not produce the documents they had asked for. He made a witness statement on 1<sup>st</sup> December 2014 after he had left the DCI. He

did not have documents in support of the conclusion that he had arrived at. Their team was to prepare a report. He had not seen any report made by the team. The evidence he had given was part of the report that was to be made. He was not under the DCI. He did not require authority to give evidence.

90. The Plaintiffs' next witness was **ALBANUS MUNGUTI (PW5)**. PW5 stated as follows in his evidence in chief: He was working with the DCI. At the time of his testimony, he was based at the office of the County Criminal Investigation Office. Previously, he was working with the Nairobi County on secondment from the DCI Headquarters. He was working in the department of Investigations and information analysis. He worked there from 2011 to March 2020. He could recall that on 23<sup>rd</sup> March 2012, the 1<sup>st</sup> to 4<sup>th</sup> Plaintiffs reported to their then director, the late Bernard Mate, that their land parcel number Nairobi/Block 83/893 (suit property) had been fraudulently acquired and registered in the name of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. This complaint was also made to the County Secretary and the Governor of Nairobi. He was instructed by Bernard Mate to carry out investigations with a view to

establishing the truth of the allegation. To prove ownership of the property, the complainants provided several documents, among them, a certificate of registration of their group, a certificate of lease in their name, a copy of their allotment letter signed by the late Ms. Wandera, a Beacon Certificate, a valuation roll, and some court orders. They claimed that their land had been subdivided into 124 plots.

91. He visited the office of the Chief Valuer, Mr. Nyoike. Mr. Nyoike confirmed that the suit property had been entered in the valuation roll in his office, but the entry had been removed from the record in unclear circumstances. He also summoned the Chief Accountant in charge of rates, Mr. Mureithi. He wanted to confirm if the property had been in the valuation roll. He confirmed that the suit property was in the valuation roll in the system and that it was removed in unclear circumstances. He then went to the conveyancing department to confirm the lease agreement that the complainants had. The department confirmed that they had issued the lease agreement. There was a copy of the allotment letter. He went to the clerical officer in charge of documentation. The clerical officer

confirmed that the letter of allotment had been generated through the office of the Town Clerk. The clerical officer confirmed this from his records. He extended his investigations to the office of the Chief Officer of Lands. He interrogated Baptista Kihingo. Mr. Kihingo confirmed that the signature appearing in the Beacon Certificate was his.

92. He requested the Chief Officer, Mr. Mwangi to give him two (2) surveyors to take him to the ground. He gave him Ms. Cecilia Wangare and Mr. Matoke. These were County surveyors. They took him to the ground. They pointed out to him the location of Nairobi/Block 83/530 (plot No. 530), and gave him the measurement as 1.527 acres. They further took him to Nairobi/Block 83/893 (plot No. 893). They gave him the measurement of the land as 9.7 hectares. He thereafter took statements from the Chief Officer, Ms. Wangari, and Mr. Matoke. The Chief Officer confirmed that both parcels of land were County Government properties and plot No. 530 was allocated to the 2<sup>nd</sup> defendant, while plot No. 893 was allocated to Wazee Makadara Group (Plaintiffs).

93. He thereafter wrote to the Chief Land Registrar, who allowed him to interrogate and record a statement from a land registrar Ms. Sarah Mwendwa. He interrogated Ms. Mwendwa and recorded her statement. Ms. Mwendwa confirmed having issued a lease to Wazee Makadara Group (Plaintiffs). He requested for the parcel files from Ardhi House for both properties. The parcel files could not be traced. They started looking for the parcel files in 2012. By 2014, they had not received the files. After this, the Director of Investigations, the late Bernard Mate, summoned the Plaintiffs and the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant did not answer the summons. He was summoned through his mobile phone. The director of the 2<sup>nd</sup> Defendant was also summoned. He also did not appear. They then gave a status report of the investigations. In the report, they concluded that the resultant numbers after the subdivision plot No. 893 should be registered in the name of the Plaintiffs and that any aggrieved party should seek a civil remedy. The status report dated 27<sup>th</sup> June 2013, which he prepared for Mr. Mate's signature, was at page 35 of the Plaintiffs' bundle of documents. He was no longer working with

the Nairobi City County. He was summoned from Machakos through the office of the DCI to appear in court. He personally prepared the status report for the late Mr. Mate's signature. He identified the report, which was marked as "PMFI 17". He adopted his witness statement filed in court on 9<sup>th</sup> December 2014 as part of his evidence in chief.

94. On cross-examination by the advocate for the 4<sup>th</sup> Plaintiff, PW5 stated that plot No. 893 and plot No. 530 were about 50 meters apart. He stated that there was a mosque on plot No. 530, which was abutting Stage "C" in Umoja. He stated that plot No. 893 was opposite the Chief's office in Umoja, and on the plot was a famous restaurant called "Visa Place". He stated that the parcel files for both plot No. 530 and plot No. 893 were missing at the land office. He stated that he verified all the documents that were brought to them by the Plaintiffs and found them authentic. He stated that they did not receive any document from the Defendants.

95. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, **PW5 ALBANUS MUNGUTI** stated as follows: He started working with the County Government of Nairobi in 2011. This

case was pending then. There was nothing wrong with the Plaintiffs' complaining to them in respect of a matter that was in court. The Plaintiffs made a complaint on 3<sup>rd</sup> March 2012. The complaint was made to Bernard Mate, the then Director of Investigations at City Hall, who had since passed away. They did not come to him directly. The Plaintiffs were referred to him by the said Director of Investigations. The Director instructed him to verify whether the complaint had any merit. He was instructed to attend to the complaint. The complaint was oral. There was another complaint that was addressed to the Governor and the Company Secretary. He did not see the complaint. His role in the office was to carry out general investigations of any reported case and to evaluate the information received. He could also investigate reported crimes. He could not recall if the office of the Governor had been set up at the time. The Plaintiffs told him that the documents they brought were copies of the documents that they retained after presenting the same for registration at Ardhi House. He was the one who prepared the status report. The office of the Director of Investigations used to report to

whoever had requested the investigation. Mr. Nyoike, the Chief Valuer, told him that plot No. 893 had been registered in the valuation roll and that the same was removed from the roll in unclear circumstances.

96. During his investigations, he did not interrogate the memo at page 251 of the 2<sup>nd</sup> Defendant's bundle. He did not come across it. He did not know K. J. Ayieko. He reported to the City Hall in December 2011. He did not meet K. J. Ayieko. Mr. Nyoike did not explain why the plot was removed from the valuation roll. The Chief Accountant in charge of rates did not tell him anything about this memo. He confirmed what the chief valuer had told him. The plots that were on the valuation roll were the 324 plots that were subdivisions of plot No. 893. The documents that were given to him were signed by specific officers. He did not interrogate Mrs. Wandera on the letter of allotment. He did reach her as she was in Western Kenya and was ailing. He did not go to her home. He was not aware that Mrs. Wandera had denied signing the letter of allotment. The lease at page 21 of the 1<sup>st</sup> Defendant's bundle was not the lease that was brought to him by the Plaintiffs. He had never

seen the lease. He was not aware that the mayor and the town clerk had denied signing the lease. Baptista Kihingo confirmed that he issued the beacon certificate. He was not aware that Mr. Kihing'o had disowned the beacon Certificate. He was given two surveyors who took him to the ground.

97. The surveyors identified the location of the plots to him. They also gave him the measurements of each parcel of land. The two plots were County Government Land. He recorded a statement from Sarah Mwendwa. Sarah Mwendwa confirmed having issued the lease certificate. He was not aware that Sarah Mwendwa was arrested over this dispute. The parcel files could not be traced. The Director of Investigations summoned the 1<sup>st</sup> Defendant through mobile phone. He did not appear. The call to the 1<sup>st</sup> Defendant was made in his presence. The Director of the 2<sup>nd</sup> Defendant was summoned through the 1<sup>st</sup> Defendant. The Director of Investigations told him that the 2<sup>nd</sup> Defendant was associated with the 1<sup>st</sup> Defendant. The Governor was not in the office when he was undertaking the investigations. He did not visit the Director of Surveys' offices. The two surveyors who were with him were

supposed to collect information from the survey department. He was not aware that the Director of Surveys had confirmed that the subplots that they recommended should be registered in the name of the Plaintiffs did not exist. He did not interrogate the Chief Land Registrar because the parcel files were missing. His investigations were conclusive. The land in dispute belonged to the County Government, and they had all the records. Plot No. 530 was allocated to the 2<sup>nd</sup> Defendant. He got the information from the evidence he collected from the County records. There were parcel files in the County offices. The County had a land registry. The parcel file that he obtained for plot No. 530 had an application, a letter of allotment, and other documents.

98. The 2<sup>nd</sup> Defendant sold plot No. 530 to the Kenya Assemblies of God Church (KAG). He got the information from a bishop whose name he could not recall. The bishop told him that the Church plot was a subdivision of plot No. 530. Plot No. 530 was not subdivided. It had a school, a mosque, and some other buildings. The bishop was sold a plot within plot No. 893 by the 1<sup>st</sup> Defendant. The ground which the bishop was shown was on

plot No. 893 that belonged to Wazee Makadara. There was doctoring of documents so that plot No. 893 appeared as plot No. 530, while plot No. 530 was doctored to appear as plot No. 893. The church had bought a plot, but the ground that it was shown was on plot No. 893. In their report, the County Assembly stated that plot No. 893 belonged to Wazee Makadara while plot No. 530 belonged to the 1<sup>st</sup> Defendant. By March 2020, the parcel files were still missing. The investigation file was still open. He left for Machakos in March 2020. He verified the documents that were supplied to them by the County Government.

99. **ALBANUS MUNGUTI (PW5)** stated as follows in cross-examination by the advocate for the 2<sup>nd</sup> Defendant: He was attached to the City Council of Nairobi by the DCI headquarters. He continued drawing a salary from the National Government (DCI), and he was answerable to the DCI. He was carrying out general investigations. He joined the Council in 2011. He was a Police Corporal. He was in a department within the City Council of Nairobi. The department was still in existence. They were about 5 officers from the DCI. He was not the head of the

team. The late Bernard Mate was the head of the team. He was discharging his duties as he would have done at the DCI offices. When a member of the public came to the office with a complaint, there was an occurrence book where the complaint was recorded. There was also a complaint form to be filled out and taken to the director. The director would then assign an officer to carry out investigations. He did not have a copy of the complaint that was lodged by the Plaintiffs, which was recorded in the occurrence book (OB). He could not have been asked to investigate a complaint that was not recorded in the OB. The complaint was made through the town clerk. There was a written complaint. The Plaintiffs wrote a letter. They thereafter came to the office and made a report that was recorded in the occurrence book. They filled out a complaint form. The investigations then commenced. An inquiry file was opened, but he could not remember the file number. The file would contain the normal documentation.

100. He moved to Machakos. He could not bring the file to court. There were about 5 people who made the complaint. He took their statements, which were in the file. The complaints had

several documents, including a court order. He was aware that there was an ongoing civil case touching on the property. The investigation was not going to prejudice any party. He did not peruse the court file. Their duty was to investigate all the documents through which the land was transferred. He was investigating the ownership of Nairobi Block 83/893 and Nairobi Block 83/530. He was not aware that there was a criminal case facing the complainants. Even if he was aware of the criminal case, he would still have proceeded with the investigations because it concerned the council's property. The land initially belonged to the City Council of Nairobi. He learnt of the criminal case in court. He was not aware of it. He stood with paragraph 5 of his statement. He did not issue summons to the directors of the 2<sup>nd</sup> Defendant. They were summoned by Mr. Mate after obtaining their names from the registrar of companies. He had never heard of Anthony Kememia Gathumbi. He did not know he was a councilor. Mr. Mate called the 1<sup>st</sup> Defendant and the director of the 2<sup>nd</sup> Defendant. He was not aware if Mr. Mate called Anthony Kimemia. The investigation was not one-sided. The respondents were called,

and they failed to respond. He completed his investigation and presented a report, which was at page 35 of the Plaintiffs' list of documents. It was not true that this was a status report and that it was given for internal consumption. The letter dated 11<sup>th</sup> September 2014 from the Nairobi City County to Odero Osiemo & Co. Advocates, written by Mr. S. G. Mwangi, Chief Officer Lands, to the effect that land parcel No. Block 83/893 did not exist was misleading. There was a swapping of numbers. There were two parcels with the number 530. There was a manipulation of documents. Land parcel number 893 was allocated to Wazee Makadara. He interviewed Mr. Ndegwa, who carried out the subdivision on behalf of the Plaintiffs. He was a private surveyor, and he confirmed that he carried out the subdivision. His report was addressed to the Director Legal. He was the legal advisor of the County Government. He recorded a statement of one of the bishops. He could not comment on the letter dated 24<sup>th</sup> March 2006 by the K.A.G. He stood with his evidence. The internal memo dated 16<sup>th</sup> April 2015, at page 174 of the 2<sup>nd</sup> Defendant's bundle of documents by Karisa Iha, the Director Legal, contained pure lies.

101. The Plaintiff's last witness was **PHILIP OCHARO (PW6)**.

PW6 stated as follows in his evidence in chief: He was the Deputy Director in the Department of Investigation and Information Analysis, Nairobi County. The document marked PMFI 17 was an investigation report dated 27<sup>th</sup> June 2013 from their department to the Director Legal regarding a complaint over Nairobi/Block 83/893 by Jared Oduor and others. He found it in their correspondence file. It was signed by Mr. Mate, who was deceased. He produced the report as P.EXH.17. He did not participate in the investigations. The investigations were carried out by CPL Urbanus Munguti (PW5).

102. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, PW7 stated as follows: He was employed in 1989. He was in the office when the investigations were carried out. He was a county employee. He was not a police officer. He was not part of the investigation. All he knew was what was in the report. He came to produce the report.

103. On cross-examination by the advocate for the 2<sup>nd</sup> Defendant, PW6 stated as follows: He had a carbon copy of the report. The original was forwarded to the legal department. They were not

part of the inspectorate department. They were trained by the C.I.D., and they had the C.I.D. officers in the department. They kept investigation files. Once the file was closed, it was taken to DCI for closure. The file was handled from the criminal angle. He did not know whether the file was closed and taken to the DCI. He did not know why the report was addressed to the Director Legal.

The 4<sup>th</sup> Plaintiff closed his case without calling a witness.

### **The evidence presented by the Defendants**

104. The 1<sup>st</sup> Defendant, **HABIB OMAR KONGO(DW1)**, gave evidence after the close of the Plaintiffs' case. He gave evidence on his own behalf and on behalf of the 2<sup>nd</sup> Defendant. He stated as follows in his evidence in chief: He was a businessman in Nairobi. He recorded a witness statement, which was filed in court on 11<sup>th</sup> May 2015. He adopted the statement as part of his evidence in chief. He filed two bundles of documents, which he produced as exhibits. The 1<sup>st</sup> Defendant's bundles of documents filed on 11<sup>th</sup> May 2015 and 17<sup>th</sup> June 2015 were produced in evidence as D. EXH. 1 and

D.EXH. 2, respectively. He did not know the parcel of land known as Nairobi/Block 83/893. He did not even know its location. In 1997, he did not vie for any political seat. He was not a councilor in 1997. In 1997, the Nairobi City Commission did not exist. He became the Chairman of Nairobi City Commission in 1991/1992, and not in 1997. In 1992, he ceased to be the Chairman because elections were called, at which the City Council of Nairobi was reinstated. This was a General Election. He did not run in the 1997 elections. He ran in 1992 and lost. The council that was elected in 1992 served until 1997, when another election was held. It was not true that the 4<sup>th</sup> Plaintiff was his chief campaigner during the 1997 KANU elections. He knew the 4<sup>th</sup> Plaintiff. In 1997, he ran for a seat during the KANU elections. He was vying for the seat of the Chairman of the KANU Nairobi Branch. In 1997, he only vied for the Chairmanship of the Nairobi KANU Branch. The 4<sup>th</sup> Plaintiff was not his chief campaigner. He was not vying for the Chairmanship of Makadara Constituency. He was vying for the Chairmanship of the whole of Nairobi. He became the Chairman of the KANU Nairobi Branch.

105. He did not ask the Plaintiffs to form a group. It was not true that he encouraged the Plaintiffs to form a group. In 2005/2006, he was called by the Chief of Umoja. The Chief told him that there were people claiming that he had sold land to them and that they had documents from an advocate and a list of names of people totaling 323. He went to the Chief's office, and the Chief gave him the documents. The Chief gave him a letter written to the Registrar of Lands, to the attention of Sarah Mwendwa.

106. The letter was at page 38 of the Plaintiff's bundle. It was produced as P.EXH.11. The chief gave him another letter addressed to him, dated 24<sup>th</sup> November 2003, which was produced as P.EXH. 12). The Chief also gave him the documents, which were listed in the letter dated 14<sup>th</sup> November 2005 by J. M. Rioba & Co. Advocates. The letter by R. M. Kimani, dated 24<sup>th</sup> November 2003, claimed that he sold to Wazee Makadara Self Help Group, the parcel of land known as Plot No. 83/893 in 1998. He did not know the group until he got the letter from the chief. He could not, therefore, be a patron of the group. He did not know the location of plot No.

83/893, so he could not have given the land to the Plaintiffs or the group. He did not know the 1<sup>st</sup> Plaintiff. He could not, therefore, have entered into an agreement for sale with him in respect of the suit property. It was a contradiction to say on one hand that he gave them land and on the other that he sold the land to them at Kshs.6,000,000/-. He knew Mr. Festus Kimani, whom the Plaintiffs had referred to, but he was not his agent for collecting money from the Plaintiffs. He was not selling his land to the Plaintiffs, and he did not enter into any agreement with them. He could not interfere with the land whose location he did not know.

107. He did not agree with the report dated 5<sup>th</sup> November 2003 by the 4<sup>th</sup> Plaintiff, save that he was the KANU Chairman, Nairobi Branch. The Plaintiffs had contradicted themselves in paragraph 14 of the re-amended plaint. He could not have sold or given the Plaintiffs the disputed parcel of land, and at the same time, the same land be allocated to them by the Council. Plot No. 83/893 was not allocated to him by the Council. In HCCC No. 193 of 2006, the 1<sup>st</sup> Plaintiff had claimed in the supplementary affidavit sworn on 2<sup>nd</sup> March 2006, that he sold

the suit property to the Plaintiffs. The letter of allotment dated 5<sup>th</sup> September 1998 in favour of the Plaintiffs was inconsistent with the Plaintiffs' claim that he sold them the property in dispute. The letter of allotment was issued by the Nairobi City Commission, which was not in existence in 1998. The letter of allotment did not also refer to the parcel number for the suit property, which was already in existence in 1992 according to the survey plan.

108. There were several contradictions in the purported allocation of the suit property to the Plaintiffs. The certificate of lease in favour of Wazee Makadara Self Help Group (the group) was dated 27<sup>th</sup> October 2005 (P.EXH. 9). There was no evidence of surrender of this certificate of lease before another certificate of lease was issued in favour of the Plaintiffs, Jared Oduor Osodo and Others (P.EXH. 8). The two certificates of lease bore the same date. There was no lease between the City Council of Nairobi and Jared Oduor Osodo and his colleagues as trustees of the group. In the letter dated 24<sup>th</sup> April 2006 (page 46 D.EXH. 1), the Chief Land Registrar informed Wazee Makadara Self Help Group (the group) that their registration as the

owners of plot No. 83/893 was irregular and unauthorised. The group was also asked to surrender the certificate of lease for the property. He was not aware whether the surrender was done as directed by the Chief Land Registrar. He referred to the subdivision certificate at page 32 of D.EXH. 1. He stated that by the time plot No. 83/893 was being approved for subdivision, the title for the property had not been issued to the group. The group's title was issued in 2005. The land could not have been subdivided before its title had been issued. F.M. Ndereva denied issuing the subdivision certificate. The City Council of Nairobi (Council) also stated that it had no records of approval of the subdivision scheme for plot No. 83/893 Umoja Inner Core. The Council denied surveying plot No. 83/893. The Commissioner of Lands also stated that the subdivision of Plot No. 83/893 was not done by the Ministry of Lands. The survey plan F/R No.313/39 did not cover plot No. 83/893. It was a survey plan for plot No. 83/530.

109. The Director of Surveys, in his letter at page 48 of P.EXH. 1, stated that plot No. 83/893 was not in the survey plan F/R No.224/20, and that it was plot No. 83/530 that was subdivided

in 2001 with subplots Nairobi Block 83/899 - 1222. These were the same subplots claimed by the Plaintiffs. He was familiar with plot No. 83/530. This parcel of land was owned by the 2<sup>nd</sup> Defendant. The subdivision of the land was done by a surveyor named L. K. Gitau. L. K. Gitau denied surveying plot No. 83/893. He also denied knowing the Wazee Makadara Self Help Group. He was the Managing Director of the 2<sup>nd</sup> Defendant and its Chief Executive Officer. In the letter dated 11<sup>th</sup> September 2014 (Page 45 D.EXH. 1), the Nairobi City County stated that plot No. 83/893 did not exist and that the letter superseded any previous communication on the issue from the Nairobi City County. The letter superseded the letter dated 16<sup>th</sup> May 2014 from the same author (page 43, D.EXH. 1), which contradicted it.

110. Mr. Kihingo, the surveyor who allegedly issued a beacon certificate to the Plaintiffs, denied doing so. Mr. Kihingo stated that plot No. 83/893 did not exist, and that the survey plan F/R No. 313/39 belonged to the 2<sup>nd</sup> Defendant and not the Plaintiffs. The Plaintiffs' letter of allotment dated 5<sup>th</sup> September 1998 was said to have been signed by Z. M. Wandera (Mrs). Z. M.

Wandera (Mrs) wrote a letter at page 20 of D.EXH. 1, denying having signed the said letter of allotment. There was no evidence showing that the Plaintiffs paid the stand premium set out in the letter of allotment.

111. The subdivision which was approved by the Council on 1<sup>st</sup> February 2001 was for plot No. 83/530 Umoja Inner Core and not plot No. 83/893 (See the minutes at page 16 of D. EXH. 1). In the subdivision certificate for the Plaintiffs at page 32 of D.EXH. 1, the Plaintiffs claimed that the approval of the subdivision of plot No. 83/893 was also given by the Council on the same date. There were, however, no minutes to support the claim. The subdivision of plot No. 83/530 was approved by the Commissioner of Lands on 15<sup>th</sup> May 2001 (See page 19, D.EXH. 1). In the Plaintiffs' subdivision certificate at page 32 of D.EXH. 1, the Plaintiffs claimed that it was the subdivision of plot No. 83/893 that was approved. According to the subdivision certificate, by the Plaintiffs, only subplot No. 952 was subdivided. It was plot No. 83/530 that was subdivided into 323 plots. These were the plots being claimed by the Plaintiffs to be the subdivisions of plot No. 83/893, which only gave rise

to plot No. 952. He did not know where plot No. 83/893 was located. He had never invaded that land. Plot No. 83/893 was being used by the Plaintiffs to hoodwink the public into giving them money. The land did not exist. They reported the matter to the police, the Survey of Kenya, and the Ministry of Lands.

112. On further examination in chief by the advocate for the 2<sup>nd</sup> Defendant, DW1 stated as follows: He was an officer of the 2<sup>nd</sup> Defendant. He was the Chief Executive Officer (CEO) of the company. He had been the CEO since 1993. He adopted his witness statement filed in court on 29<sup>th</sup> June 2015 as part of his further evidence in chief. He produced the documents attached to the 2<sup>nd</sup> Defendant's comprehensive bundle of documents filed on 29<sup>th</sup> June 2015 as D.EXH. 3, and the documents attached to the 2<sup>nd</sup> Defendant's supplementary list of documents filed on 23<sup>rd</sup> September 2015 as D.EXH. 4. He stated that plot No. 83/530 (plot No. 530) was owned by the 2<sup>nd</sup> Defendant. The plot was allocated to the 2<sup>nd</sup> Defendant by the Nairobi City Commission (the Commission) in 1992. Plot No. 530 was allocated to the Commission by the Commissioner of Lands. The commission accepted the allotment. The letter of

acceptance was at page 3 of D.EXH. 3. The Commission did not pay for the allotment. The land was allocated to the 2<sup>nd</sup> Defendant by the Commission before it paid for it.

113. After the 2<sup>nd</sup> Defendant was allocated the land by the Commission, it took some time before getting the title from the Commission because the Commission did not have a title from the Commissioner of Lands. The 2<sup>nd</sup> Defendant took it upon itself to clear the sum of Kshs. 3,442,610/-, which was to be paid by the Commission for the land. The 2<sup>nd</sup> Defendant requested the Nairobi City Council to allow it to pay the said amount. The Council wrote to the Commissioner of Lands on 29<sup>th</sup> September 1995, asking the Commissioner of Lands to issue the 2<sup>nd</sup> Defendant with a lease. The letter confirmed that the Council had entered into a lease with the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant had paid Kshs.3,442,610/-, which was payable by the Commission.

114. The Commissioner of Lands responded on 2<sup>nd</sup> October 1995 and confirmed that the lease would be prepared in the name of the 2<sup>nd</sup> Defendant (see pages 6 and 8 of D.EXH. 3). In addition to the sum of Kshs.3,442,610/-, the 2<sup>nd</sup> Defendant paid a

further sum of Kshs.2,639,990/- to the Commissioner of Lands. For the letter of allotment, the 2<sup>nd</sup> Defendant paid the Council Kshs.1,800,000/-. At page 4 of D.EXH. 3 was a form of transfer, and at page 4 of D.EXH. 3 was the rent demand. The 2<sup>nd</sup> Defendant was subsequently issued with a lease and certificate of lease. See pages 10 to 15 of D.EXH. 3. The lessor was the Government of Kenya. Plot No. 530 measured 9.7hectares. The size of plot No. 83/893 was given as 6.7 hectares. The Plaintiffs' title was issued in 2005, 10 years after the 2<sup>nd</sup> Defendant's title.

115. In the Plaintiff's title, the lessor was the Council, while in the 2<sup>nd</sup> Defendant's title, the lessor was the Government of Kenya. The lease terms for the two titles were different. The two parcels of land were distinct. However, on the ground, the Plaintiffs would show members of the public the 2<sup>nd</sup> Defendant's land as their plot No. 83/893. The church only bought a small portion of plot No. 530. It was not true that the church bought the whole of plot No. 530. The 2<sup>nd</sup> Defendant intended to build residential houses on plot No. 530. The 2<sup>nd</sup> Defendant had reserved some spaces for public utilities. The

2<sup>nd</sup> Defendant made an application to the Council to subdivide the property. At pages 17 to 22 of D.EXH. 3 were the minutes of the proceedings for December 2000/January and February 2001. At page 22 of D.EXH.3, the approval of the application for the subdivision made by the 2<sup>nd</sup> Defendant. The number of subplots approved was 319, but this could be reduced or increased. The Plaintiffs had relied on the 2<sup>nd</sup> Defendant's subdivision approval, claiming that the same belonged to them. At page 25 of D.EXH. 3, was the plan, which was approved by the Council. The plan was taken to the Commissioner of Lands. The Commissioner of Lands received the plan and approved the same. He had not seen a similar approval in respect of the Plaintiff's purported subdivision.

116. Once the subdivision was approved by the Commissioner of Lands, the title had to be surrendered to the Commissioner of Lands before the other titles for the subplots were issued. The 2<sup>nd</sup> Defendant's surrender was at page 37 of D.EXH. 3. The 2<sup>nd</sup> Defendant surrendered its title on 23<sup>rd</sup> June 2004, even before the Plaintiffs got their title. There was no evidence of the surrender of the Plaintiffs' title. The survey of Plot No. 530 was

done, and the 2<sup>nd</sup> Defendant was given survey computation No. 47867. The computation was at pages 33 to 36 of D.EXH. 3. At page 38 of D.EXH. 3 was a document from the Director of Surveys that was to enable the 2<sup>nd</sup> Defendant to get the titles. The letter indicated computation No. 47867. The map referred to in the letter was at page 43 of the D.EXH. 3. After the subdivision, the 2<sup>nd</sup> Defendant started getting the titles in its name.

117. The 2<sup>nd</sup> Defendant had sold almost all the subdivisions to third parties as of the date of his evidence. The third parties had developed their parcels of land. The titles of some of the subplots were at pages 44 to 126 of D.EXH. 3. Some of the titles were at pages 4 to 16 of D.EXH. 4. The third parties had not been joined in the suit. There was a criminal case and a civil case prior to this suit. The criminal case was instituted in 2006. The persons who were charged were the Plaintiffs, who were the officials of Wazee Makadara. The case ended halfway. At page 139 of D.EXH.3 was the charge sheet against the officials of Wazee Makadara. The case was stayed briefly through a judicial review order. The judicial review suit was

ultimately dismissed, and the criminal case was to continue. See judgment at page 144 of D.EXH. 3. The criminal case was never concluded. A fresh case was instituted. At pages 252 to 255 of D.EXH., 3 were the warrants of arrest against the official of Wazee Makadara.

118. The new criminal case was number 2055/2015. The officials of Wazee Makadara were acquitted, and there was a pending appeal. The report by C. W. Wamutitu, dated 5<sup>th</sup> December 2014, was filed in court pursuant to a court order issued on 14<sup>th</sup> November 2014. He was not aware of the survey or the visit to the ground by C. W. Wamutitu. He did not even know of the report until he saw it in court. Through the letter dated 9<sup>th</sup> April 2015, the 2<sup>nd</sup> Defendant's advocates, Mwangi & Guandaru Advocates, complained to the Governor against the report. The Nairobi City County internal memo at page 174 of D.EXH. 3 stated that the report by C. W. Wamutitu contradicted the position of the County Government. The memo recommended that the report be withdrawn.

119. At page 258 of D.EXH. 3 was an agreement for lease between the Council and Young Muslim Association dated 31<sup>st</sup>

January 1989 in respect of plot No. 16. It was this Plot No. 16, which was duplicated to be plot No. 530. The duplication occurred in 2010 after the 2<sup>nd</sup> Defendant had acquired its title. There was therefore another title, Block 83/530, which resulted from the said duplication of Block 83/850, with a mosque. This was formerly plot No. 16. It was given plot No. 83/530 after the 2<sup>nd</sup> Defendant had surrendered its title. The survey department stated that they would correct the anomaly. This was the plot that had been referred to in C. W. Mutitu's report as plot No. 83/530. The Director of Surveys confirmed in a letter dated 3<sup>rd</sup> July 2015 (See page 18 of D.EXH. 4) that there was a duplication of number 530. The 2<sup>nd</sup> Defendant was not involved in this duplication of plot No. 530. The Director of Surveys stated that the error would be rectified. The 2<sup>nd</sup> Defendant had a counterclaim against the Plaintiffs, prayed for judgment in terms thereof.

120. **DW1 HABIB OMAR KONGO** stated as follows in cross-examination by the advocate for the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs: He was not consulted when C. W Wamutitu carried out her survey. He was not aware that the Plaintiffs were also not consulted. Plot

No. 83/530 did not have a mosque. The land with a mosque was the former plot No. 16, which was duplicated as plot No. 83/530 in 2010. C. W. Wamutitu concluded that plot No. 83/530 and plot No. 83/893 were distinct and different parcels of land. He could see special-purpose plot No. 16 near Sector 1. Plot No. 83/530 belonging to the 2<sup>nd</sup> Defendant was in sector IV. Plot No. 83/530 was triangular, and it was in Sector IV. The mosque was still on plot No. 16, which was erroneously given plot No. 83/530. He was not aware that C.W Wamutitu was demoted and her office vandalized after she gave evidence in this suit. The Plaintiffs were acquitted in the criminal case, but the DPP appealed. They were found to have no case to answer. This was in a 2015 criminal case. He was not aware that the 2006 criminal case (Criminal Case No. 2168/2006) was withdrawn. The third parties who purchased portions of plot No. 83/893 had developed their parcels of land. He had not produced all the titles for the subdivisions of plot No. 83/530 in D.EXH. 4. The surrender of lease at page 37 of D.EXH. 3 was not dated. The subdivision certificate at page 31 of D.EXH.1 had no letter reference number of the Commissioner of Lands.

121. The 2<sup>nd</sup> Defendant paid land rates to the Council before it subdivided the plot No. 83/530. The 2<sup>nd</sup> Defendant requested to be allocated plot No. 83/530. The land was allocated to the 2<sup>nd</sup> Defendant by the Nairobi City Commission. The lease was, however, issued by the Commissioner of Lands. He was not aware if there was someone else having a title issued by the Government of Kenya for the Umoja Inner Core land. He never sold or gave the Plaintiffs any land. The newspapers could report anything. The report was false. He was at one time the Chairman of the Nairobi City Commission. He was also a councillor for Makadara. He became the Chairman of Nairobi City Commission in 1991. He served until 1992 when elections were held. Before he became the Chairman of the Commission, he was a businessman. In 1992, he vied for a council seat and lost in the elections. He became a councilor in 1980 and served in the Council until 1983, when the Council was disbanded. Between 1983 and 1991, he was a businessman. In 1991, all the elected councilors were returned to the Commission. Between 1983 and 1991, the Chairman of the Commission was Mr. Gumo. He became the Chairman of

the Nairobi KANU Branch around 1996/1997. He held the post for 2 years. He became the Chairman of the Nairobi Water Board in 1997 or thereabouts.

122. The land allotted to the 2<sup>nd</sup> Defendant by the Nairobi City Commission was plot No. 83/530. The offer was to be accepted and payment made within 30 days. The allotment was accepted within 30 days through a letter dated 19<sup>th</sup> August 1992. The form of transfer dated 13<sup>th</sup> October 1995 referred to a consideration of Kshs.1,800,000/- paid by the 2<sup>nd</sup> Defendant. The Commission did not pay the sum of Kshs.3,442,610/- in its letter of allotment. The payment was made by the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant had a receipt for this payment, but did not produce it. The 2<sup>nd</sup> Defendant paid the said sum of Kshs.3,442,610/- in two instalments on 26<sup>th</sup> July 1995 and 27<sup>th</sup> July 1995. The payments were made about 3 years after the letter of allotment to the Commission. Wazee Makadara Self Help Group's letter of allotment dated 5<sup>th</sup> September 1998, referred to Residential Plot Umoja Innercore Sector IV – Plot No. IV. He could not recall if there was a scheme at that time. A scheme was subject to a survey before parcel numbers were

issued. The letter of allotment to the Plaintiffs did not have a parcel number. The plaintiffs were issued with a certificate of lease in respect of plot No. 83/893 on 27<sup>th</sup> October 2005. The lessor was indicated as the Nairobi City Council, and the lessee as Wazee Makadara Self Help Group (the group). The lease was for a term of 99 years with effect from 1<sup>st</sup> January 1994. The Plaintiffs were indicated as the first registered owners. Parcel No. 530 was duplicated in plot No. 16 in 2010. Parcel No. 530 had already been given to the 2<sup>nd</sup> Defendant earlier.

123. He was not allocated land irregularly in Nairobi when he was the Chairman of the Commission. The other director of the 2<sup>nd</sup> Defendant was his son. The 2<sup>nd</sup> Defendant acquired the suit property while he was in office as the chairman of the City Commission. He did not take the Plaintiffs to court to intimidate them. The Council was not favouring him because of the position that he held. He was not intimidating the Plaintiff. This suit was commenced when the 2<sup>nd</sup> Defendant had had a title for the suit property for 10 years. The 2<sup>nd</sup> Defendant acquired its title in 1995. He was not in the Nairobi City Commission then. He left the Commission in 1992.

124. **DW1 HABIB OMAR KONGO** stated as follows in cross-examination by the advocate for the 4<sup>th</sup> Plaintiff: He was the Managing Director of the 2<sup>nd</sup> Defendant, a position he had held since 1993. The 2<sup>nd</sup> Defendant was registered in 1992 by his son and another person. He was in the Commission then. He was not a director of the 2<sup>nd</sup> Defendant. He was an appointed Managing Director. He had not produced a resolution authorising him to represent the 2<sup>nd</sup> Defendant. He was not aware whether the report of the Public Accounts Committee of the County Assembly on the issue of the ownership of plot No. 83/530 and plot No. 83/893 was published. The Nairobi City County withdrew the report by C. W. Wamutitu. As the chairman of the Commission, he did not allocate land. He could remember the Silver Springs case, which was pending in court.

125. **DW1 HABIB OMAR KONGO** stated as follows in re-examination by the advocate for the 1<sup>st</sup> Defendant: He expected that he would be invited to accompany Ms. Wamutitu to the ground. He did not even know the plot she visited. The parcel of land, Nairobi Block 83/893, referred to in Ms.

Wamutitu's report, was not the land owned by the 2<sup>nd</sup> Defendant. Plot No. 83/530, which had a mosque, was a special-purpose plot No. 16, which was erroneously given land reference No. 83/530 (duplication). What was to be corrected was RIM in respect of Nairobi Block 83, prepared on 16<sup>th</sup> June 2010, which duplicated the 2<sup>nd</sup> Defendant's parcel No. 83/530. He joined the Nairobi City Commission in 1991 and served until 1992. There were many Commissions before 1991. The Commissions were appointed. Between 1983 and 1990, he was not in any of the Commissions that ran Nairobi City.

126. The payment of the charges in the letter of allotment dated 6<sup>th</sup> August 1992 was made by the 2<sup>nd</sup> Defendant in 1995. The Government did not cancel the letter of allotment on account of late payment. The 2<sup>nd</sup> Defendant would not have been issued with a title if it had not made the payment. He did not know when plot No. 83/893 was surveyed. What he knew was that the Plaintiffs had copied the 2<sup>nd</sup> Defendant's survey information in their documents. The survey map F/R No. 224/20 that created plot No. 83/893 was prepared in 1992. The Plaintiffs' letter of allotment that was issued on 5<sup>th</sup>

September 1998 should have mentioned the land by its parcel number. This failure meant that the survey map was a fraud and was not for parcel No. 893. No one from the 2<sup>nd</sup> Defendant had challenged his authority to appear in court on its behalf.

127. **DW1 HABIB OMAR KONGO** stated as follows on examination by the court: The 2<sup>nd</sup> Defendant paid Kshs.1,800,000/- mentioned in the form of transfer to the Nairobi City Council for the allotment of the property to the 2<sup>nd</sup> Defendant by the Council. The 2<sup>nd</sup> Defendant was given a letter of allotment by the Council, which he had not produced in evidence. The letter dated 29<sup>th</sup> September 1995 by the Council to the Commissioner of Lands at page 6 of D.EXH. 3 referred to an agreement for lease dated 21<sup>st</sup> September 1992 between the 2<sup>nd</sup> Defendant and the Council. When there was a delay in the issuance of a title, the 2<sup>nd</sup> Defendant entered into a lease with the Council on 21<sup>st</sup> September 1992, which was registered.

128. The 2<sup>nd</sup> Defendant called **LIVINGSTONE KAMANDE GITAU(DW2)** as its second witness. DW2 stated as follows in his evidence in chief: He was a surveyor in the private sector. He worked in the public sector for some time. He was also

known as L.K. Gitau. He recorded a witness statement filed in court on 29<sup>th</sup> June 2015, which he adopted as part of his evidence in chief. He was the one who wrote the letter dated 28<sup>th</sup> September 2011 at page 175 of D.EXH. 3. He was engaged by the 2<sup>nd</sup> Defendant to conduct a subdivision of plot No. 83/530. He did not know a group known as Wazee Makadara Self Help Group (the group). He had never dealt with them. He was the one who prepared the survey plan No. F/R 313/39 for plot No. 83/893. The instructions from the 2<sup>nd</sup> defendant were in respect of plot No. 83/530.

129. He was familiar with the other survey plan F/R No. 313/39 at page 43 of D.EXH. 3. It was the same survey plan that he had referred to earlier. In this survey plan, they had not indicated the original parcel of land being subdivided. The plots were, however, indicated as 899 - 1222. The F/R number was the same. It was he who did this subdivision. He signed the survey plan. The earlier survey plan was not signed by him. He prepared this subdivision plan for the 2<sup>nd</sup> Defendant and not for Wazee Makadara Self Help Group. He normally prepared the survey computations. It was not true that plot No. 83/530 was a

small plot with a mosque. The documents at pages 34, 35 and 36 of D.EXH. 3 were called area lists, which they produced. In the area list, they start with number one to the last. The Survey of Kenya, however, does its own numbering. The documents at pages 43 to 45 of the Plaintiff's bundle of documents were unknown to him. They were just a list of plot numbers with no other details. The other documents at pages 39 to 42 of the same bundle were area lists in respect of plots forming Block 83. What he surveyed was plot No. 530. These documents had not referred to plot No. 893. The plot No. 530 referred to here, which measured 0.6212hectares was not the plot that he surveyed and subdivided. A client who wants to carry out a subdivision must provide the surveyor with an approved subdivision scheme and a letter of approval from the Commissioner of Lands. They normally do not require the minutes. What they require is an approval in form PPA 2.

130. In the subdivision he carried out, an approval was issued by the Commissioner of Lands on 15<sup>th</sup> May 2001 (see page 32 of D.EXH. 3). It was on the strength of the approval that he carried out the survey. He did not know plot No. 83/893 or

Wazee Makadara Self-Help Group. He could not, therefore, have carried out a survey for them. Their survey plan bears only his name. He did not sign it. It was a mere copy of his survey plan done for the 2<sup>nd</sup> Defendant in respect of plot No. 530.

131. **LIVINGSTONE KAMANDE GITAU(DW2)** stated as follows on cross-examination by the advocate for the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs: The 2<sup>nd</sup> Defendant did not give him instructions in writing. It, however, supplied him with the necessary documents. He had been a surveyor for 50 years. After graduation, he worked with the Council for 6 months. He thereafter moved to private practice until 1978. From 1979 to 2010, he worked with Kenya Railways. After 2010, he joined his own firm, Development Survey Services. He formed the company in 1981. He knew Nairobi quite a bit. He did not know Umoja Inner core in detail. He was taken to plot No. 83/530 by a young man who was with the 1<sup>st</sup> Defendant. He showed him the land. He also got the survey maps from the Survey of Kenya to satisfy himself that that was the correct parcel of land. He did not carry out a survey in respect of plot

No. 83/893. He just filed the survey plans. The survey plan with respect to plot No. 83/893 did not bear his signature or name. After he filed the survey plan, it was the Director of Surveys who filled in the details. Survey plan F/R No. 313/39 did not bear the original parcel number but had subdivisions 899 - 1222. This survey plan was not signed by him.

132. The Director of Surveys is the custodian of survey maps. The original number is not filled by the Director of Surveys. He did not take ownership of the survey plan F/R No. 313/39. The survey plan shown to him earlier was more authentic, save for the portion that referred to parcel No. 893, which was filled by the Director of Surveys. Survey plan F/R No.224/20 at page 42 of D.EXH. 3 was for plot No. 530. The purpose of this survey was to excise the two (2) small plots on the top right and below to create plot No. 530 (See P.EXH. 15). The survey was intended to create plot No. 530. He was unable to say what reference numbers were given to these plots. The measurement of parcel No. 530 was given as 9.422 hectares. He could see the alteration. He could also see the cancellation

of the grid on top. The grid was just to help plot the corners of the plots.

133. They normally send a transparent copy of the plan to the Director of Surveys. Once the Director of Surveys approves the plan, a linen copy is prepared and approved. He could see that this plan was approved and authenticated. The preliminary details were not given. The columns for checkers were not filled. A linen map is difficult to alter. The alterations he could see were coming from a transparent survey plan. The parcel numbers are usually inserted by the Director of Surveys.

134. On re-examination, DW2 stated that he did not survey plot No. 83/893, and he did not know where it came from. In P.EXH. 15, there were two (2) excisions. All that was done was to excise the two plots and get the bigger plot. The parcel from which these plots were excised was not indicated. Before the excision, this plot was not plot No. 530. In the survey plan at page 43 of D.EXH. 3, two parcels could be seen at the top and middle, which were blank. These were not part of plot No. 530.

135. The 2<sup>nd</sup> Defendant's next witness was **JOHN NDIRANGU KARIUKI (DW3)**. DW3 stated as follows in his evidence in

chief: He had recorded a witness statement filed in court on 29<sup>th</sup> June 2015, which he adopted as part of his evidence in chief. He stated that he did not sign the lease at page 56 of the Plaintiffs' supplementary list of documents filed on 23<sup>rd</sup> January 2019. He was not the mayor of Nairobi in 2005. The document was not signed by the mayor. He was not familiar with the two signatures in the document. The signature purporting to be his was not his signature because he did not sign such a lease. He did not deal with the Plaintiffs. He was not aware of any meeting at which the Council approved the subdivision of plot No. 83/893 in favour of the Plaintiffs.

136. **JOHN NDIRANGU KARIUKI (DW3)** stated as follows in cross-examination by the advocates for the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs: He was seeing the 2005 lease for the first time. He could not refer it to the document examiner because he had not seen it. He was sitting in the full council meeting. He was not sitting in the Town Planning Committee. He did not know all the Self-Help Groups in Nairobi while he was the mayor. He did not know the Plaintiffs, and as such, he would not report them for fraud.

137. The 2<sup>nd</sup> Defendant's next witness was **BENSON NDEGWA GICHOHI (DW4)**. DW4 stated as follows in his evidence in chief: He was working with the Nairobi City Council in Urban Development and Planning. The department was initially referred to as the City Planning Department. He had worked in the department for 34 years. When an owner of the land wants to subdivide land, he will apply to the County for approval through a registered Physical Planner. That is what used to happen even before the County came into being. He could see the minutes of the Town Planning Committee meeting held on 1<sup>st</sup> February 2001 approving the subdivision of plot No. 83/530 Umoja Innercore at the instance of Aviton Enterprises Ltd. After an approval, a notification is sent out to the applicant in Form P.P.A. 2. The approvals by the Town Planning Committee were normally confirmed at a full Council meeting. He had not seen any other approval in favour of the Plaintiffs. He had also not seen in their records a notification issued to the Plaintiffs of an approval of their subdivision application. The survey computations in favour of the Plaintiffs were not approved by the Council. They could only be approved by the Survey of

Kenya. They only issued beacon certificates. It was possible to issue a certificate of subdivision for one plot only, but it was rare. It was only issued where an applicant was not prepared to meet the conditions for all the plots. According to the minutes in their possession, the subdivision approval that was given was for plot No. 83/530, and the applicant was the 2<sup>nd</sup> Defendant and not the Plaintiffs. They did not have in their records the letter of allotment in favour of the Plaintiffs (P.EXH. 1). The Beacon Certificate produced by the Plaintiffs (P. EXH. 2), was incomplete. It was not signed by the Chief Land Surveyor. They were not aware of Plot No. 83/893 owned by the Plaintiffs.

138. On cross-examination by the advocate for the 1<sup>st</sup> Defendant, DW4 stated that he did not know Urbanus Munguti (PW 5). When shown the report produced by PW5 as P.EXH. 17, DW4 stated that his department was not approached to determine the status of the suit property. He stated that all development applications must be approved by the technical committee in their department. He stated that he knew Cecilia Wangare Wamutitu (PW 2). He stated that PW2 was the Chief Officer in

charge of the Land Sub-Sector in Nairobi City County Government. He stated that he was not familiar with PW2's report at page 133 of D.EXH. 3. He stated that PW2 did not consult their office. He stated that what he dealt with was plot No. 83/530. He stated that plot No. 83/893 could be a different parcel of land existing somewhere. He stated that they did not issue a letter of allotment for plot No. 83/893, and that was why he concluded that the land did not exist. The surveyor may have located it somewhere.

139. **BENSON NDEGWA GICHOHI (DW4)** stated as follows on cross-examination by the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs: He was not David N. Gichohi. He had not recorded a witness statement. He came to give evidence on behalf of the Chief Officer, Urban Planning. He could see the memo dated 27<sup>th</sup> June 2013 (P.EXH. 17). It was copied to the Director City Planning. He was not the Director of City Planning, but he was working in the department. He could see the Survey Report by Cecilia Wamutitu at page 133 of D.EXH. 3. There was nothing wrong with the conclusion made by the surveyor. He did not think

there was Umoja Sector IV. He stated that Umoja Innercore had only Sectors 5 and 6.

140. The 2<sup>nd</sup> Defendant's next witness was **ERICK MUNENE KIVARA (DW5)**. DW5 stated as follows in his evidence in chief: He was a land surveyor working at the Ministry of Lands, Department of Surveys. He had worked in the department since 2012. He was in court to represent the Director of Surveys, who had received a summons to attend court. They checked their records with respect to plot No. 83/530 and plot No. 83/893. From their records, they had a request from the Commissioner of Lands to comment on a subdivision scheme in respect of plot No. 83/530. They did not receive a similar request in respect of plot No. 53/893. The correspondence regarding plot No. 53/893 concerned its existence. According to their records, they had plot No. 53/530, which was subdivided into approximately 270 plots. Upon subdivision, plot No. 53/530 ceased to exist, save only for record purposes. The letter dated 10<sup>th</sup> April 2001 from the Nairobi City Council to the Commissioner of Lands (page 27 D.EXH. 3) was copied to them and was in their records. The same applied to the letter

at page 28 of D.EXH. 3 from the Director of City Planning. They also had in their records a copy of the letter dated 26<sup>th</sup> April 2001, at page 29 of D. EXH. 3. At page 30 of D. EXH. 3 was their response. They did not have in their records similar correspondence regarding the subdivision of plot No. 83/893.

141. He knew Pricilla Wango. They worked in the same Ministry. She was his boss. In their Survey Department, they had S.R.O., which meant Survey Records Office. It was based at the Ruaraka Survey of Kenya office. There used to be a survey office at Ardhi House several years ago. All survey services were transferred to the Survey Office at Ruaraka. As of 2023, there was no Survey Office at Ardhi House. He had a certified copy of the survey plan produced as P.EXH. 15. It was in respect of Block 83/530. It was F/R No. 224/20. According to the survey plan, the land measured 9.422 hectares. He could see some cancellation in the measurements. The same also appeared in his copy. Whenever there was an error, they would cross it. They did not erase it. He could see Provisional Approval No. CT/330T/OIA. They gave this number in their survey inward registry. He could see P.EXH. 16. This was also

a survey plan said to be of Plot No. 83/893. This was a survey plan, F/R No. 224/20. The measurement of the parcel of land was 9.422 hectares. This survey plan was similar to the survey plan produced as P.EXH. 15. The only difference was the parcel number. It was not normal to have similar survey plans for two different parcels. In this case, there should have been two survey plans. The latter survey plan for parcel 83/893 was not in their records. He did not come across it. They were the custodians of survey plans. If the document was found elsewhere, then it was a forgery. He could see the survey plan at page 43 of D.EXH. 3. He had a copy in their office. The survey plan was F/R No. 313/39. It was in respect of parcel Nos. 83/899 - 1222. It was in respect of the subdivision of plot No. 53/530. He did not have a similar survey plan for plot No. 83/893. He could see the document at page 38 of D EXH. 3 bearing subdivision numbers 899 - 1222 and the old number 530. The document was from their office. It was addressed to surveyor L. K. Gitau. The letter at page 167 of D EXH. 3 from the Director of Surveyors to the 2<sup>nd</sup> Defendant was written by Z. T Kanunu. Z. T Kanunu had retired. Z. T Kanunu stated in

the letter that plot No. 83/893 did not appear in the survey plan F/R No.313/39. The letter at page 171 of D. EXH. 3 was from the Director of Surveys. It was written by Polly Gitimu. Polly Gitimu stated that plot No. 83/893 was not in the survey plan, F/R No. 224/20. The letter dated 3<sup>rd</sup> July 2015, at page 18 of D.EXH 3, from the Director of Surveys to the County Criminal Investigations Department, explained plot No. 83/893 and plot No. 83/530. The Director of Surveys mentioned that there was a duplication of parcel No. 530. The letter confirmed that plot No. 83/893 did not exist in the survey records. He could see the survey plan F/R No. 211/68 for parcels No. 530 to 618. He had the same survey plan in his file. He could see plot No. 83/530 with a measurement of 0.6212 hectares. He had seen the other parcel No. 83/530, which measured about 9 hectares. This was an anomaly. This was a duplication or an error that occurred during the allocation of parcel numbers. The process was being done manually. The two parcels of land were different. The original parcel that gave rise to this plot No. 83/530 was a new Grant. The other one was also a new Grant.

142. The small land parcel 83/530 was given its parcel number in 1990. The larger land parcel 83/530 was given the parcel number in 2001. The larger plot No. 83/530 was subdivided and given new numbers. The owner of plot No. 83/530, which was small in size, still had a title that should be corrected. The letter he had referred to talked of a planned correction of the title. He did not know if the correction had been done. He knew J. M. Mwaniki. He was Senior Assistant Director of Surveys. In his letter dated 11<sup>th</sup> December 2008, he stated that plot No. 83/893 was a small plot measuring 0.560 hectares. He confirmed that we had no records for the subdivision of plot No. 83/893.

143. **DW5 ERICK MUNENE KIVARA** stated as follows in cross-examination by the advocate for the 1<sup>st</sup> Defendant: They did not have an office at the Director of Surveys, known as SPRO. The SPRO office was at Ardhi House. He had not worked in that office. He was not sure of what they were doing in that office. He did not know the kind of records that were kept there. A Blueprint copy of a survey plan is a copy of the original. The Director of Surveys keeps the original survey plans. When a

proprietor of land wants a copy of a plan, they give him a Blueprint copy. They did not have the original of the survey plan for plot No. 83/893 at the Survey of Kenya. He could see what was referred to as the survey computations in the Plaintiff's bundle. They were actually not survey computations but an area list. They were the authors of area lists. The list is prepared at the point of preparing the RIM or amending the RIM. He had not seen any area list for plot No. 83/893.

144. The file for the subdivision of plot No. 83/530 had been tampered with. There was, however, a subdivision. They had the original survey plan No. F/R 224/20. The Folios and Registers are unique numbers that they use to identify survey plans. The survey plan for the small plot No. 83/530 was authenticated in 1994. He was not aware of why the authentication was delayed. The survey plan No. 224/20 for the larger Plot No. 83/530 was authenticated on 28<sup>th</sup> May 1992. When it was authenticated, they had been supplied with all the required information and documents. The Blueprint for plot No. 83/530 should not have been certified by Pricila Wango because the Director of Surveys did not have the original

survey plan in their custody. There was a duplication of parcel No. 530. He could not blame the duplication on any of the owners of the two plot No. 530s. It was the survey office to blame.

145. The records at the SPRO could not override the records at the Survey of Kenya as concerns the Survey records. As far as he was concerned, both plans F/R No. 211/68 and F/R 220/20 were authentic. The problem was the duplication of parcel No. 530. If plot No. 83/893, claimed by the Plaintiffs, was subdivided in 2001, the title held by the Plaintiffs could not have been issued in 2005. This is because a title must be surrendered upon subdivision. According to the Plaintiffs' letter of allotment for plot No. 83/893 dated September 1998, the allotment seemed to have been done after the survey, which was not normal.

146. **DW5 ERICK MUNENE KIVARA** stated as follows in cross-examination by the advocate for the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs: Pricila Wango was his senior at work. He did not consult her before he came to court. He was not told that she had testified in the matter. Survey plans are prepared by private licensed

surveyors and approved by the Director of Surveys. One of the survey plans for parcel No. 83/530 was prepared by the Director of Surveys. A private surveyor has to submit the survey to the Director of Surveys for approval. He had seen the area lists that were referred to him, which began with parcel No. 530. This was prepared by the Director of Surveys. It was in respect of survey plan F/R No.211/68. He saw the survey plan. The area list corresponded with the survey plan. They had documents in their records. He could see that this survey plan, F/R 211/68 was prepared by a private surveyor. He had seen the original of F/R 224/20. It was in Durafilm. Some originals were in a linen map. Durafilm was easy to alter, unlike the linen map.

147. A linen map can be altered, but it is hard to do so. He had seen the survey plan, F/R 224/20, for the larger parcel No. 83/530. He could see the alterations on the map. He could not tell who did the alterations. He did not find the area list for the subdivision of plot No. 83/530 that gave rise to plot No. 899 - 1222. The whole subdivision file was missing. It was not

proper for Pricila Wango to certify the Blueprint. He could see that the Blueprint (P.EXH.16) had no alterations.

148. The 2<sup>nd</sup> Defendant's next witness was **GEORGE GITONGA (DW6)**. DW6 stated as follows in his evidence in chief: He was a land registrar working at the court section in the office of the Chief Land Registrar. He came to court pursuant to a court summons issued at the instance of the advocates for the Defendants. He had worked in that office for 3 years. When land is subdivided, the original title should be surrendered. He could see the surrender of lease at page 37 of D.EXH. 3. The surrender was in consideration of the subdivision of Plot No. 83/530. The lease was surrendered. He had not seen any surrender in respect of the subdivision of parcel No. 83/893. He could see the certificate of lease (P.EXH. 9). The registered owner of the leasehold property was Wazee Makadara Self Help Group. A self-help group should hold land in the name of its office bearers. The Chief Land Registrar, in a letter dated 24<sup>th</sup> April 2006, informed the Plaintiffs that they were holding an irregular title for plot No. 83/893 and asked them to surrender the same for cancellation. That position remained. He did not

check their records for parcel No. 83/893. He only checked plot No. 839/530, whose records they had.

149. **DW6 GEORGE GITONGA** stated as follows in his evidence on cross-examination by the advocate for the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs: He was not aware if any action had been taken by the Chief Land Registrar against the Plaintiffs. The process of subdivision can precede the surrender of title, but new titles cannot be issued for the subdivisions until the original title is surrendered. The land registry could not issue a title for the subdivisions until the mother title was surrendered. He knew Umoja Innercore Block 83. He did not know if the title for Block 83 was issued by the Commissioner of Lands to the City Council of Nairobi. He knew the Government could allocate land to the Council for development. The Commissioner of Lands could not re-allocate land that had already been allocated to the City Council.

150. The 2<sup>nd</sup> Defendant's next witness was **REV. SIMON MUHUKO MAINA (DW7)**. DW7 stated as follows in his evidence in chief: He was a church minister. He had been a minister with KAG Church for 30 years. He adopted his witness

statement filed on 16<sup>th</sup> September 2015 as his evidence in chief. He identified D.EXH. 4 as the agreement that KAG entered into with the 2<sup>nd</sup> Defendant. He stated that KAG bought a portion of plot No. 83/530. Their portion was plot No. 83/899, which the 2<sup>nd</sup> Defendant transferred to them. They purchased the land from the 2<sup>nd</sup> Defendant. The Plaintiffs were known to him, but they never dealt with them in relation to plot No. 83/899.

151. **REV. SIMON MUHUKO MAINA (DW7)** stated as follows in his evidence on cross-examination by the advocates for the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs: They purchased plot No. 83/899. They had a title for the plot in their name. He did not carry it with him. The agreement dated 2<sup>nd</sup> May 2000 between KAG and the 2<sup>nd</sup> Defendant referred to a portion of plot No. 83/899. They did due diligence in respect of plot No. 83/530 before purchasing a portion thereof. They did a search on the title. He had a copy of the search on plot No. 83/530. According to the search, the property measured 0.166 hectares. At the time they purchased a portion of plot No. 83/530, there was a proposed subdivision scheme, but the subdivision had not been done. He heard from

the CID that there was another property known as plot No. 83/893. He did not see a title deed for plot No. 83/893. They did not purchase a portion of plot No. 83/893. When they purchased the plot from the 2<sup>nd</sup> Defendant, what they were shown was a proposed subdivision scheme for plot No. 83/530. They paid stamp duty in 2013. In the same year, they were issued a certificate of lease. They paid Stamp Duty through the 2<sup>nd</sup> Defendant.

152. In re-examination by the 2<sup>nd</sup> Defendant's advocate, DW6 stated as follows: According to the search they conducted, plot No. 83/530 measured 0.166 hectares, which was an error. That measurement was for the portion of plot No. 83/530 that they purchased. The total area for plot No. 83/530 was 9.7 hectares.

### **The submissions**

153. After the close of evidence, the parties were directed to make written closing submissions. On 28<sup>th</sup> January 2025, the Interested Parties filed an application brought by way of Notice of Motion dated 23<sup>rd</sup> January 2025 seeking leave to be added to the suit as interested parties. The court granted leave to the applicants to be joined in the suit as interested parties on

condition that the proceedings of the court that took place before their joinder would not be set aside or varied to accommodate their joinder and that they would not lead evidence or file submissions in the matter.

**The Plaintiffs' submissions.**

154. The Plaintiffs filed submissions dated 22<sup>nd</sup> January 2025. The Plaintiffs framed two issues for determination by the court namely; whether the Plaintiffs, Wazee Makadara Self Help Group was the lawful owner of the land parcel Nairobi/Block 83/893 (the suit property), and whether the certificates of leases in respect of land parcel Nairobi/Block/893 and land parcel Nairobi/Block 83/530 referred to the same parcel of land.

155. The Plaintiffs submitted that the suit property was allocated to them by the City Council of Nairobi. The Plaintiffs submitted that they were subsequently registered as the leasehold proprietors of the suit property and were issued with a certificate of lease by the Land Registrar in respect thereof. The Plaintiffs submitted that they acquired the suit property lawfully and had a right to own and enjoy the same. The Plaintiffs submitted that the Defendants failed to impeach the

Plaintiffs' title despite a spirited attempt. The Plaintiffs submitted that the Defendants failed to prove that the Plaintiffs acquired the suit property fraudulently or through forgery, as they alleged in their pleadings.

156. On the second issue, the Plaintiffs submitted that they placed evidence before the court showing that the suit property was distinct and separate from the land parcel Nairobi/Block 83/530. The Plaintiffs submitted that the suit property measured 9.422 hectares (approximately 23.161 Acres) and was created through a survey plan, F/R No. 224/20 dated 28<sup>th</sup> May 1992, with clear boundaries and beacons. The Plaintiffs submitted that the suit property had been subdivided through survey plan F/R No. 313/39 dated 19<sup>th</sup> December 2001 into a total of 324 plots, namely, Nairobi/Block 83/899-1222. The Plaintiffs submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants failed to prove that the land parcel Nairobi/Block 83/530 Umoja Innercore Sector IV was allocated to the 2<sup>nd</sup> Defendant as the first allottee, and subsequently to a mosque. The Plaintiffs submitted that the evidence adduced by the parties showed that the land parcel Nairobi/Block 83/530 existed but in Umoja

Innercore Sector 1, and was the first parcel of land to be assigned that parcel number in Umoja Innercore.

157. The Plaintiffs submitted that the land parcel Nairobi/Block 83/530(plot No. 530) measured 0.6212 hectares, and as such could not be the same as the land parcel Nairobi/Block 83/893, which measured 9.422hectares. The Plaintiffs submitted that plot No. 530 could not be subdivided into 324 plots. The Plaintiffs submitted that the survey plan No. F/R No. 313/39, relied on by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, was disowned by the said Defendant's witness, DW3, who was alleged to have prepared the plan on their behalf. The Plaintiffs submitted that the survey plan for the second plot, No. 530, F/R No. 224/20, had several alterations in the measurements. The Plaintiffs submitted that the alterations were not countersigned by the surveyor as required under Regulation 96(2) of the Survey Regulations (Legal Notice No. 168 of 1994).

158. The Plaintiffs submitted that this was clear evidence that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had overlayed or superimposed their forged ownership documents on the suit property to make it look as if the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' alleged plot No. 530 was

related to the suit property. The Plaintiffs submitted that the 2<sup>nd</sup> Defendant had failed to prove the legality of its title over plot No. 530. The Plaintiffs submitted that the purported plot No. 530 claimed by the 2<sup>nd</sup> Defendant had already been allocated to the City Council of Nairobi, which had already subdivided the same. The Plaintiffs submitted that the land was not available for allocation to the 2<sup>nd</sup> Defendant by the Commissioner of Lands. The Plaintiffs wondered under what circumstances the land that was allocated to the 2<sup>nd</sup> Defendant on 6<sup>th</sup> August 1992, with Kshs. 3,000,000/- as the Stand Premium was again transferred to the 2<sup>nd</sup> Defendant, 3 years later on 13<sup>th</sup> October 1995 at a consideration of Kshs. 1,800,000/-. The Plaintiffs also wondered how the land that was allocated to the 2<sup>nd</sup> Defendant by the National Government in 1992 could again be transferred to the 2<sup>nd</sup> Defendant by the Nairobi City Commission in 1995.

159. The Plaintiffs submitted that the 3<sup>rd</sup> Defendant had no power to issue titles for non-existent subdivisions of land. The Plaintiffs submitted that the 3<sup>rd</sup> Defendant acted illegally. The Plaintiffs cited several authorities in support of these submissions, which I have considered, and some of which I will

refer to later in the judgment. The Plaintiffs submitted that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants caused the Plaintiffs to be arrested and charged at Kibera Law Court with the offence of forgery of the Plaintiffs' title, and the supporting documentation of which charge, the Plaintiffs were acquitted. The Plaintiffs submitted that the original documents, which were in their possession, were taken away. The Plaintiffs urged the court to note that there was evidence of document tampering at the Survey of Kenya and the Nairobi City County valuation department.

160. The Plaintiffs submitted that the evidence of PW2, PW3, PW4 and PW5 on the existence of the suit property was not controverted by the Defendants' witnesses. The Plaintiffs submitted that DW3 disowned the 2<sup>nd</sup> Defendant's survey plan and confirmed that it was the survey plan for the subdivision of the Plaintiffs' land that he signed. The Plaintiffs submitted that the evidence adduced by the Defendants' witnesses amounted to mere denials. The Plaintiffs submitted that the evidence corroborated the claim of superimposition of the 2<sup>nd</sup> Defendant's second Plot No. 530 on the suit property owned by the Plaintiffs. The Plaintiffs submitted that they had proved

their case on a balance of probabilities and were entitled to the reliefs sought in their re-amended plaint.

### **The 1<sup>st</sup> Defendant's Submissions.**

161. The 1<sup>st</sup> Defendant filed submissions dated 21<sup>st</sup> March 2025.

The 1<sup>st</sup> Defendant framed four issues for determination by the court, namely;

(a) Who is the owner of the disputed land?

(b) Are the Plaintiffs entitled to the reliefs sought in the plaint?

(c) Is the 2<sup>nd</sup> Defendant entitled to the reliefs sought in its counterclaim?

(d) Who should pay the costs of the suit?

162. On the first issue, the 1<sup>st</sup> Defendant submitted that, whereas the Plaintiffs claim to be the registered owners of land parcel Nairobi/Block 83/893 (suit property/plot No. 893), the 2<sup>nd</sup> Defendant claims to be the registered owner of land parcel Nairobi/Block 83/530 (plot No. 530). The 1<sup>st</sup> Defendant submitted that both the Plaintiffs and the 1<sup>st</sup> Defendant produced evidence in proof of their titles to the two parcels of land. The 1<sup>st</sup> Defendant submitted that the Plaintiffs, who

claimed to have been allocated plot No. 893 for a term of 99 years, with effect from 1st January 1994, by the City Council of Nairobi/Nairobi City Commission, accused the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of trespassing on the property and interfering with their legal and beneficial interest in the land.

163. The 1<sup>st</sup> Defendant submitted that, on the other hand, the 2<sup>nd</sup> Defendant had claimed that plot No. 530 was allocated to it by the Government of Kenya for a term of 99 years, effective from August 1, 1992. The 1<sup>st</sup> Defendant averred that the 1<sup>st</sup> Defendant's claim against the Plaintiffs was that the Plaintiffs had, through fraud and forgery, laid a claim on the 2<sup>nd</sup> Defendant's plot No. 530 together with its subdivisions, which they claimed to be their plot No. 893.

164. The 1<sup>st</sup> Defendant submitted that from the evidence adduced by the parties, both parties were claiming the same parcel of land on the ground. The 1<sup>st</sup> Defendant cited several authorities and submitted that it was important in the circumstances to examine the root of each title to determine whether the acquisition was legal.

165. The 1<sup>st</sup> Defendant submitted that the Plaintiffs did not provide the particulars of the alleged fraud, illegality or unlawfulness in the acquisition of the 2<sup>nd</sup> Defendant's title, and the subdivision of the property contrary to the provisions of Order 2 Rule 10 of the Civil Procedure Rules. The 1<sup>st</sup> Defendant submitted that the evidence adduced by the Plaintiffs about the alleged forgery of documents and superimposition of the 2<sup>nd</sup> Defendant's plot on the Plaintiff's property, and interference by the Defendants with the Plaintiffs' land, were not based on any evidence and must be rejected by the court. In support of this submission, the 1<sup>st</sup> Defendant cited Mellen Mbera v. James Theuri Wambugu [2020]eKLR.

166. The 1<sup>st</sup> Defendant submitted further that the Plaintiffs gave a contradictory account of how they acquired their plot No. 893. The 1<sup>st</sup> Defendant submitted that the Plaintiffs claimed in some of their documents produced in evidence that Plot No. 893 was sold to them by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant submitted that PW1 also testified that Plot No. 893 was sold to the Plaintiffs by the 1<sup>st</sup> Defendant, the evidence which he later recanted, and claimed that the agreement they entered into

with the 1<sup>st</sup> Defendant was not a sale agreement but an agreement on how they would process the title for the property.

167. The 1<sup>st</sup> Defendant submitted that the Plaintiffs had also claimed that Plot No. 893 was given to them by the 1<sup>st</sup> Defendant as a gift for having supported the 1<sup>st</sup> Defendant in his quest to become Nairobi Branch Kanu Chairman. The 1<sup>st</sup> Defendant referred the court to the document referred to as the Chairman's Report dated 5<sup>th</sup> November 2003, which was produced as part of P.EXH.3. The court was also referred to PW1's evidence in chief and on cross-examination by the advocate for the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant submitted that the Plaintiffs finally claimed that Plot No. 893 was allocated to them by the Nairobi City Commission/City Council of Nairobi, which owned the property. The 1<sup>st</sup> Defendant submitted that this claim was set out in paragraphs 14 and 15 of the amended plaint. The 1<sup>st</sup> Defendant submitted that the Plaintiffs gave three contradictory accounts of how they acquired plot No. 893. The 1<sup>st</sup> Defendant submitted that the contradiction in the Plaintiffs' claim over Plot No. 893 was an indication of the level

of fraud that was employed by the Plaintiffs in the purported acquisition of Plot No. 893. The 1<sup>st</sup> Defendant submitted that with all these contradictions, it could not be said that the Plaintiffs had properly explained the root of their title to Plot No. 893.

168. The 1<sup>st</sup> Defendant submitted further that the Plaintiffs did not explain why, in their letter of allotment issued in 1998, the parcel of land that was allocated to them was indicated as Plot No. IV-Unsurveyed Scheme, Umoja Innercore Sector IV, instead of plot No. 893, which was allegedly surveyed and created in 1992 under survey plan, F/R No. 224/20, which was authenticated by the Director of Surveys in 1992. The 1<sup>st</sup> Defendant submitted that it was this Plot No. IV-Unsurveyed Scheme, Umoja Innercore Sector IV, which the Plaintiffs claimed to be plot No. 893. The 1<sup>st</sup> Defendant submitted that if it was plot No. 893, which was allocated to the Plaintiffs, there was no reason why it was not stated as much in the letter of allotment.

169. The 1<sup>st</sup> Defendant submitted that the Plaintiffs' purported letter of allotment and survey plan No. F/R 224/20 were both

fraudulent, and as such, tainted the root of the Plaintiffs' title. The 1<sup>st</sup> Defendant submitted further that a survey could not have been conducted in 1992 for an allocation which was done in 1998. The 1<sup>st</sup> Defendant submitted that there was no land in 1992 or 1998 known as plot No. 893, and that explained why the same was not indicated in the purported letter of allotment.

170. The 1<sup>st</sup> Defendant submitted that the report that was produced by PW6 had no evidential value as it was prepared by a deceased person and produced by a person who never participated in the investigations. The 1<sup>st</sup> Defendant submitted that although the report claimed that the land parcel known as Umoja Innercore Block 83 was leased by the Government of Kenya to the City Council of Nairobi (the Council) in 1978, no evidence was placed before the court in proof of the allegation. The 1<sup>st</sup> Defendant submitted that apart from the purported lease, which was fraudulent, the Plaintiffs produced nothing else to support their claim that their title had its root in a lease from the Council. The 1<sup>st</sup> Defendant submitted that the purported lease was not produced in evidence. The 1<sup>st</sup> Defendant submitted that the Plaintiffs never demonstrated

that the Council was the head lessor and the Plaintiffs, the sublessees.

171. The 1<sup>st</sup> Defendant submitted that there was no evidence that the certificate of lease that was issued in the name of the group, dated 27<sup>th</sup> October 2005, was surrendered to the land registrar before another certificate of lease of the same date was issued in the name of the trustees of the group. The 1<sup>st</sup> Defendant also wondered how the two certificates could have the same date while they were not issued on the same day. The 1<sup>st</sup> Defendant submitted further that the purported subdivision of plot No. 893 was a sham and a fraud. The 1<sup>st</sup> Defendant submitted that there was no way in which Plaintiffs could have subdivided plot No. 893 in 2001, and even managed to get a title for one of the subdivisions, Nairobi/Block 83/893/952, while the title for plot No. 893 was not issued to them until 2005.

172. The 1<sup>st</sup> Defendant submitted that the subdivision survey plan, F/R No. 313/39, which the Plaintiffs claimed to be the subdivision plan for their plot No. 893, was for the 2<sup>nd</sup> Defendant's plot No. 530. The 1<sup>st</sup> Defendant submitted that the

survey plan was registered on 26<sup>th</sup> November 2001 and authenticated on 19<sup>th</sup> December 2001. The 1<sup>st</sup> Defendant submitted that since plot No. 893 was private land allegedly owned by the Plaintiffs, a title had to be in existence before it could be subdivided. The 1<sup>st</sup> Defendant submitted that L.K.Gitau, who allegedly surveyed plot No. 893, denied having surveyed plot No. 893. The 1<sup>st</sup> Defendant submitted that his testimony was that the survey plan No. 313/39 was for plot No. 530 owned by the 2<sup>nd</sup> Defendant and not plot No. 893.

173. The 1<sup>st</sup> Defendant submitted that, unlike the 2<sup>nd</sup> Defendant, the Plaintiffs placed no evidence before the court showing that the subdivision approval was granted to them by the Council and that it surrendered its certificate of lease for plot No. 893 in consideration of the subdivision. The 1<sup>st</sup> Defendant submitted that the Plaintiffs' subdivision certificate bore the information regarding the approval of the 2<sup>nd</sup> Defendant's subdivision of plot No. 530.

174. The 1<sup>st</sup> Defendant submitted further that various Government offices, such as the Director of Surveys, the Ministry of Lands, and the City Council of Nairobi, all disowned

plot No. 893 and the allocation thereof to the Plaintiffs. The 1<sup>st</sup> Defendant submitted that even the Nairobi City Commission, which was alleged to have allocated plot No. 893 to the Plaintiffs on 5<sup>th</sup> September 1998, was not in existence at the time. The 1<sup>st</sup> Defendant submitted that there was also no evidence that the Plaintiffs complied with the terms of the alleged letter of allotment regarding payments.

175. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant's title was first in time. The 1<sup>st</sup> Defendant submitted that it had not only proved that the survey plan produced by the Plaintiffs was a sham and a fraud, but he had also demonstrated that the 2<sup>nd</sup> Defendant's title was issued first in 1995, while the Plaintiffs' title was issued 10 years later in 2005. The 1<sup>st</sup> Defendant submitted that the 2<sup>nd</sup> Defendant had produced credible evidence on the root of its title to plot No. 530. The 1<sup>st</sup> Defendant submitted that it was also demonstrated that there was a duplication of parcel number 530, an error that was admitted by the Director of Surveys, who promised to attend to it.

176. The 1<sup>st</sup> Defendant submitted that the Defendants had demonstrated that the 2<sup>nd</sup> Defendant had a title to the land in question, while the Plaintiffs had no land on the ground. The 1<sup>st</sup> Defendant submitted that since the Plaintiffs had no title to the disputed land, and had no land on the ground, it could not maintain an action for trespass against the Defendants. The 1<sup>st</sup> Defendant submitted that, being a holder of a title to the land in dispute and having been in possession of the land before its subdivision, the 2<sup>nd</sup> Defendant could maintain an action for trespass against the Plaintiffs. The 1<sup>st</sup> Defendant submitted that the reliefs sought by the Plaintiffs could not be granted since the Plaintiffs had not proved their case. The 1<sup>st</sup> Defendant submitted further that granting the orders sought by the Plaintiffs would also affect the rights of the third parties who had purchased the subdivisions of Plot No. 530, who were not parties to the suit. The 1<sup>st</sup> Defendant submitted that granting the orders sought would amount to condemning the said parties unheard. The 1<sup>st</sup> Defendant urged the court to dismiss the Plaintiffs' suit and allow the 2<sup>nd</sup> Defendant's counterclaim, which had been proved with costs to the Defendants.

## **The 2<sup>nd</sup> Defendants' Submissions**

177. The 2<sup>nd</sup> Defendant filed submissions dated 8<sup>th</sup> April 2025. The 2<sup>nd</sup> Defendant framed the following issues for determination by the court;

- (a) Whether the Plaintiffs had the *locus standi* to file this suit;
- (b) Whether the suit is time-barred;
- (c) Whether the title for the land parcel, Nairobi/Block 83/893, is lawful and owned by the Plaintiffs;
- (d) Whether the 2<sup>nd</sup> Defendant is the proprietor of the land parcel, Nairobi/Block 83/530, and whether the 2<sup>nd</sup> Defendant subdivided the property;
- (e) Whether the Plaintiffs trespassed on the land parcel, Nairobi/Block 83/530;
- (f) Whether the non-joinder of the third parties to the suit is fatal to the Plaintiff's claim; and
- (g) Who should pay the costs of the suit?

178. On the first issue, the 2<sup>nd</sup> Defendant submitted that a Self-Help Group is not a corporation and, as such, is not capable of instituting a suit in its own name. The 2<sup>nd</sup> Defendant submitted that a Self-Help Group can only file a suit in the name of its

officials. The 2<sup>nd</sup> Defendant submitted that the said officials must demonstrate that they are the officials of the group, and that they have authority to institute the suit on their own behalf and on behalf of the other members of the group. In support of this submission, the 2<sup>nd</sup> Defendant cited Kipsiwo Community Self-Help Group v. A.G & 6 Others [2013]eKLR.

179. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs did not produce a certificate of registration of Wazee Makadara Self Help Group(group). The 2<sup>nd</sup> Defendant submitted that the Plaintiffs did not produce any document to prove that they were the officials of the group. The 2<sup>nd</sup> Defendant submitted that the 4<sup>th</sup> Plaintiff was a stranger to the group. The 2<sup>nd</sup> Defendant submitted that he never testified, and there was nothing connecting him to the property in dispute. The 2<sup>nd</sup> Defendant submitted that none of the Plaintiffs, save for the 1<sup>st</sup> Plaintiff, had his name on the certificate of title for plot No. 893. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs, whose names were not on the certificate of lease for plot No. 893, had no nexus to the property. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs had not demonstrated that they had any *locus standi*

to file the suit. The 2<sup>nd</sup> Defendant submitted that this ground alone was sufficient to dismiss the Plaintiffs' suit.

180. On the issue of the time bar, the 2<sup>nd</sup> Defendant submitted that the Plaintiffs' claim was based on the torts of fraud and trespass. The 2<sup>nd</sup> Defendant submitted that, according to the Plaintiffs' pleadings and testimony, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' interference with the Plaintiffs' land parcel, No. 893, took place in 2000. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs also alleged that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants attempted to subdivide plot No. 893 in 2004, but failed, and that it was not until February 2006 that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants succeeded in subdividing the plot and placing the beacons thereon.

181. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs' cause of action arose in 2000, and there was a repetition of the same cause of action in 2004 and 2006. The 2<sup>nd</sup> Defendant submitted that under Section 4 of the Limitation of Actions Act, Chapter 22 Laws of Kenya, the Plaintiffs' suit should have been brought within 3 years from the date of the cause of action. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs' suit should have been filed by 26<sup>th</sup> February 2006. The 2<sup>nd</sup> Defendant submitted that

this suit, which was filed in 2010, is time-barred. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs filed a suit against the 1<sup>st</sup> Defendant in 1996, namely, Nairobi HCCC No. 193 of 2006, which they withdrew before filing the present suit out of time in 2010.

182. On the issue of the validity of the title for plot No. 893, and the ownership thereof by the Plaintiffs, the 2<sup>nd</sup> Defendant submitted that from the totality of the evidence adduced by the Defendants, plot No. 893 did not exist. The 2<sup>nd</sup> Defendant submitted that the parcel of land that existed was plot No. 530, on which the Plaintiffs attempted to superimpose the alleged plot No. 893. The 2<sup>nd</sup> Defendant referred to several correspondences from the Director of Surveys between 2006 and 2015 in which the Director of Surveys consistently held that plot No. 893 did not exist, and that the parcel of land in existence was plot No. 530. The 2<sup>nd</sup> Defendant submitted that the existence of plot No. 893, and its purported subdivision, was also denied by the City Council of Nairobi.

183. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs' letter of allotment dated 5<sup>th</sup> September 1998, alleged to be for plot No.

893, was also disowned by Zipporah Wandera, who was alleged to have signed it. The 2<sup>nd</sup> Defendant submitted that although the Plaintiffs alleged to have been issued with a lease by the City Council of Nairobi, the lease was never produced in evidence. The 2<sup>nd</sup> Defendant submitted that the then mayor of the City of Nairobi, John Ndirangu Kariuki (DW3), who was alleged to have signed the lease, disowned the same. The 2<sup>nd</sup> Defendant submitted that the then Town Clerk of the City of Nairobi, Godfrey Mate, also denied having signed the lease. The 2<sup>nd</sup> Defendant submitted that the existence and the legality of plot No. 893 were also disowned by the Ministry of Lands.

184. The 2<sup>nd</sup> Defendant submitted that even the Plaintiffs themselves were unable to establish the existence and the legality of plot No. 893. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs gave conflicting accounts of how they acquired plot No. 893. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs' title documents, which they received from a go-down in Nairobi rather than from the offices of the City Council of Nairobi, could not be legitimate. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs did not give an unbroken account of how they

acquired plot No. 893 through allotment. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs did not meet the threshold of proof of valid acquisition of a title to land through allotment outlined in Ali Mohamed Dagane v. Hakar Abshir & 3 Others[2021] KEELC 3604(KLR).

185. The 2<sup>nd</sup> Defendant submitted that the letter of allotment produced by the Plaintiffs in evidence also had no second page and was not signed. The 2<sup>nd</sup> Defendant submitted that the letter of allotment was purportedly issued by the Nairobi City Commission, which was not in existence in 1998. The 2<sup>nd</sup> Defendant submitted that there was no actual allotment and that the purported allotment was to Makadara Self Help Group and not Wazee Makadara. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs did not also produce a Part Development Plan (PDP) on the basis of which the allotment was done.

186. On whether the 2<sup>nd</sup> Defendant was the proprietor of the land parcel, Nairobi/Block 83/530, the 2<sup>nd</sup> Defendant submitted that the root of the 2<sup>nd</sup> Defendant's title was clear and supported by evidence. The 2<sup>nd</sup> Defendant submitted that through its witnesses, it demonstrated the root and authenticity of its title

to plot No. 530 and its subdivisions. On whether the Plaintiffs trespassed on plot No. 530, the 2<sup>nd</sup> Defendant submitted that the Plaintiffs not only made a claim over plot No. 530, which they alleged to be their plot No. 893, but also attempted to take possession of the same. The 2<sup>nd</sup> Defendant submitted that the Plaintiffs had trespassed on the 2<sup>nd</sup> Defendant's land, and still had a desire to acquire the land. The 2<sup>nd</sup> Defendant submitted that it had laid a basis for the permanent injunction sought against the Plaintiffs.

187. On whether the non-joinder of the third parties to the suit was fatal to the Plaintiffs' claim, the 2<sup>nd</sup> Defendant submitted that the Plaintiffs were claiming land that had been subdivided and portions transferred to third parties. The 2<sup>nd</sup> Defendant submitted that it had placed before the court evidence of several titles that had been issued to third parties. The 2<sup>nd</sup> Defendant submitted that the Plaintiff should have joined these third parties to the suit, as they were seeking to have their titles cancelled. The 2<sup>nd</sup> Defendant submitted that the court cannot cancel titles held by third parties without hearing them, and in a suit in which they are not parties.

188. In a rejoinder to the Plaintiffs' submissions, the 2<sup>nd</sup> Defendant downplayed the evidence of PW2. The 2<sup>nd</sup> Defendant submitted that PW2 did not involve the 2<sup>nd</sup> Defendant in her investigations and inquiries. The 2<sup>nd</sup> Defendant submitted that PW2 went to the ground alone without the 2<sup>nd</sup> Defendant's representative. The 2<sup>nd</sup> Defendant termed her evidence one-sided and partisan. The 2<sup>nd</sup> Defendant submitted that it registered its protest against PW2's report. The 2<sup>nd</sup> Defendant submitted that PW2's evidence was contrary to all the other evidence from the Nairobi County Government on the dispute. The 2<sup>nd</sup> Defendant submitted that the evidence of PW4 and PW5 was unreliable. The 2<sup>nd</sup> Defendant submitted that the investigations conducted by the two witnesses were done in a partisan manner.

189. On the issue of costs, the 2<sup>nd</sup> Defendant submitted that costs follow the event. The 2<sup>nd</sup> Defendant urged the court to dismiss the Plaintiffs' suit and allow the 2<sup>nd</sup> Defendant's counterclaim with costs of the suit and the counterclaim to the Defendants.

### **Analysis and Determination.**

190. I have considered the pleadings, evidence, and submissions by the parties. The following, in my view, are the issues arising for determination in this suit;

- (a) Whether the Plaintiffs are the lawful owners of the land parcel No. Nairobi/Block 83/893 claimed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be the land parcel No. Nairobi/Block 83/530, and its subdivisions.
- (b) Whether the 2<sup>nd</sup> Defendant is the lawful owner of the land parcel No. Nairobi/Block 83/530, claimed by the Plaintiffs to be the land parcel No. Nairobi/Block 83/893, and its subdivisions.
- (c) Whether the land parcel No. Nairobi/Block 83/893 claimed by the Plaintiffs and the land parcel No. Nairobi/Block 83/530 claimed by the 2<sup>nd</sup> Defendant are at the same location on the ground, or in other words, whether land parcel No. Nairobi/Block 83/893 claimed by the Plaintiffs and the land parcel No. Nairobi/Block 83/530 claimed by the 2<sup>nd</sup> Defendant are the same parcel of land on the ground.
- (d) Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespassed on the Plaintiffs' land parcel No. Nairobi/Block 83/893 claimed by

the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be the land parcel No. Nairobi/Block 83/530.

- (e) Whether the Plaintiffs trespassed on the 2<sup>nd</sup> Defendant's land parcel No. Nairobi/Block 83/530, claimed by the Plaintiffs to be the land parcel No. Nairobi/Block 83/893.
- (f) Whether the Plaintiffs are entitled to the reliefs sought in their re-amended plaint.
- (g) Whether the 2<sup>nd</sup> Defendant is entitled to the orders sought in its counterclaim.
- (h) Who is liable for the costs of the suit and the counterclaim?

**191. Whether the Plaintiffs are the lawful owners of the land parcel No. Nairobi/Block 83/893 claimed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be the land parcel No. Nairobi/Block 83/530.**

192. As mentioned earlier in the judgment, the Plaintiffs claimed in their re-amended plaint that they were the registered owners of the leasehold parcel of land known as Nairobi/Block 83/893, measuring 9.7 hectares (plot No. 893). The Plaintiffs averred that they had subdivided plot No. 893 into 324 plots, namely, Nairobi/Block 83/899-1222. The Plaintiffs averred that

in 2001, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants began interfering and trespassing on plot No. 893, claiming that plot No. 893 was the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' land parcel No. Nairobi/Bock 83/530(plot No. 530). The Plaintiffs claimed that the two parcels of land were separate and distinct. The Plaintiffs averred that on 27<sup>th</sup> February 2006, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants entered plot No. 893 with a surveyor and purported to establish the beacons of the already subdivided land. The Plaintiffs averred that the 3<sup>rd</sup> Defendant had purported to issue the 1<sup>st</sup> and 2<sup>nd</sup> Defendants with certificates of leases for a total of 208 subdivided portions of plot No. 893. The Plaintiffs averred that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had no interest in plot No. 893 and, as such, their actions amounted to trespass. The Plaintiffs averred further that the said certificates of title issued to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were illegally and fraudulently acquired.

193. The Plaintiffs have accused the 1<sup>st</sup> and 2<sup>nd</sup> Defendants of trespass and illegal and fraudulent acquisition of the subdivisions of plot No. 893. To maintain the claims, the Plaintiffs had to prove their title to plot No. 893. The suit properties were registered under the Registered Land Act,

Chapter 300 Laws of Kenya (now repealed). Sections 27 and 28 of the Registered Land Act, Chapter 300 Laws of Kenya (now repealed) provide as follows:

**27. Subject to this Act-**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”**

**28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject -**

**(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**

**(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:**

**Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”**

194. The foregoing sections have been reproduced in sections 24, 25 and 26 of the Land Registration Act 2012 as follows:

**24. Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and**

**(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.**

**25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—**

- (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and**
- (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.**

**(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee”.**

**26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or**

**endorsed in the certificate, 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**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

195. It is the lawful registration and valid title to plot No. 893 that would give the Plaintiffs legal rights over the property and its subdivisions to the exclusion of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who have been branded trespassers by the Plaintiffs. The burden of proof of the Plaintiffs' title to plot No. 893 was on the Plaintiffs. The same applies to the proof of the alleged acts of trespass and illegalities alleged against the Defendants. In Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

**“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.**

**14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”**

196. In Miller v. Minister of Pensions [1947] 2 All ER 372, Lord Denning J. stated that:

**“Thus proof on a balance of preponderance or probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained”.**

197. The term fraud is defined in Black's Law Dictionary, 9<sup>th</sup> Edition, as follows:

**“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, and**

**intentional. As applied to contracts, it 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 unconscientious advantage is taken of another”.**

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

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

199. In Railal Gordhanbhai Patel v. Lalji Makanji [1957] EA 314, the court stated as follows at page 317:

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

200. In the Court of Appeal, Fourth District, Division 1, California, in Ralphs Grocery Co. v. Victory Consultants Inc. (2017) 17Cal. App.5<sup>th</sup> 245, 261; CACI No. 2000, the court stated that:

**“In the instant action, Appellants have sued Respondents for trespass. “Trespass is unlawful interference with possession of property.” (Staples v. Hoefke (1987)189 Cal.App. 3d 1397,1406). The elements of trespass are: (1) the plaintiff’s ownership or control of the property; (2) the defendant’s intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of permission; (4) harm; and (5) the defendant’s conduct was substantial factor in causing the harm. (See CACI No. 2000).”**

201. In Munyu Maina v. Hiram Gathiha Maina [2013] eKLR the Court of Appeal stated as follows:

**“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this**

**instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register.”**

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

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

203. In Torino Enterprises Limited v. Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023)

(Judgment), the Supreme Court stated as follows in paragraphs 56 to 61:

**“56. Consequently, we find that upon alienation to Kayole Estates Limited in 1964, the suit property was converted from un-alienated government land to private freehold land. There being no question as to the regularity and legality of the process by which the said land was alienated in favour of Kayole Estates Ltd, we find and hold that the same was effectively divested from the purview of the regulatory regime of the *Government Lands Act* (now repealed). The Commissioner of Lands could therefore not have had any authority, to allocate the suit property to any other person as he purported to have done.**

**By the same token, there being no evidence on record to the contrary, we find that the defunct Nairobi City Council acquired valid title to the suit property from Kayole Estates Ltd through purchase. Where does our finding leave Renton company ltd? It is worthy restating that the said company could only have acquired valid title from the Nairobi City Council, and not the commissioner of lands who had long been divested of authority to allocate the same.**

**57. The respondent also challenged the letter of allotment on grounds that at the time of its transfer, the**

conditional thirty (30) days acceptance period had lapsed. As it turned out, the letter was also silent on whose behalf the commissioner of lands had made the allotment. Noting that the Commissioner of Lands by an allotment letter dated December 19, 1999 purported to allocate the suit property to Renton Company Limited. Thereafter, by a letter dated April 25, 2001, Renton Company Limited sought approval from the Commissioner of Lands to transfer the same to the appellant. The appellant's ownership is traced back to this allotment Letter even if subsequently registered under the *Registration of Titles Act* cap 281 (Repealed) on April 26, 2001.

58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfillment of conditions stipulated therein. In *Dr Joseph NK Arap Ng'ok v Justice Moiyo Ole Keiyua & 4 others* CA 60/1997 [unreported]; and in *Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others* HC Civil Case No 182 of 1992; [2008] eKLR, the superior courts restated this principle as follows:

“ It has been held severally that a letter of allotment per se is nothing but an invitation to treat. It does not constitute a contract between the offerer and the

offeree and does not confer an interest in land at all ” [Emphasis added].

59. The pronouncement in Gladys Wanjiru and Dr Joseph NK Arap Ng’ok (*supra*) has been echoed in various Environment and Land Court decisions post the 2010 *Constitution*, including; *Lilian Wanjeri Njatha v Sabina Wanjiru Kuguru & another*, Environment and Land Case No 471 of 2010; [2022] eKLR; *John Elias Kirimi v Martin Maina Nderitu & 4 others*, Environment and Land Suit No 320 of 2011; [2021] eKLR; and *Kadzoyo Chombo Mwero v Ahmed Muhammed Osman & 11 others*, Environment and Land Case No 42 of 2021; [2021] eKLR, to mention but a few.

60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter. In *Peter Wariire Kanyiri v Chrispus*

***Washumbe & 2 others*, Environment and Land Court Case No 603 of 2017; [2022] eKLR, Kemei, J held as follows:**

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

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

204. In Dina Management Ltd v. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR)

(Constitutional and Human Rights) (21 April 2023) (Judgment),  
the Supreme Court stated as follows in paragraphs 104 and  
105:

**“104. The procedure for the allocation of unalienated land is laid out by the Environment and Land Court in *Nelson Kazungu Chai & 9 others v Pwani University* [2014] eKLR as follows:**

**“ ...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for lands before any un-alienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allottees.**

**131. It is only after the issuance of the letter of allotment, and the compliance of the terms therein, that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3. The process was also reinstated in the case of *African Line Transport Co Ltd v Attorney General*, Mombasa HCCC No 276 of 2013 where Njagi J held as follows: “Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably**

accompanied by a PDP with a definite number. These are then taken to the department of survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director of Surveys for authentication and approval. Thereafter, a land reference number is issued in respect of the plot 132. A part development plan (PDP) can only be prepared in respect to Government land that has not been alienated or surveyed...”

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

205. In their re-amended plaint, the Plaintiff stated in paragraph 12 that they had “genuine relevant documents that inform on the genesis and legitimacy of ownership/title to” plot No. 893. However, the Plaintiffs did not come out clearly on the root of their title. The Plaintiffs did not expressly state from whom they

acquired the property. In paragraph 14 of the re-amended plaint, the Plaintiffs stated that they were issued with a 99-year lease by “The Nairobi City Council/Commission”. In paragraph 15 of the re-amended plaint, the Plaintiffs stated that “The Nairobi City Council/Commission” issued to them “allocation letter Ref: No. CP&ARCH/3263, dated 5<sup>th</sup> September 1998”.

206. The City Council of Nairobi and Nairobi City Commission were different legal entities. Whereas Nairobi City was always run by the City Council before the 2010 Constitution, the Nairobi City Commission would be brought in to take over the running of the city from the Council from time to time when the situation, as provided by the prevailing statutes and the then Constitution demanded. At no time did the City Council of Nairobi and Nairobi City Commission run Nairobi City at the same time. Plot No. 893 could therefore be allocated to the Plaintiffs by either the City Council of Nairobi or the Nairobi City Commission, but not by both.

207. In his evidence in chief, PW1 stated that plot No. 893 was given to them by the 1<sup>st</sup> Defendant in consideration of the support they gave him when he was vying for the position of

the Chairman of Kanu Nairobi Branch. In their submissions, the Plaintiffs averred that plot No. 893 was allocated to them by the City Council of Nairobi. The Plaintiffs produced in evidence what they referred to as their letter of allotment dated 5<sup>th</sup> September 1998(P.EXH.1). The purported letter of allotment did not have the second page, and as such did not bear any signature. A complete copy of the said letter of allotment dated 5<sup>th</sup> September 1998, which was produced in evidence by the 1<sup>st</sup> Defendant as part of D.EXH.1(page 3) was said to have been signed by the then Town Clerk, Z.M.Wandera(Mrs). The letter stipulated that the allotment had to be accepted and the payment of the fees set out therein made within 30 days from the date thereof; failure of which it would be considered to have lapsed. The letter of allotment, which was on the letterhead of the Nairobi City Commission, stated that the “City Commission” offered the plaintiffs' Residential Plot No. IV in Umoja Innercore Sector IV.

208. The Plaintiffs produced in evidence as P.EXH. 12 a copy of a letter dated 24<sup>th</sup> November 2003 from their advocate, R.M.Kimani, to the 1<sup>st</sup> Defendant. In the letter, the Plaintiffs

claimed that the 1<sup>st</sup> Defendant had sold the disputed land to them at a consideration of Kshs. 6,000,000/-, which the Plaintiffs paid in full. In what was referred to as the Chairman's report dated 5<sup>th</sup> November 2003, produced in evidence as P.EXH.13, the Plaintiffs' group Chairman stated that the 1<sup>st</sup> Defendant, in his thanksgiving speech after winning the Nairobi Branch Kanu Chairman seat, promised to give the Plaintiffs land, which he subsequently did, but asked the Plaintiffs to pay Kshs. 6,000,000/-, which the Plaintiffs paid in full in instalments.

209. In the Plaintiffs' supplementary list and bundle of documents dated 2<sup>nd</sup> May 2018, filed on 3<sup>rd</sup> January 2019, I have seen a copy of a letter dated 12<sup>th</sup> May 2006 addressed to the Permanent Secretary, Ministry of Lands by the Plaintiffs concerning plot No. 893, in which the Plaintiffs stated in part that: *"In 1997, Wazee Makadara group campaigned for Mr. Habib Kongo who beat a number of powerful Nairobi politicians to become Nairobi KANU Chairman. Mr. Kongo was so happy with the group that he sold the subject piece of land for Ksh. 6*

*million which he owned through M/s Aviton Enterprises to Wazee Makadara Group.”*

210. In the same list and bundle of documents, I have seen another letter dated 29<sup>th</sup> September 2008 by the Plaintiffs’ advocates, Meshack Okoth Obura & Company Advocates to the Commissioner of Lands in which he stated as follows in part in relation to plot No. 893: *“In 1997 Habib Omar Kongo sold the said parcel of land to Wazee Makadara Self Help Group at a price of Kenya Shillings Six Million through his company known as Aviton Enterprises Limited. Mr. Kongo confirmed running (sic) a Press Conference reported in the Daily Nation pf (sic) 17<sup>th</sup> May, 2000 that he indeed sold the parcel of Land to Wazee Makadara Self Help Group.*

211. Whether plot No. 893 was given, or sold to the Plaintiffs by the 1<sup>st</sup> Defendant, or allocated to the Plaintiffs by the Nairobi City Commission or the City Council of Nairobi, the burden was on the Plaintiffs to prove the gifting, sale, or allotment and that it resulted in a valid title in favour of the Plaintiffs. There is no evidence that the 1<sup>st</sup> Defendant at any time owned plot No. 893. The 1<sup>st</sup> Defendant could therefore neither give nor sell

what he did not have. Furthermore, the Plaintiffs placed no evidence before the court of the alleged giving or sale of plot No. 893 by the 1<sup>st</sup> Defendant to the Plaintiffs. Although the Plaintiffs claimed that they had a written agreement of sale with the 1<sup>st</sup> Defendant, which got lost when the Plaintiffs' premises were invaded by goons hired by the 1<sup>st</sup> Defendant, there was no evidence that such a loss was reported to the police.

212. In the letters I have referred to earlier, the Plaintiffs appear to acknowledge that plot No. 893 was owned by the 2<sup>nd</sup> Defendant. The 2<sup>nd</sup> Defendant is and was always a limited liability company. I am unable to see how the 1<sup>st</sup> Defendant, whether he was a director of the 2<sup>nd</sup> Defendant or not, could sell or give out a property owned by the company. There is also no evidence that the 2<sup>nd</sup> Defendant transferred its interest in the suit property to the Plaintiffs. From the foregoing, I find the Plaintiffs' claim that the suit property was given and/or sold to them by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants not proved.

213. As concerns the alleged allotment of the suit property to the Plaintiffs by the Nairobi City Commission/City Council of

Nairobi, the following is my view: It is common knowledge that the Nairobi City was run by a Commission between 1983, when the Council was dissolved, until 1992, when the Council was reinstated following the General Elections. Nairobi City Commission was not in existence in 1998 and, as such, could not have allocated the suit property to the Plaintiff on 5<sup>th</sup> September 1998, which also happened to be a Saturday when public offices were closed at the material time. For the alleged City Council of Nairobi allocation, the Plaintiffs produced no evidence of such allocation. There was no letter of allotment by the City Council of Nairobi.

214. In both cases, there was no evidence placed before the court showing that plot No. 893 was owned by the Nairobi City Commission/City Council of Nairobi to be in a position to allocate the same. There was also no evidence that the Plaintiffs accepted the allotment and paid the requisite charges for the allotment. PW1 stated in his evidence that the Plaintiffs paid Kshs. 43,000/- as a stand premium and Kshs. 6,000/- as annual rent. No evidence of such payment was presented to the court. The Plaintiffs' letter of allotment did not refer to any

survey plan or Part Development Plan (PDP) in its description of the allotted property. The allotted property was referred to only as residential Plot No. IV Umoja Innercore Sector IV and its measurement was given as 8.67 hectares.

215. According to the Plaintiffs, plot No. 893 was surveyed in 1992, and its survey plan No. F/R 224/20 was authenticated on 28<sup>th</sup> May 1992. If indeed plot No. 893 had been surveyed in 1992, 6 years before the same was allocated to the Plaintiffs in 1998, why was it not allocated as plot No. 893 measuring 9.422 hectares? Why was it allocated as an unsurveyed Plot No. IV measuring 8.67ha.? Why was a beacon certificate necessary for a surveyed parcel of land that had beacons in place? All these cast doubt on the Plaintiffs' claim that Plot No. 893 was surveyed in 1992. The letter of allotment referred to the duration of the lease as "Residue of the Commission's term of 99 years (less three days). This was also vague in that the land being allocated was unsurveyed and unregistered in the name of the Commission/Council as a lessee or an absolute proprietor.

216. I wish to add that the Plaintiffs did not rebut the evidence adduced by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that Z.M.Wandera, the then Town Clerk of the City Council of Nairobi, denied signing the Plaintiffs' letter of allotment dated 5<sup>th</sup> September 1998. The Plaintiffs contended that upon the allocation of plot No. 893 to them, and their meeting the conditions of the allotment, they were issued with a lease and subsequently a certificate of lease for the property. As correctly submitted by the Defendants, a position supported by the authorities cited earlier, acquisition of title to land through allocation is a process and not an event. It starts with allocation. If the allocation is not proper, any step taken pursuant thereto would not be valid. The Plaintiffs led evidence that they were issued with a lease by the City Council of Nairobi.

217. The Plaintiffs did not produce the lease in evidence. I have, however, seen a copy of the said lease at pages 56 to 62 of the Plaintiffs' supplementary list and bundle of documents filed on 23<sup>rd</sup> January 2019. The lease is neither dated nor registered. This may explain why it was not produced in evidence. The lease was between the Nairobi City Council and Wazee

Makadara Self Help Group. It was for a term of 99 years with effect from 1<sup>st</sup> January 1994, less the last 3 days. The lease has two execution pages for the lessor; one is an extension of the lease, while the other page is separate and distinct. The execution page, which is an extension of the lease, is not signed by the lessor. It is the detached execution page that is said to have been signed by the mayor and the town clerk. The lease was said to have been signed by the 1<sup>st</sup> Plaintiff on behalf of Wazee Makadara Self Help Group before R.M.Kimani Advocate on a date not given on the lease.

218. The circumstances under which the Plaintiffs “received” this lease is captured in the minutes of Wazee Makadara Self Help Group’s Executive Meeting held on 27<sup>th</sup> May 2005 at Railways Go Down Shade 5A Room 20. The minutes were attached to the 1<sup>st</sup> Plaintiffs’ affidavit sworn on 16<sup>th</sup> September 2011, filed herein in support of the Plaintiffs’ application of the same date filed on 19<sup>th</sup> September 2011. The lease is said to have been handed over to the 1<sup>st</sup> Plaintiff by Mr. Kihingo, the Assistant Director of City Planning, who had obtained the same from a Mr. Makwiki and Mr. Kinyua. In the Plaintiffs’ advocates’ letter

dated 29<sup>th</sup> September 2008 to the Commissioner of Lands, which I referred to earlier, the said advocate stated that the Plaintiffs had *“enlisted the services of the Director of Physical Planning at City Hall Mr. Baptista Wandumbu Kihingo to regularize the Documents whose fees was paid in full.”* In the group’s meeting of 27<sup>th</sup> May 2005 at the group’s office referred to above, which was attended by Mr. Kihingo, and Mr. Were, who was described as Land Registrar, Nairobi Province, Mr. Kihingo was thanked for his services. At the meeting, the parties agreed that the Land Registrar, Mr. Were, would be contracted to fast-track the registration of the lease because *“if the other procedure was to be used then it would take long time”*. The Land Registrar was to be given Kshs. 20,000/- for the title, *“but the official receipt would read less since the registrar would be working on contractual base(sic)”*.

219. In the earlier case between the parties, Nairobi HCC No. 193 of 2006, Mr. Kihingo swore an affidavit on 15<sup>th</sup> March 2006 (see page 37 D.EXH.1) admitting having signed the beacon certificate for plot No. 893. He stated that he signed the same in the normal course of business, but it was established later

that plot No. 893 did not exist, and he took no further steps in the matter. The town clerk who was in the office at the material time Mr. Godfrey M. Mate wrote a letter dated 27<sup>th</sup> March 2006 denying having signed the lease by the City Council of Nairobi in favour of the Plaintiffs (see page 30 of D.EXH.1). Mr. John Ndirangu Kariuki (DW3) who was the mayor of the City of Nairobi between 1999 to 2001 whose signature appeared in the lease wrote a letter to the Town Clerk on 24<sup>th</sup> March 2006 and also gave evidence at the trial denying having signed the lease. The letter by Godfrey Mate and the evidence of John Ndirangu Kariuki were not challenged in any material respect by the Plaintiffs. From the totality of the evidence adduced at the trial, I am not convinced that the City Council of Nairobi issued a lease in favour of the Plaintiffs in respect of plot No. 893.

220. The Plaintiffs' lease is said to have been registered on 27<sup>th</sup> October 2005 and a certificate of lease issued on the same date to Wazee Makadara Self Help Group. The certificate of lease was in respect of a lease for plot No. 893 measuring 8.67 hectares for a term of 99 years with effect from 1<sup>st</sup> January 1994. This Certificate of Lease was said to have been

erroneously issued in the name of Wazee Makadara Self Help Group(group), which was said not to be a legal entity capable of holding land. I am unable to see the error since the letter of allotment was in the name of the group as well as the lease. A new certificate of lease is said to have been issued on the same date in the names of Jared Oduor Osodo, Julius Nderitu Mititii and John Wachira Macharia as trustees of Wazee Makadara Self Help Group.

221. I have made a finding that there was no valid letter of allotment of plot No. 893 in favour of the Plaintiffs, and that no valid lease was executed and registered in favour of the Plaintiffs. It follows that the purported certificate of lease was issued in vacuum using a shortcut that was hatched in the meeting held at the group's office on 27<sup>th</sup> May 2005, which was attended by a land registrar, Mr. Were, who was to be paid Kshs. 20,000/- to fast-track the process of registration of the lease and issuance of the certificate of lease. It is worth mentioning that although the Plaintiffs claimed that the lease and certificate of lease were issued pursuant to the survey plan F/R No. 224/20, in which the measurement of plot No. 893 was

given as 9.422 hectares, the lease did not give the measurement of the leased property, while the certificate of lease gives the measurement of the leased property as 8.7hectares. This is the measurement given in the letter of allotment, which supports the Defendants' contention that the land purportedly allocated to Plaintiffs had no relationship with survey plan F/R No. 224/20.

222. From the foregoing, it is my finding that the Plaintiffs had no valid title or interest in plot No. 893. Since the Plaintiffs had no valid title to plot No. 893, they could not validly subdivide the same. Even if it is assumed that the Plaintiffs had a valid proprietary interest in plot No. 893, did they lawfully carry out the purported subdivision? The Plaintiffs claimed to have subdivided plot No. 893 on 20<sup>th</sup> November 2001 into 323 portions (899-1222) through a Licensed Surveyor, L.K.Gitau, pursuant to a subdivision scheme approved by the Commissioner of Lands through a letter dated 15<sup>th</sup> May 2001, reference number 144024/36. The Plaintiffs claimed that following that subdivision, L.G.Gitau prepared a survey plan F/R No. 313/39, which was authenticated by the Director of Surveys

on 19<sup>th</sup> December 2001(PMFI 4). As stated earlier, the burden was on the Plaintiffs to prove the alleged subdivision.

223. It is common ground that the subdivision of plot No. 893 had to be carried out by a surveyor, and the same had to be approved by the City Council of Nairobi and the Commissioner of Lands. L.K.Gitau the surveyor who was alleged to have carried subdivision of plot No. 893 on behalf of the Plaintiffs, gave evidence as DW2. L.K.Gitau disowned the Plaintiffs. He stated that Wazee Makadara Self Help Group was unknown to him, and it never instructed him to carry out any subdivision work for them in respect of plot No. 893. He admitted that he prepared survey plan No. 313/39. He stated, however, that he prepared the said survey plan pursuant to the instructions from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to subdivide plot No. 530 and not plot No. 893. Before his testimony, L.K.Gitau had written a letter dated 28<sup>th</sup> September 2011 to the Director of Criminal Investigations Department(see page 40 of D.EXH.1) in which he explained how he subdivided plot No. 530 through a survey plan, F/R No. 313/39. He stated that he carried out the subdivision on behalf of the 2<sup>nd</sup> Defendant, which provided him

with the City Council of Nairobi's approval dated 1<sup>st</sup> February 2001, a copy of the approved subdivision scheme and approval from the Commissioner of Lands through a letter ref: 144024/36 dated 15<sup>th</sup> May 2001, and the original survey plan for plot No. 530. He stated that he finished the subdivision on 20<sup>th</sup> November 2001, and submitted the work to the Director of Surveys, who authenticated the survey plan on 19<sup>th</sup> December 2001. He denied ever carrying out any survey work on plot No. 893 or knowing Wazee Makadara Self Help Group.

224. The Plaintiffs never produced any evidence of the approvals obtained from the City Council of Nairobi and the Commissioner of Lands for the purported subdivision of plot No. 893 disowned by the surveyor who was alleged to have carried out the same. As mentioned earlier, the Plaintiffs alleged that they were issued with a lease for plot No. 893 on 27<sup>th</sup> May 2005, which lease was registered on 27<sup>th</sup> October 2005, on which date they were also issued with a certificate of lease. How could the City Council of Nairobi or the Commissioner of Lands approve the subdivision of plot No. 893 by the Plaintiffs 4 years before they were issued with a title for the property? The Plaintiffs were

allegedly allocated an unsurveyed plot No. IV Umoja Innercore Sector IV. How could a subdivision be carried out on the strength of a letter of allotment describing the allotted property as such?

225. I disagree with **CECILIA WANGARE WAMUTITU ALIAS KOIGU (PW2)** that the City Council of Nairobi could subdivide its land before a title was issued. First, there was no evidence that plot No. 893 was owned by the City Council of Nairobi. How could it own it without a title? Secondly, it was not the City Council of Nairobi subdividing plot No. 893. It was the Plaintiffs who were undertaking the subdivision of the property. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants presented evidence in court showing that the letter of subdivision approval from the Commissioner of Lands dated 15<sup>th</sup> May 2001 ref: 144024/36 was issued in respect of the subdivision of plot No. 530 owned by the 2<sup>nd</sup> Defendant and not for plot No. 893 owned by the Plaintiffs. The same applied to the City Council approval issued on 1<sup>st</sup> February 2001. It is my finding that plot No. 893 was never subdivided into subplots 899-1222 as claimed by the Plaintiffs. The Plaintiffs, in the circumstances, have no valid interest or

claim over the said subplots. In conclusion, it is my finding that the Plaintiffs are not the lawful owners of plot No. 893 and its purported subdivisions.

**226. Whether the 2<sup>nd</sup> Defendant is the lawful owner of the land parcel No. Nairobi/Block 83/530, claimed by the Plaintiffs to be the land parcel No. Nairobi/Block 83/893.**

227. The 2<sup>nd</sup> Defendant produced evidence showing that plot No. 530 measuring 9.7 hectares was allocated to the Nairobi City Commission by the Commissioner of Lands for a term of 99 years with effect from 1<sup>st</sup> August 1992 through a letter of allotment dated 6<sup>th</sup> August 1992 on the terms and conditions that were set out in the letter of allotment which provided among others that the Commission was to pay a Stand Premium of Kshs. 3,000,000/- and annual rent of Kshs. 600,000/-. The total payment the Commission was supposed to pay was Kshs. 3,442,610/-. The Commission was supposed to accept the allotment and make the payment within 30 days from the date of the allotment; failure to which the allotment would be considered to have lapsed.

228. The Commission wrote to the Commissioner of Lands on 19<sup>th</sup> August 1992, accepting the allotment and promising to pay the

allotment fees set out in the letter of allotment in due course. The Commission did not pay the allotment charges of Kshs. 3,442,610/-. On 21<sup>st</sup> September 1992, the City Council of Nairobi purported to enter into a lease with the 2<sup>nd</sup> Defendant in respect of the property. I have not seen the said lease. It is not clear, therefore, what its terms were and the interest, if any, which the City Council of Nairobi (Council) had in the land which was the subject of the lease.

229. On 29<sup>th</sup> September 1995, the Council wrote to the Commissioner of Lands informing him of the said lease with the 2<sup>nd</sup> Defendant. The Council informed the Commissioner of Lands further that the 2<sup>nd</sup> Defendant had paid Kshs.3,442,610/- on behalf of the Council to expedite the processing of a lease in its favour. The Council requested the Commissioner of Lands to release the title for the suit property to the Council to enable them process the lease for the 2<sup>nd</sup> Defendant. The Council informed the Commissioner of Lands that the Council would have no objection to the Commissioner of Lands issuing the title directly to the 2<sup>nd</sup> Defendant.

230. Following the communication from the Council that it had no objection to the Commissioner of Lands issuing the lease for plot No. 530 directly to the 2<sup>nd</sup> Defendant, the Commissioner of Lands under cover of a letter dated 2<sup>nd</sup> October 1995 forwarded to the Council a form of transfer for execution through which the Council was to transfer plot No. 530 to the 2<sup>nd</sup> Defendant at a consideration of Kshs. 1,800,000/-. The Council executed the transfer on 13<sup>th</sup> October 1995, effectively transferring its interest in plot No. 530 to the 2<sup>nd</sup> Defendant. The transfer was forwarded to the Commissioner of Lands by the Council on 13<sup>th</sup> October 1995. On 17<sup>th</sup> October 1995, the Commissioner of Lands wrote to the 2<sup>nd</sup> Defendant demanding payment of a sum of Kshs. 2,639,990/- comprising the consideration for the transfer in the sum of Kshs. 1,800,000/-, Kshs. 539,990/- for Stamp Duty on the informal transfer and Kshs. 300,000/- being the consent to transfer fees.

231. It is not clear from the evidence on record whether the 2<sup>nd</sup> Defendant paid the said sum of Kshs. 2,639,990/- to take over the interest of the Council in the letter of allotment dated 6<sup>th</sup> August 1992. In the absence of any complaint from the Council

or the Commissioner of Lands, it must be assumed that the payment was made. The Commissioner of Lands issued a lease to the 2<sup>nd</sup> Defendant dated 21<sup>st</sup> October 1995. The lease was registered on 1<sup>st</sup> November 1995, and on the same date, the 2<sup>nd</sup> Defendant was issued with a certificate of lease. All the documents I have referred to above are contained in the 2<sup>nd</sup> Defendant's bundle of documents dated 26<sup>th</sup> June 2015, filed on 29<sup>th</sup> June 2015, which was produced as D.EXH.3.

232. I am satisfied that the 2<sup>nd</sup> Defendant has established the root of its title to plot No. 530. In the absence of any challenge to the 2<sup>nd</sup> Defendant's title by Nairobi City County the successor of the Council to which plot No. 530 was allocated but chose to surrender the property to the 2<sup>nd</sup> Defendant or the National Land Commission, the successor of the Commissioner of Lands who allocated the property to the Council, it is my finding that the 2<sup>nd</sup> Defendant is the lawful leasehold proprietor of plot No. 530 measuring approximately 9.7 hectares.

233. I am also satisfied from the evidence on record that plot No. 530 was lawfully subdivided by the 2<sup>nd</sup> Defendant into plot Nos. 899-1222. The 2<sup>nd</sup> Defendant proved that it engaged a

surveyor, L.K. Gitau, who subdivided plot No. 530 after all the required approvals were granted. L.K.Gitau gave evidence and confirmed that the survey plan, F/R No. 313/39, was for the subdivision of plot No. 530 into subplot Nos. 899-1222. His evidence was not shaken in cross-examination by the Plaintiffs, who had also claimed that the survey plan, F/R No. 313/39, was for the subdivision of their plot No. 893. The Plaintiffs failed to produce evidence showing that they obtained the approval for the subdivision of plot No. 893 and that they engaged L.K.Gitau to carry out the subdivision. The 2<sup>nd</sup> Defendant proved that the approvals issued by the City Council of Nairobi and the Commissioner of Lands were for the subdivision of plot No. 530. The 2<sup>nd</sup> Defendant has established that it had a lawful proprietary interest in plot No. 530 and its subdivisions, subplot Nos. 899-1222.

**234. Whether the land parcel No. Nairobi/Block 83/893 claimed by the Plaintiff and the land parcel No. Nairobi/Block 83/530 claimed by the 2<sup>nd</sup> Defendant are at the same location on the ground, or in other words, whether land parcel No. Nairobi/Block 83/893 claimed by the Plaintiff and the land parcel No. Nairobi/Block**

**83/530 claimed by the 2<sup>nd</sup> Defendant is the same parcel of land on the ground, and if so, who among them has the right to the land in contention?**

235. From the evidence on record, the parcel of land claimed by the Plaintiffs to be plot No. 893 and the parcel of land claimed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be plot No. 530 are in the same location on the ground. That means that the Plaintiffs and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are claiming the same land on the ground. The Plaintiffs are claiming the land through plot No. 893, while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are claiming the same through plot No. 530. To determine who has the right to the land in contention, it is necessary to go back to the root of each title. This would enable the court to know when each title came into being, and if at all, one land parcel was given two titles, when the titles were issued, and which one was the first in time.

236. As I stated earlier in the judgment, the Plaintiffs failed to establish the root of their title to plot No. 893. The Plaintiffs' title is only manifested in the certificate of lease dated 27<sup>th</sup> October 2005, which in itself is not conclusive proof of title. The lease was said to have been granted to the Plaintiffs by the City

Council of Nairobi following an allocation of plot No. 893 to the Plaintiffs. No evidence was placed before the court showing that the City Council of Nairobi owned plot No. 893 at any time. No evidence was also presented to the court showing that the City Council of Nairobi allocated plot No. 893 to the Plaintiffs. As stated earlier, the Plaintiffs' letter of allotment dated 5<sup>th</sup> September 1998, which the City Council of Nairobi disowned, referred to the allotted parcel of land as residential Plot No. IV Umoja Innercore Sector VI. The Plaintiffs did not explain the process through which Plot No. IV Umoja Innercore Sector VI, which was allocated as unsurveyed land measuring 8.67 hectares, became plot No. 893. According to the Plaintiffs, plot No. 893 was surveyed on 25<sup>th</sup> May 1992 under survey plan, F/R No. 224/20, which was authenticated by the Director of Surveys on 28<sup>th</sup> May 1992. The Plaintiffs gave no explanation why plot No. 893, which was already surveyed according to them, and the parcel number given was not allocated to them, as such, instead of being allocated as Plot No. IV.

237. As concerns the 2<sup>nd</sup> Defendant's plot No. 530, I have made a finding that the 2<sup>nd</sup> Defendant established that it acquired the

property lawfully. The 2<sup>nd</sup> Defendant traced the root of its title to the letter of allotment that was issued by the Commissioner of Lands to the Nairobi City Commission on 6<sup>th</sup> August 1992. The Commissioner of Lands allocated plot No. 530 measuring 9.7 hectares to the Commission on terms and conditions set out in the letter of allotment. The City Council of Nairobi transferred its interest in the letter of allotment to the 2<sup>nd</sup> Defendant with the approval of the Commissioner of Lands. The 2<sup>nd</sup> Defendant satisfied the conditions of the allotment and was issued with a lease and subsequently a certificate of lease for plot No. 530 measuring 9.7 hectares. According to the 2<sup>nd</sup> Defendant, plot No. 530 was allocated and leased to them as surveyed land. The land was surveyed by Jacob Oyato, a licensed surveyor, on 25<sup>th</sup> May 1992 through survey plan No. 224/20, which was authenticated by the Director of Surveys on 28<sup>th</sup> May 1992. This is the same survey plan that the Plaintiffs also claimed to have created their plot No. 893. The Plaintiffs and the Defendants are therefore claiming that both their parcels of land, plot No. 893 and plot No. 530, were created in 1992 through survey plan No. 224/20.

238. According to the Plaintiffs, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants superimposed their purported plot No. 530, which was small in size and situated in Umoja Innercore Sector I, on the survey plan, F/R No. 224/20 for plot No. 893, which is situated in Umoja Innercore Sector IV. The Plaintiffs contended that plot No. 530 owned by the 2<sup>nd</sup> Defendant was surveyed in January 1989 through survey plan, F/R No. 211/68, which was authenticated by the Director of Surveys on 5<sup>th</sup> August 2004. That survey plan created land parcel Nos. 530 to 618 of various measurements, of which parcel No. 530 measured 0.6212 hectares. The Plaintiffs contended that this was the parcel of land which was allocated to the 2<sup>nd</sup> Defendant, and which the 2<sup>nd</sup> Defendant superimposed on the Plaintiffs' plot No. 893, which measured 8.67 hectares.

239. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants admitted that there was in existence a parcel of land measuring 0.6212 hectares with parcel No. 530 created through a survey conducted in January 1989, which gave rise to a survey plan, F/R No. 211/68, which was authenticated on 5<sup>th</sup> August 2004. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that there was a duplication in the

numbering of land parcels by the Director of Surveys, with the result that No. 530 was given to two parcels of land, the 2<sup>nd</sup> Defendant's land at Umoja Innercore Sector IV and another parcel of land in Umoja Innercore Sector I owned by someone else. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contended that parcel No.530 measuring 0.6212 hectares was not the 2<sup>nd</sup> Defendant's parcel of land measuring 9.7 hectares, which was created on 25<sup>th</sup> May 1992 through survey plan, F/R No. 224/20.

240. It was established at the trial that the parcel of land that upon survey in 1990 was given land parcel No. 530 under survey plan F/R No. 211/68 was a special purpose plot in Umoja Innercore Sector I known as Plot No. 16. PW2 confirmed that Special Purpose plot No. 16 is what became Plot No. 530 measuring 0.6212 hectares under survey plan F/R 211/68. PW2 confirmed that upon visiting the ground, he found a mosque on this plot No. 530. The 2<sup>nd</sup> Defendant produced evidence showing that the said special purpose Plot No. 16 in Umoja Innercore Sector 1 was leased by the City Council of Nairobi on 31<sup>st</sup> January 1989 to the trustees of Young Muslim Association for religious purposes (see the lease at page 258 of D.EXH. 3).

241. It follows that neither the Government nor the City Council of Nairobi could have allocated this parcel of land to the 2<sup>nd</sup> Defendant in 1992 when the Government of Kenya allocated plot No. 530 measuring 9.7 hectares to the City Council of Nairobi. Plot No. 530, formerly Special Purpose Plot No. 16, could not therefore be the same Plot No. 530 measuring 9.7 hectares which was allocated to the City Council of Nairobi, which transferred the allotment to the 2<sup>nd</sup> Defendant. Secondly, in the letter of allotment dated 6<sup>th</sup> August 1992, the Commissioner of Lands stated that the parcel of land allocated to the City Council of Nairobi measured 9.7 hectares. The transfer of Plot No. 530 by the City Council of Nairobi to the 2<sup>nd</sup> Defendant dated 13<sup>th</sup> October 1995, gave the measurement of the land as 9.7 hectares. The lease issued by the Government of Kenya to the 2<sup>nd</sup> Defendant dated 21<sup>st</sup> October 1995, also gave the measurement of plot No. 530, the subject of the lease as 9.7 hectares. There is no doubt, therefore, that plot No. 530, which the 2<sup>nd</sup> Defendant acquired, was not the former Special Purpose Plot No. 16 measuring 0.6212 hectares but the larger plot No. 530 measuring 9.7 hectares. It is therefore my finding

that there were indeed two parcels of land with the same parcel No. 530; one with a mosque that had been leased by the City Council of Nairobi to the Young Muslim Association, measuring 0.6212 hectares, and another one that was leased by the Government of Kenya to the 2<sup>nd</sup> Defendant, measuring 9.7 hectares. PW2 confirmed that it was possible to have parcel numbers duplicated. The duplication in this case was confirmed by the Director of Surveys in a letter dated 3<sup>rd</sup> July 2015 produced by the 2<sup>nd</sup> Defendant as part of D.EXH.4. Having concluded that indeed there was a parcel of land known as plot No. 530 measuring 9.7 hectares, the question that I need to answer is whether it was this plot No. 530 claimed by the 2<sup>nd</sup> Defendant which was the product of survey plan No. 224/20 or plot No. 893 owned by the Plaintiffs.

242. From the totality of the evidence before the court, I agree with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that plot No. 893 was a creation of the Plaintiffs and those who were recruited to assist them at the City Council of Nairobi and the Ministry of Lands to obtain a title for the land which they claimed had been given or sold to them by the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant was said to own

the land through the 2<sup>nd</sup> Defendant. As correctly submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, plot No. 893 does not exist. The City Council of Nairobi and its successor, the Nairobi City County, the Ministry of Lands, and the Director of Surveys have, in their conclusive opinions on this dispute, unanimously concluded that plot No. 893 does not exist. I find the reports and opinions presented by PW5 and PW6 on the existence of plot No. 893 not convincing, having regard to the fact that they never involved the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the same. They also did not interrogate the roots of the titles that were held by the Plaintiffs and the 2<sup>nd</sup> Defendant. The same applies to the report by PW2. PW2, in my view, took the survey plans which she used in the preparation of her report on face value. PW2 did not appreciate the fact that there was a claim that the survey plan, F/R No. 224/20, was for plot No. 530 and not for plot No. 893. PW2 also did not consider the fact that there were two parcels of land that were given the same parcel number 530.

243. Ironically, PW2 insisted that plot No. 893 existed while she admitted that they did not have in their records the file relating to the plot. To her, the existence of a survey plan said to have

created plot No. 893 was conclusive on the existence of the plot. I have also noted that PW2 did not involve the parties while preparing the report, and as such, the report did not have their input. PW2 was also cagey on the question of the sources of the survey plans that she used. When asked that question, she stated that she got the survey plans from their database. At one point, she stated that she used what was in her custody. PW2 also claimed that she confirmed the validity of the survey plans from the Director of Surveys. The plans were, however, not certified by the Director of Surveys. I wonder where PW2 got the survey plan F/R No. 224/20 for plot No. 893, while she told the court that they did not have any records relating to plot No. 893 in their custody. I have also noted that the conclusion reached by PW2 in her report was contrary to the positions that had earlier been taken by her seniors, namely, the Chief Land Surveyor, City Council of Nairobi, in a letter dated 21<sup>st</sup> March 2006, and Chief Officer, Lands, Nairobi City County, in a letter dated 11<sup>th</sup> September 2014. I find no depth in the report by PW2. It is of very little evidential value in the dispute before the court.

244. I also find the evidence of PW3 on the existence of Plot No. 893 not convincing. PW3 told the court that the only survey plans which she found in their records as the custodian of survey records in Kenya were survey plan F/R No. 211/68 for the plot No. 530 measuring 0.6212 hectares and survey plan F/R No. 224/20 for plot No. 530 measuring 9.422 hectares. PW3 did not get any survey plan in their records relating to plot No. 893. The survey plan F/R No. 224/20 for plot No. 893, which PW3 produced in evidence, was not from the Director of Surveys but from some office in the Ministry of Lands at Ardhi House known as S.P.R.O, which was not the custodian of Survey Records but could have survey plans sent to it from time to time. PW3 did not tell the court when the survey plan F/R No. 224/20 for plot No. 893 was sent to the S.P.R.O, and by whom. I find no basis for PW3's conclusion that plot No. 893 was created through survey plan F/R No. 224/20 and not plot No. 530, while the Director of Surveys did not have in its records any survey plan relating to plot No. 893. The fact that there were two survey plans for the same parcel of land, plot No. 530, was well explained. PW3 admitted that there were

cases of duplication of parcel numbers. Like PW2, PW3 believed that the mere existence of a survey plan F/R No. 224/20 for plot No. 893 meant that the land existed. The evidence of this witness contradicted the position of the Director of Surveys under whom she was working. In his letter dated 3<sup>rd</sup> July 2015 to the Director of Criminal Investigations, the Director of Surveys stated that plot No. 893 did not exist. The Commissioner of Lands similarly stated in his letter dated 12<sup>th</sup> April 2006 to the Provincial Criminal Investigations Officer that plot No. 893 did not exist.

245. Arising from the above analysis, it is my finding that survey plan F/R No. 224/20 is for plot No. 530, and that plot No. 893 does not exist on the ground. In the circumstances, the issue of plot No. 893 and plot No. 530 being at the same location on the ground does not arise.

246. **Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants trespassed on the Plaintiffs' land parcel No. Nairobi/Block 83/893 claimed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be the land parcel No. Nairobi/Block 83/530.**

247. I have made a finding that the Plaintiffs have not established the existence of plot No. 893 and their title to the same. The

Plaintiffs cannot, therefore, maintain an action for trespass in relation to the plot. I have made a further finding that the parcel of land the Plaintiffs are claiming to be plot No. 893 is indeed plot No. 530 owned by the 2<sup>nd</sup> Defendant. The Plaintiffs have not proved that the 2<sup>nd</sup> Defendant had authorised them to occupy or use the property. The Plaintiffs have not proved trespass against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

**248. Whether the Plaintiffs trespassed on the 2<sup>nd</sup> Defendant's land parcel No. Nairobi/Block 83/530, claimed by the Plaintiffs to be the land parcel No. Nairobi/Block 83/893.**

249. The evidence on record shows that when the Plaintiffs came to court, they had been evicted from Plot No. 530 and barred from regaining possession. The land has since been subdivided and several portions sold to third parties who are in occupation thereof. There is no evidence that, at the time the counter-claim was brought by the 2<sup>nd</sup> Defendant against the Plaintiffs, there was any continuing trespass. The 2<sup>nd</sup> Defendant has not proved the trespass alleged against the Plaintiffs.

**250. Whether the Plaintiffs are entitled to the reliefs sought in their re-amended plaint.**

251. The Plaintiffs have not proved their case against the Defendants. The Plaintiffs are therefore not entitled to the reliefs sought in their re-amended plaint.

**252. Whether the 2<sup>nd</sup> Defendant is entitled to the orders sought in its counterclaim.**

253. I have at the beginning of the judgment set out the orders sought by the 2<sup>nd</sup> Defendant against the Plaintiffs in their counterclaim. The Plaintiffs are claiming the subdivisions of plot No. 530, namely, Nairobi/Block 83/899-1222, which were owned by the 2<sup>nd</sup> Defendant and some of which the 2<sup>nd</sup> Defendant has sold to third parties. I have already held that the Plaintiffs' claim has no basis. The 2<sup>nd</sup> Defendant is, in the circumstances, entitled to a permanent injunction restraining the Plaintiffs from interfering with the said parcels of land. The 2<sup>nd</sup> Defendant had also sought a permanent injunction restraining the Plaintiffs and the members of Wazee Makadara Self Help Group (the group) from publishing in the press, newspaper or any other media adverse notices or features relating to the 2<sup>nd</sup> Defendant's properties known as Nairobi/Block 83/899-122. I am of the view that this order is not

merited. Apart from the notices which the Plaintiffs put in the press during the pendency of these proceedings, warning third parties from dealing with the properties in dispute, there is no evidence that the Plaintiffs had engaged in any malicious media campaign against the 2<sup>nd</sup> Defendant in relation to the disputed properties. The 2<sup>nd</sup> Defendant had also claimed general damages. The 2<sup>nd</sup> Defendant did not prove that it had suffered any loss or damage as a result of the Plaintiffs' activities or claims over plot No. 530 or its subdivisions. The 2<sup>nd</sup> Defendant is, in the circumstances, not entitled to the damages sought.

**254. Who is liable for the costs of the suit and the counterclaim?**

**255.** The Plaintiffs have not succeeded in their claim against the Defendants. The 2<sup>nd</sup> Defendant has, on the other hand, succeeded in its claim against the Plaintiffs. There is no reason why the Defendants should be denied the costs of the suit and the counter-claim. The Defendants shall have the costs.

**256. Conclusion**

In conclusion, I hereby make the following orders in the matter:

1. The Plaintiffs' suit is dismissed with costs to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
2. The Interested Parties shall bear their own costs of the suit.
3. Judgment is entered for the 2<sup>nd</sup> Defendant against the Plaintiffs, in the counterclaim for:
  - (a) A permanent injunction restraining the Plaintiffs and the members of Wazee Makadara Self Help Group (the group) from trespassing, interfering, claiming, or dealing in any way with the 2<sup>nd</sup> Defendant's parcels of land known as Nairobi/Block 83/899-1222.
  - (b) The costs of the counter-claim.

**Dated and signed at Kisumu this 17<sup>th</sup> day of December 2025**

**S. OKONG'O  
JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing platform in the presence of;

Mr. Kinyanjui for the 1<sup>st</sup> to 3<sup>rd</sup> Plaintiffs

N/A for the 4<sup>th</sup> Plaintiff

Mr. Ngugi for the 1<sup>st</sup> Defendant

Mr. Thuita for the 2<sup>nd</sup> Defendant

N/A for the 3<sup>rd</sup> Defendant

Mr. Musundi for the Interested Parties

Ms. J. Omondi-Court Assistant

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