

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NUMBER E045 OF 2022

TELEPOSTA PENSION SCHEME

TRUSTEES REGISTEREDPLAINTIFF

VERSUS

CRUCIAL PROPERTIES LIMITED1ST DEFENDANT

CHIEF LAND REGISTRAR2ND DEFENDANT

JUDGMENT

1. The question as to whether surrender of land under the **Registration of Titles Act chapter 281, Laws of Kenya** [*now repealed*] had to be by way of a Deed of surrender and not otherwise has been the subject of various court decisions. There has been the question of *de jure* surrender, which denotes execution of the Surrender Instrument and formal registration of a deed of surrender; and *de facto* surrender. The latter envisages the informal return/ submission [consensual handing over] of the document[s] of title. Regarding the later, no deed of surrender is ordinarily executed and registered on behalf of the person surrendering the land.
2. In the case of *Mwinyi Hamisi Ali Vs The Attorney General & Another [1997] Keca 210 (Klr)* , the Court of Appeal addressed its judicial mind to the twin questions of *de jure* surrender and *de facto* surrender.

3. The Court stated thus:

*The land in question was held under the Registration of Titles Act, Cap 281, Laws of Kenya. **Section 44 of the Act requires that surrender of land leased by the Government to persons to be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender. But Section 44 does not envisage a situation whereby lack of such registration would make null and void de facto surrenders.** From the evidence before the superior court, there can be no doubt that Captain Townsend and his three co-owners had factually surrendered Plot No. 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr. Hamisi any title to the suit land.....The Commissioner had de facto control of Plot No. 334 and if he proceeded, as he did, to allot the land to other persons..., their titles cannot be impugned except as provided for in Section 24 of the Act.... It is on these observations that, in our view, Mr. Hamisi Ali's claim to the title to the suit land fails.”*

4. This court will be engaged with the question as to whether the suit property which was previously assigned [allocated] to and reserved in favour of East African posts and telecommunications [EAP& TC] was surrendered back to the Government of Kenya; and thereafter became unalienated government land in-terms of the provisions of section 2 of the Government Land Act, chapter 280 Laws of Kenya [*now repealed*].

5. Back to the matter beforehand. Before me is the amended Plaintiff dated the 22/05/2023 filed by and on behalf of **Teleposta Pension Scheme Trustees Registered** [the Plaintiff] and wherein same has sought diverse reliefs. The reliefs are reproduced as hereunder:

- i. *A Declaration be and is hereby issued that purported title and ownership by the 1st Defendant of the property known as Land Reference Number 290/3355, Nairobi is fraudulent, illegal, wrongful, null and void ab initio.*
- ii. *A declaration be and is hereby issued that the Plaintiff is entitled to exclusive and unimpeded right, of possession, occupation and use of that property known as Land Reference Number 209/3355, Nairobi.*
- iii. *A declaration be and is hereby issued that the 1st Defendant, whether by itself, servants or agents or otherwise howsoever, has no right, interest and or title to the said property Land Refence Number 209/3355, Nairobi and is wrongfully in occupation of the same, it at all, and is accordingly a trespasser.*
- iv. *An order be and is hereby issued revoking the title held by the 1st Defendant, over the property known as Land Reference Number 209/3355, Nairobi and a subsequent order be and is hereby issued directing the 2nd Defendant to issue to the Plaintiff a title over the suit property known as Land Reference number 209/3355, Nairobi in the name*

of the Plaintiff [Telposta Pension Scheme Trustees Registered].

- v. *An order directing the 1st Defendant to issue a vacant possession of the property known as Land Reference Number 209/3355, Nairobi to the Plaintiff.*

- vi. *A permanent injunction restraining the 1st Defendant whether by itself or its agents and/or servants, from doing acts or any to them that is to say from selling by public auction or private treaty, leasing, letting or otherwise however interfering with the Plaintiff's ownership to title and/or interest in all that piece of land known as Land Reference number 209/3355 Nairobi.*

- vii. *In the alternative to prayers [1] [iii] [iiii],[iv] , [v] and [vi] above, an for compensation/damages assessed at the prevailing market value of property known as Land Reference Number 209/355 Nairobi.*

- viii. *Mense profit*

- ix. *Damages for trespass*

- x. *Advertisement charges*

xi. Interest at court rates on [vii], [viii], [ix] and [x] above from the date of judgment until payment in full.

xii. Costs of this suit.

xiii. Any other relief which the Honourable Court may deem fit to grant in the circumstances.

6. Briefly, the Plaintiff contends that what constitutes the suit property belonged to East Africa Post and Telecommunication and that upon the collapse/dissolution of the East African Community, the suit property devolved to and vested in the name of Kenya Post and Telecommunication. Additionally, it has been contended that the suit property was thereafter a subject of vesting order *vide* legal notice number 131 of 14th of September, 2001, which vested same in the name of the Plaintiff. Moreover, it has been contended that insofar as the suit property belonged to East Africa Post and Telecommunication, the suit land ceased to be unalienated government land; and thus same could not have been allocated/alienated to Philemon Chelagat.

7. The Plaintiff has further contended that the allocation of the suit property to Philemon Chelagat [the allottee]; the subsequent issuance of the certificate of title thereto; and the consequential transactions affecting and touching on the suit property were/are fraudulent, illegal and unlawful. To this end, the Plaintiff has invited the court to find and hold that the 1st Defendant does not hold any lawful rights to and in respect of the suit property. On the contrary, the Plaintiff has posited that the Certificate of

Title held by and on behalf of the First Defendant is illegal; unlawful; and fraudulent.

8. Consequently, and in the premises the court has also been implored to cancel the certificate of title in favour of the 1st Defendant; declare that the suit property lawfully belongs to the Plaintiff; direct the grant of vacant possession of the same to the Plaintiff; Eviction of the First Defendant and its agents; Issue an Order of Permanent Injunction; and decree Mesne Profits and Costs.

9. The 1st Defendant duly entered appearance and thereafter filed a statement of defence to the original Plaint. The statement of defence was dated the 27/06/2022. Subsequently, the 1st Defendant filed an amended statement of defence the 19/06/2023 and wherein the 1st Defendant has denied the claims at the foot of the amended Plaint under reference. Moreover, the 1st Defendant has posited that the suit property, namely; LR Number, 209/3335, was previously allocated to one Philemon Chelagat, *vide* letter of allotment issued in October 1994; thereafter the said Philemon Chelagat procured and was issued with a grant and certificate of title.

10. Additionally, the 1st Defendant has contended that suit property was thereafter sold to and transferred in the name of Rine Hart Limited; who thereafter sold and transferred the suit property to and in favour of the 1st Defendant. To this end, the 1st Defendant has contended that suit property was lawfully transferred to and registered in its name. Furthermore, it has been contended that the 1st Defendant is a bona fide purchaser for value, without notice of any defect in the title of its

predecessors; and that the First Defendant has been in quite possession of the Suit Property wef 1998 upon purchase thereof.

11. The 1st Defendant has also contended that the Plaintiff herein has no lawful title to or rights over the suit property. Further, and in any event, it has been posited that the suit property belonged to and was registered in the name of the 1st Defendant as at 14th September, 2001; when the gazette notice number 131 of 14.09.2001 was published. In this regard, it has contended that the said gazette notice could not therefore divest the 1st Defendant of its property rights to and interest over the suit property.

12. Flowing from the foregoing, the 1st Defendant has therefore invited the court to find and hold that the Plaintiff has no lawful rights to the suit property. In addition, it has been contended that the Plaintiff herein became aware of the registration of the suit property in name of the 1st Defendant on or about 2002/2003 and thus the subject suit is defeated by the Provisions of **Limitation of Actions Act, Chapter 22 Laws of Kenya**.

13. The 2nd Defendant duly entered appearance and filed a statement of defence to the original Plaint. The statement of defence was dated 12.05.2022. The statement of defence under reference was subsequently amended resting with the amended statement of defence dated the 3rd of May, 2023. Pertinently, the Hon. Attorney General has contended that the Plaintiff has neither demonstrated: that the suit property was allocated to Kenya Post and Telecommunication Corporation; that the Plaintiff has any lawful rights to the suit property; and that the vesting order *vide* legal

notice number 131 of 2001 was illegal; unconstitutional and thus incapable of conferring any Legal Title to and in favour of the Plaintiff, or at all.

14. Further, and in addition, the 2nd Defendant has also contended that the suit property constituted an unalienated Government land; same was lawfully allocated; the 1st Defendant thereafter acquired lawful title thereto; and that the 1st Defendant's title to the suit property is unimpeachable. Besides, the 2nd Defendant has also contended that the Plaintiff's suit is statute barred; and contravenes the Mandatory Provisions of **The Government Proceedings Act Chapter 40 Laws of Kenya**. In the premises, the 2nd Defendant posits that the Plaintiff's suit is *devoid* of merits; and legally untenable.

15. The Plaintiff filed an amended reply to statement of defence filed by the 1st Defendant. The amended reply to the statement of defence is dated the 20.07.2023 and wherein the Plaintiff has reiterated the contents of the amended plaint. Furthermore, the Plaintiff has contended that the suit property stood reserved to public use [East African Post and Telecommunication] and thus same was not available for allocation or alienation to Philemon Chelagat on the basis of the letter of allotment issued in 1994 or at all.

16. Moreover, it has been contended that the said allottee did not comply with the law as pertains to allocation of government land and thus the allotment and all the subsequent transactions were null and void.

17. The Plaintiff has further averred that the issue of Limitation of Actions was addressed *vide* preliminary objection which was raised by/on behalf of the 1st Defendant and moreover, that the issue was disposed of *vide* ruling of the court rendered on the 20.12.2022. It has further been contended that the ruling of the court was neither reviewed nor appealed against. To this end, the Plaintiff has posited that the question of limitation cannot be revisited. In any event, it has been contended that the question of limitation is prohibited by the Doctrine of *Res Judicata*.

18. Similarly, the Plaintiff filed a reply to the amended statement of defence by the 2nd Defendant. The reply to defence is dated the 20.07.2023 and wherein the Plaintiff has reiterated that the allocation of the suit property to Philemon Chelagat was illegal and unlawful. Furthermore, it has been contended that the suit property stood reserved in favour of East African Post and Telecommunications and thus same was not available for alienation or at all.

19. The Plaintiff has equally contended that insofar as the allocation of the suit property to Philemon Chelagat was illegal and void; the suit property therefore remained available for vesting, which was lawful done by the Minister of Finance in terms of legal notice number 131 of 14/09/2001. Essentially, the Plaintiff has reiterated its position that the suit property stands vested in its favour.

20. Regarding the contention by the 2nd Defendant that the 1st Defendant title is lawful and unimpeachable, the Plaintiff has posited that the 1st Defendant's title is vitiated by fraud; illegality; and thus void. In addition, it has also been contended that the vesting order was neither, unlawful

nor unconstitutional. In any event, the Plaintiff has invited the 2nd Defendant [the Hon. Attorney General] to strict proof.

21. The suit came up for pretrial direction on the various dates including the 20.12.2022 whereupon the advocates for the parties finally confirmed that same filed and exchanged the requisite list and bundle of documents; list of witnesses; and witness statements. Moreover, the parties intimated to the court that the matter was therefore ready for hearing.

22. The Plaintiff's case is anchored on the evidence of three witnesses namely; **Peter Kipyegon Rotich; Edwin Macharia; and Evans Maghas**. Same testified as PW1, PW2 and PW3, respectively.

23. It was the testimony of PW1 [Peter Kipyegon Rotich] that same is Administrator/Trust Secretary of the Plaintiff. In addition, the witness averred that he has been the secretary/administrator of the Plaintiff for 10 years. To this end, the witness posited that same is therefore familiar and conversant with the facts of the case. Moreover, the witness averred that same has since recorded and filed a witness statement dated 24.07.2023 and which witness statement, the witness sought to adopt and rely on as his evidence in chief. The statement under reference was thereafter adopted and constituted as the Evidence in chief of the witness.

24. Additionally, the witness adverted the list and bundle of documents dated the 22/10/2022 and thereafter sought to tender and produce the documents as exhibits before the court. There being no objection to the

production of the documents, same were produced and admitted as exhibits P1 -P16, respectively.

25.The witness further referenced the supplementary list and bundle of documents dated the 24.07.2023 and thereafter sought to produce same as exhibits. However, the learned counsel for the 2nd Defendant [the Honourable Attorney General] objected to the production of documents numbers 5, 6 , 7 and 8, respectively. Suffice it to state that learned counsel for the Plaintiff conceded the objection and invited the court to mark the documents for identification. Same were thereafter marked as PMFI – 21, 22, 23 and 24, respectively.

26.On the other hand, the rest of the documents at the foot of the supplementary list and bundle of documents dated the 24.07.2023 were admitted and marked as exhibits P17 to P20; exhibits P25 to 29, respectively.

27.It was the further testimony of the witness that the Plaintiff herein had previously lodged a complaint with National Land Commission; Ethics and Anti-Corruption and the Ndungu Commission. Moreover, it was posited that the Ndungu Land Commission recommended that the 1st Defendant's title to the suit property be revoked.

28.Regarding the pleadings filed, the witness intimated to the court that the Plaintiff has filed an amended plaint dated the 22.05.2023; verifying affidavit sworn on 22/05/2023; amended reply to the statement of defence

dated the 20.07.2023; and the reply to statement of defence dated 20.07.2023. The witness thereafter intimated to the court that same shall be relying on the named documents/pleadings.

29. On cross examination by learned counsel for the 1st Defendant, the witness testified that the Plaintiff herein does not have any certificate of title to or in respect of the suit property. Furthermore, the witness added that the Plaintiff has never been in possession of the suit property. On the contrary, it was averred that the suit property is under the occupation and possession of 1st Defendant.

30. Upon being referred to the documents at page 36 of the 1st list and bundle of documents, the witness averred that the document in question is copy of the certificate of title. In addition, the witness posited that the certificate of title relates to the suit property. The witness also testified that the term/ duration at the foot of the certificate shows 99 years.

31. It was the further testimony of the witness that the grant in respect of the suit property was issued to Philemon Chelagat. Furthermore, the witness testified that the suit property was subsequently transferred to and registered in the name of Rine Hart Limited on the 30.04.1997. Moreover, the witness stated that the suit property was later transferred to the 1st Defendant. Notably, the witness averred that the transfer in favour of the 1st Defendant was undertaken on the 22nd of October, 1998.

32. While still under cross examination, the witness testified that the Plaintiff is registered under a Trust Deed. The witness averred that the Plaintiff

was registered on the 01.07.1997. In addition, the witness testified that he has since availed a copy of the certificate of incorporation of the Plaintiff. Besides, the witness testified that the trust deed shows the date when same was issued. In particular, the witness averred that the document is dated the 16.09.1999.

33.Regarding the document at page 20 of the Plaintiff's list and bundle of documents, the witness averred that the document is the vesting order. It was clarified that the vesting order was issued vide legal notice published on the 14th of September, 2001. Besides, the witness testified that *vide* the legal notice various properties, inter alia the suit property was being transferred to the Plaintiff.

34.The witness further testified that the vesting order is shown to relate to the properties that were available as at 30.06.1999. Moreover, the witness clarified that the suit property is one of the properties that was vested in favour of the Plaintiff. Nevertheless, the witness testified that the by the time the vesting order was being published/issued, the suit property had long been transferred to and registered in name of a third party.

35.On further cross examination, the witness testified that the suit property belonged to Kenya Posts and Telecommunication and that the legal notice issued in 2001, impacted upon and affected the suit property. Regarding the filing of the suit, the witness averred that the suit was filed after more than 22 years when the legal notice was issued/published.

36.As concerns when the Plaintiff became aware of the registration of the suit property in the name of the 1st Defendant, the witness stated that the Plaintiff discovered the 1st Defendant's interest over the suit property in the year 2013. However, when pressed further the witness stated that same is aware that the Plaintiff lodged a complaint with the Ndungu Land Commission in the year 2003. In addition, the witness averred that the Plaintiff was aware of the irregular and illegal allocation of the suit property in the year 2003.

37.It was the further testimony of the witness that the suit property was captured at the foot of the report by the Ndungu Land Commission. Moreover, the witness averred that same has since tendered an except of the Ndungu Land Commission Report. The witness added that the report in question touched on and dealt with irregular/illegal allocation of public properties including the suit property.

38.The witness further testified that though the Ndungu Land Commission made various recommendations, the commission did not recommend the revocation of the title of the suit property. Moreover, the witness testified that the Plaintiff has also lodged various complaints with the National Land Commission. Nevertheless, the witness clarified that National Land Commission has responded to the complaint.

39.Regarding whether the Plaintiff has been sleeping on its rights as pertains to recovery of the suit property, the witness testified that the Plaintiff has not been sleeping on its rights. In any event, the witness posited that the Plaintiff has been following the issue of the suit property with various

government agencies. In particular, the witness testified that he personally became aware of the illegal allocation of the suit property in the year 2003.

40. In addition, the witness testified that the Plaintiff herein also proceeded to and attempted to register a caution against the suit property. However, the witness averred that the attempt to register a caution was not successful.

41. While still under cross examination, the witness testified that the same is aware that the transfer of the suit property in favour of the 1st Defendant was fraudulent. Furthermore, the witness testified that the suit property was not available for alienation. Besides, the witness posited that the suit property was part of the properties that were affected by the vesting orders.

42. On cross examination by learned counsel for 2nd Defendant, the witness testified that same is before the court on behalf of the Plaintiff. Besides, the witness testified that the Plaintiff made a resolution to authorize /sanction the filing of the suit. However, the witness admitted that the resolution is not part of documents that has been filed/lodged before the court.

43. Regarding the complaint that was lodged with the Ethics and Anti-corruption Commission, the witness averred that the same is not privy to the scope and extent of the investigations. Moreover, the witness posited

that he is unable to confirm whether the commission has since communicated with the Plaintiff.

44. In respect of the registration of the vesting order, the witness averred that the same has never been registered. However, the witness clarified that the process of registration of the vesting order is still ongoing. Additionally, the witness testified that the Plaintiff has not tendered or produced a copy of the certificate of official search in respect of the suit property. In any event, the witness testified that the Plaintiff has attempted to obtain an official Search over the suit property but the attempts were not fruitful.

45. It was the further testimony of the witness that the same has not been able to avail the deed file because the same has been missing. Nevertheless, the witness conceded that the same has not tendered any evidence to show that the deed file was lost/misplaced.

46. In respect of whether the suit property was government land, the witness confirmed that the suit property was indeed government land. However, the witness clarified that the land was allocated to East Africa Post and Telecommunication and same was thereafter transferred to and in favour of the Plaintiff. In addition, the witness posited that the suit property belongs to the Plaintiff. Regarding the question as to whether the Plaintiff has any evidence to show that the property belonged to East African Posts and Telecommunications, the witness averred that same does not have any search documents.

47. It was the further testimony of the witness that the suit property was illegally allocated to Philemon Chelagat. However, the witness added that he does not know how the land was allocated. Furthermore, the witness averred that he has no document to show that the land previously belonged to the Plaintiff.

48. Upon being shown a copy of the letter of allotment dated 08.11.1994, the witness stated that the letter of allotment in question relates to the suit property. Besides, the witness testified that the letter of allotment alluded to statutory levies which were due and payable by the allottee.

49. While still under cross examination by the learned counsel for the 2nd Defendant, the witness testified that the suit property was being used/occupied by an employee of Kenya Posts and Telecommunication Limited. However, the witness admitted that same has not tendered or produced any records before the court to show who was in occupation of the house.

50. Upon being referred to the documents at page 19 of the list and bundle of documents, the witness averred that the document in question is a copy of the trust instrument which was registered on the 16.11.1998. However, the witness conceded that the Plaintiff has never been in occupation of the suit property.

51. Regarding whether, Kenya Posts and Telecommunications was ever issued with a certificate of title, the witness testified that same has never come across any certificate of title. Moreover, it was the testimony of the

witness that by the time the vesting order was being issued, the suit property was already registered in the name of the 1st Defendant.

52.As concerns the registration of the vesting orders, the witness testified that the Plaintiff has made various efforts to register the vesting orders. However, the witness conceded that the vesting orders has not been registered against the suit property.

53.Turning to issue of illegality in the registration of the suit property in the name of the 1st Defendant, the witness averred that same has no evidence to confirm fraud and illegality. Nevertheless, the witness reiterated that the suit property lawfully belongs to the Plaintiff.

54.In addition, it was the testimony of the witness that the suit property was alienated government land and was designated for public use. However, the witness admitted that same has no evidence to show that the suit property was reserved for public use/purpose. Furthermore, the witness testified that same does not know whether the land was alienated and designated for public use. The witness added that the same does not know whether the land in question reverted to the government.

55.Regarding the contents of paragraph 25 of the witness statement, the witness averred that suit property has never been registered in the name of the Plaintiff. On the contrary, the witness posited that the land is registered in the name of the 1st Defendant. The witness however, testified that the transfer of the land in favour of the 1st Defendant is part of a corrupt scheme.

56. When pressed further, the witness testified that he does not have any evidence of corruption; or corrupt scheme. Additionally, the witness posited that the Plaintiff is laying a claim to the suit property on historical basis. However, the witness conceded that same has not availed any document to show/establish ownership of the land.

57. In respect of when the Plaintiff became aware of the regular and illegal allocation of the suit property, the witness testified that the Plaintiff became aware of the irregular allocation of the suit property in 2013. Furthermore, the witness testified that the Plaintiff lodged a complaint with the Ndungu Land Commission. The witness clarified that the Ndungu Land Commission did not recommend revocation of the certificate of title in favour of the 1st Defendant.

58. As pertains to whether any letter of allotment was issued in favour of East African Posts and Telecommunications, the witness averred that he has never seen any letter of allotment to that effect. Moreover, the witness averred that he has also not seen any certificate of title in favour of East African Posts and Telecommunications.

59. The 2nd witness who testified on behalf of the Plaintiff was Edwin Macharia. The witness testified as PW2.

60. It was the testimony of the witness [Edwin Macharia] that same is a registered and practicing valuer. In addition, the witness testified that he was registered in the year 2000. Moreover, the witness testified that same

was instructed and retained by the Plaintiff to inspect and value the suit property. To this end, the witness averred that he thereafter proceeded to and valued the property and prepared a valuation report dated 12.08.2022. 61. The witness sought to produce the valuation report as an exhibit before the court; and there being no objection to the production of the valuation report, same was tendered/produced as exhibit P23.

62. On cross examination by learned counsel for the 1st Defendant, the witness averred that upon undertaking the valuation, same proceeded to and prepared a valuation report. In addition, the witness testified that the report under reference contained the terms of engagement. Furthermore, the witness averred that he was able to inspect the suit property and thereafter advice on the market value. Besides, the witness testified that he visited the suit property.

63. Additionally, it was the testimony of the witness that he visited the suit property and undertook the valuation in the year 2022. Moreover, the witness testified that he did not undertake a search on the suit property. In any event, the witness averred that a search/certificate of search was not necessary.

64. While still under cross examination, the witness testified that same was granted a vesting order. The witness further testified that he did not physically inspect the suit property. Nevertheless, the witness averred that he took photographs of the suit property from outside. In addition, the witness averred that the valuation report was prepared with part of the information that was obtained from/availed by the client.

65. It was the further testimony of the witness, that upon undertaking the valuation exercise, same proceeded to and provided/indicated the market value of the suit property. In particular, the witness testified that he arrived at the value of Kshs. 215,000,000/= only. Furthermore, the witness indicated that the market value was arrived at from his understanding of valuation; and the market factors.

66. On further cross examination, the witness testified that he has alluded to and indicated the rents payable over and in respect of the suit property. Furthermore, the witness averred that the valuation report was undertaken in accordance with the set standards of valuation. In addition, the witness averred, that he complied with the valuation rules and that same has provided a basis for valuation.

67. On cross examination by learned counsel for 2nd Defendant, the witness testified that he was instructed to undertake inspection and valuation of the suit property by the Plaintiff. Nevertheless, the witness testified that he did not know whether the suit property had a certificate of title. In addition, the witness testified that he was not supplied with any certificate of title.

68. It was the further testimony of the witness that upon receipt of the instruction [s]same procured and obtained a copy of the registry index map from the directorate of survey. Furthermore, the witness testified that he took into account, the contents of the registry index map, and the other important factors before arriving at the market value. Besides, the witness also testified that same prepared/generated a schedule of rents. Nevertheless, the

witness conceded that same has not availed any source of information to verify the contents of the rent schedule.

69.The next witness who testified on behalf of the Plaintiff was Evans Maghas. The witness testified as PW3.

70.It was the testimony of the witness that same is a registered surveyor. In addition, the witness testified that he practices under the name and style of Topland Geospatial Limited. Besides, the witness testified that he was instructed to undertake survey and verification exercise by the Plaintiff. To this end, the witness testified that same has prepared a report and which report, the witness sought to tender and produce before the court. There being no objection to the production of the report, same was produced and marked as exhibit P22.

71.It was the testimony of the witness that his instructions, included undertaking due diligence over the suit property, namely; LR No. 209/3335, situated at Kileleshwa within Nairobi. Moreover, the witness testified that he indeed visited the property and thereafter prepared a report dated 19.04.2023. The witness sought to tender and produce the report. In the absence of any objection to the production, same was produced as exhibit P21.

72.The witness further testified that he visited the office of the Director of Survey and requested to be availed some documents to enable him to prepare the report. In particular, the witness averred that he requested to be availed a copy of the survey plan [FR]; registry index map; and the computations that were held by the office of survey.

73. Other than the foregoing, the witness averred that he has made various recommendation at the foot of the report. In particular, the witness testified that the conclusions at the foot of the report were arrived at on the basis of various documents including the registry index map, the valuation roll and other documents procured from the directorate of the survey.

74. On cross examination by learned counsel for the 1st Defendant, the witness testified that he is the one who prepared the report dated 19.04.2023 and which has been tendered and produced before the court. In addition, the witness testified that he was qualified to prepare the report. Nevertheless, the witness averred that the report tendered before the court does not have any attachment thereto.

75. While still under cross examination, the witness testified that he wrote a letter to the directorate of survey and thereafter sought various documents. However, the witness conceded that same has not produced before the court a copy of the letter which was written to the directorate of survey. Besides, the witness admitted that he has not availed a copy of the official search before the court.

76. It was the further testimony of the witness that the document which he obtained from the directorate of survey, have not been certified. Furthermore, the witness testified that he is aware of procedures that apply before one can obtain documents from government offices. However, the witness reiterated that he has not availed before the court any letter forwarding the documents from the directorate of survey.

77. On further cross examination, the witness testified that he has made various observations/conclusions at the foot of the report. Moreover, the witness averred that the observations that same has made are discernable from the entrance of the suit property.

78. It was the further testimony of the witness that the same did not procure/obtain a copy of the Deed Plan. Moreover, the witness clarified that he did not come across any Deed Plan in respect of the suit property.

79. On cross examination by the learned counsel for the 2nd Defendant, the witness testified that even though he is the one who prepared the report before the court, same has not availed any letter from the government offices/departments to show that he obtained any document from the said offices. However, the witness clarified that he obtained the survey plan from the directorate of survey.

80. Additionally, the witness testified that he has made reference to various computation files. Furthermore, the witness stated that the details of the computations are before the court. However, the witness admitted that the computations have not been certified by the directorate of survey.

81. While still under cross examination, the witness testified that the area where the suit property is located, was reserved for senior government officials. However, the witness admitted that he has not tendered any document to show/prove his assertions.

82. Upon being referred to the witness statement of Gordon Ochieng, the witness admitted that the said statement covers the historical background of the suit land. In any event, the witness stated that he has seen the letter of allotment dated 10.06.1950. Besides, the witness clarified that the letter of allotment in question relates to LR No. 209/3335, which is the suit property.

83. It was the further testimony of the witness that even though he undertook due diligence, same did not come across the copy of the letter of allotment that has been referred to. Besides, the witness posited that he did not access the correspondence file. Further, the witness testified that he did not come across any Deed file or Deed plan. However, the witness added that he came across the grant number 72888. In addition, the witness confirmed that the grant in question reflects the details of the Deed plan and that a copy of the Deed plan is attached thereto.

84. Regarding, the process of allocation of government land, the witness testified that same is familiar/conversant with the process relating to allotment of government land. Nevertheless, the witness stated that the suit property was not available for alienation or allocation.

85. On further cross examination, the witness testified that even though he contends that the suit property was not available for alienation, same did not come across any reservation affecting the suit property. Regarding the documents at page 10 of the list and bundle of documents filed by the 2nd Defendant, the witness stated that the document in question is a copy of the letter of allotment. Furthermore, the witness admitted that the Plaintiff herein, was not in existence at the time when the letter of allotment was issued.

86. It was the further testimony of the witness that same did not come across any letter of reservation against the suit property. In particular, the witness averred that he did not come across any such letter because he was never availed the correspondence file. Furthermore, the witness testified that the letter of reservation [if any] could only be traceable to the correspondence file and not otherwise.

87. While still under cross examination, the witness testified that the correspondence file is under the custody of the Ministry of Lands. Nevertheless, the witness reiterated that the suit property was not available for allocation. In any event, the witness added that the property in question was already alienated.

88. With the foregoing testimony the Plaintiff's case was closed.

89. The 1st Defendant's case is premised on the evidence of two [2] witnesses the witnesses are; Julius Mwema Kabita; and Dickens Owuor. Same testified as DW1 and DW2, respectively.

90. It was the testimony of DW1[Julius Mwema Kabita] that same is an accountant by profession. Furthermore, the witness testified that he is currently employed by Jeanus Continental Group of Companies. To this end, the witness posited that the he is therefore conversant with the facts of this case. In addition, the witness clarified that he is before the court on behalf of the 1st Defendant.

91. Additionally, the witness testified that the 1st Defendant is one of the companies owned/operated by Jeanus Group of Companies. Furthermore, the witness averred that same has since recorded and filed a witness statement dated the 11.07.2024 and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to state that the witness statement was duly adopted as the evidence in chief of the witness.

92. The witness further referenced the list and bundle of documents dated the 27.06.2022 and thereafter sought to tender and produce the documents as exhibits before the court. In the absence of any objection, the documents under referenced were produced and admitted as exhibits D1 and D2, respectively.

93. Furthermore, the witness adverted to a further list and bundle of documents dated the 20.07.2023 and thereafter sought to produce the documents at the foot of the said lists as exhibits on behalf of the 1st Defendant. In the absence of any objection, the documents were duly produced and admitted as exhibits D3 on behalf of the 1st Defendant.

94. In addition, the witness also alluded to a supplementary list and bundle of documents dated the 1/11/2023 and thereafter sought to produce the documents as further exhibit before the court. Suffice it to state that documents number 1 and number 2 were duly produced and admitted as exhibits D4 and D5. However, documents number 3 was marked as DMFI – 6.

95. Other than the foregoing, the witness referenced the amended statement of defence dated the 19.07.2023 and thereafter sought to adopt same on behalf of the 1st Defendant.

96. On cross examination by learned counsel for 2nd Defendant, the witness averred that he is an accountant by profession. Furthermore, the witness testified that he is the one in charge of the financial affairs of the 1st Defendant. Additionally, the witness posited that same has worked with Jeanus Continental Group of Companies for 2 years.

97. Upon being referred to paragraph 10 of the witness statement, the witness testified that the 1st Defendant paid the sum of Kshs. 5,000,000/= only, on account of the suit property. Furthermore, the witness clarified that he has availed documents pertaining to payments which were made on account of the suit property.

98. Regarding exhibit D3, the witness testified that the document is a copy of the grant. In particular, the witness posited that the grant in question is number 72888. Besides, the witness stated that the grant relate[s] to LR No. 209/3335. In addition, the witness confirmed that the property in question belongs to the 1st Defendant.

99. As pertains to the document at page 40 of the 1st Defendant's list and bundle of documents, the witness averred that the document in question is a copy of the official search in respect of the suit property. Furthermore, the witness clarified that the certificate of official search is dated/was issued on 05.08.2022. Additionally, it has been posited that the official search does

not show any encumbrance[s] or at all. The witness added that the grant in respect of the suit property has never been recalled.

100. On further cross examination, the witness testified that the suit property was transferred to and registered in the name of the 1st Defendant on the 22.11.1998. Besides, the witness averred that it was the 1st Defendant who has been in occupation of the suit property. Moreover, the witness clarified that the suit property was lawfully acquired by the 1st Defendant.

101. In any event, the witness testified that the 1st Defendant has been making annual payments over and in respect of the suit property; and rates.

102. On cross examination by the learned counsel for the Plaintiff, the witness testified that he is an accountant with the organization known as Jeanus Continental Group of Companies. Furthermore, the witness stated that Jeanus Continental Group is a holding company. In addition, the witness posited that the 1st Defendant is the one of the companies falling under the umbrella of Jeanus Continental Group.

103. It was the testimony of the witness that by the time the suit property was being acquired by the 1st Defendant, same was not employee of the 1st Defendant. On the contrary, the witness testified that he has only worked with Jeanus Continental Group of Companies for 2 years.

104. While still under cross examination, the witness testified that the 1st Defendant applied for conversion of the title of the suit property. Moreover, the witness testified that the suit property was surrendered to the government. In addition, the witness averred that the suit property was

historically the property of East African Posts and Telecommunications. However, the witness posited that the land in question was surrendered back to the government.

105. While still under cross examination, the witness testified that the 1st Defendant entered into a lawful sale agreement with Rine Hart Limited. Furthermore, the witness posited that there was a sale agreement that was duly executed. Nevertheless, the witness conceded that the sale agreement has not been produced before the court.

106. The witness further testified that he has availed and produced before the court a copy of the transfer instruments that was duly executed between Rine Hart Limited and the 1st Defendant. However, the witness admitted that he has not tendered or produced before the court any evidence to show that stamp duty was ever paid. In addition, the witness also admitted that he has also not tendered any evidence to show that the purchase price was paid.

107. It was the further testimony of the witness that the suit property is developed. In particular, the witness testified that the suit property has a house standing thereon. Furthermore, the witness testified that the property is currently occupied by the a tenant of the 1st Defendant. The tenant is indicated to be paying the sum of Kshs. 250,000/= per month.

108. Regarding, page 36 of the Ndungu Land Commission Report, the witness testified that the suit property is one of the properties, which has been mentioned thereunder. However, the witness clarified that the 1st Defendant

herein did not make any representation before the Ndungu Land Commission.

109. Upon being referred to the 1st Defendant's list and bundle of documents, and in particular, pages 45, 46 47 and 47 thereof, the witness averred that the notices under reference have been addressed to the Director of Kenya Posts and Telecommunications Limited. However, the witness clarified that the 1st Defendant has variously written to the city county government of Nairobi to correct their record as pertains the ownership of the suit property. Nevertheless, the witness admitted that the City County Government of Nairobi has not corrected/rectified its records.

110. Regarding the grant in respect of the suit property, the witness testified that the grant was issued in the year 1997. In addition, it has been pointed out that the transfer to and in favour of Rine Hart Limited was effect of the 30.04.1997. In any event, it was admitted that the transfer in question was undertaken within two days. Nevertheless, the witness averred that the transfer was not fraudulent.

111. While still under cross examination, the witness testified that the transfer instrument is dated the 20.04.1997. In any event, it was posited that the transfer instrument was executed on the same date/day as the grant. However, the witness clarified that the transfer was not irregular.

112. Regarding exhibit P3, the witness averred that the document is a copy of the vesting order. However, the witness added that he has only seen the vesting order through the documents that were filed in court.

113. The Second [2nd] Witness who testified on behalf of the 1st Defendant was Dickens Owuor. The witness testified as DW2.

114. It was the testimony of the witness that the same is a registered and practicing valuer. In addition, the witness testified that currently, he works with Adept Realtors Limited. Besides, the witness averred that he is conversant with the facts of the matter.

115. Additionally, the witness testified that same was instructed to inspect and value the suit property. To this end, the witness indicated that he proceeded to and undertook valuation of the suit property; and thereafter prepared a valuation report dated the 1st of November, 2023. The valuation report under reference was filed before the court *vide* the supplementary list and bundle of documents dated the 01/11/2023.

116. Furthermore, the witness thereafter sought to tender and produce the valuation report as an exhibit. In the absence of any objection, the valuation report was duly produced and admitted as exhibit D6 on behalf of the 1st Defendant.

117. On cross examination by learned counsel for the 1st Defendant, the witness testified that he was instructed to inspect and value the suit property. The witness averred that he thereafter inspected the property on the

10/08/2023 and thereafter prepared the valuation report. In addition, the witness averred that he was able to arrive at and indicated the market value of the suit property.

118. Regarding page 5 of the report [exhibit D6], the witness testified that the property which he valued was registered in the name of 1st Defendant. Moreover, the witness intimated to the court that same returned a value of Kshs. 212, 000,000/= only, as the market value of the property.

119. On cross examination by learned counsel for the Plaintiff, the witness testified that he is a registered and practicing valuer. In addition, the witness testified that he is one of the directors of Adept Realtors Limited. Besides, the witness pointed out that the other directors are: Jacob Kipaa and Michal Mwangi.

120. It was the further testimony of the witness that he was instructed by the 1st Defendant to undertake valuation of the suit property. Furthermore, the witness confirmed that upon receipt of instructions, same proceeded to and inspected the suit property. In particular, the witness stated that he inspected the suit property on the 10/08/2023.

121. The witness further testified that the suit property is developed with a single storey old type bungalow, which has since been converted into a commercial shop and an attached store; ablution block and semi-permanent office block. In any event, the witness posited that the suit property is being used for commercial purposes.

122. Furthermore, the witness testified that he is the one who prepared the valuation report before the court. The witness indicated that same relied on a copy of certificate of official search that was issued/availed to him by the 1st Defendant. Besides, the witness affirmed that the report was thereafter signed and sealed under the seal of the company.

123. Regarding the rent, the witness testified that same did not enquire about the rents being paid in respect of the suit property. Nevertheless, the witness clarified that he did not enquire about the rent[s] because he wanted to give an independent opinion on the issue of rents.

124. Upon being referred to exhibit P23, the witness stated that the document in question is a valuation report by Crystal Valuers Limited. The witness added that the assessed value shown at the foot of the report is Kshs. 215,000,000/= only. In addition, the witness posited that the report in question has also alluded to loss of income between January, 2001 to June 2022. The loss of income has been certified in the sum of Kshs. 20,299,073/= only. On the other hand, the witness averred that the Plaintiff's valuer has also assessed loss of income for the same period in the sum of Kshs. 32,831,599/= only.

125. With the foregoing testimony, the 1st Defendant's case was closed.

126. The 2nd Defendant's case is premised on the evidence of Three [3] witnesses. The witnesses are: Gordon Ochieng Odeka; Charles Kipkurui Ngetich; and Habiba Godana. Same testified as DW3, DW4 and DW5 respectively.

127. It was the testimony of DW3 [Gordon Ochieng Odeka] that same is currently the Director of Land Administration. In addition, the witness testified that he has been the Director of the Land Administration since August 2021.

128. By virtue of being the Director of Land Administration, the witness posited that same is therefore conversant/familiar with the facts of the case. In addition, the witness averred that same has since recorded and filed a witness statement dated the 12/06/2023; and which witness statement the witness sought to adopt and rely on as his evidence in chief. Suffice it to state that the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.

129. Additionally, the witness referenced the supplementary list and bundle of documents dated 13.06.2023, containing 17 documents and thereafter sought to produce the documents as exhibits before the court. The documents under reference were thereafter tendered and produced as Exhibit D1 to D17, respectively, on behalf of the 2nd Defendant.

130. On cross examination by learned counsel for the 1st Defendant, the witness testified that he is the director of land administration and by virtue of his office, same is familiar with the processes pertaining to and concerning allotment of government land.

131. In addition, the witness averred that same has since recorded a witness statement and wherein he has alluded to the process to be undertaken before issuance of a new grant. Moreover, the witness averred that the processes pertaining to the issuance of a new grant were duly complied with and

followed in the issuance of the grant in favour of the suit property. In particular, the witness referenced the letter at page 17 of the 2nd Defendant's list and bundle of documents. Thereafter the witness averred that the letter in question was written by Mr Philemon chelagat to the commissioner of Lands.

132. It was the further testimony of the witness that the letter in question contains various notations on the face thereof. Besides, the witness posited that the letter also bears a number, namely; 34469 and which number is said to signify the correspondence file in respect of the suit property.

133. While still under cross examination, the witness testified that the letter under reference was a request by the author [Philemon Chelagat] and wherein the author was requesting for allocation of an alternative property. The alternative property relates to the suit property. Moreover, the witness testified that upon receipt of the letter in question, the commissioner of lands [now defunct] proceeded to and issued a letter of allotment. In particular, it was averred that the letter of allotment was in respect of the suit property.

134. It was the further testimony of the witness that the letter of allotment which was issued in favor of Mr Philemon Chelagat contained terms and conditions, including payment of standard premium and statutory levies. Additionally, it was stated that the allottee was also obliged to accept the letter of allotment. The witness testified that the allottee duly accepted the letter of allotment and paid the standard premium. Furthermore, the witness clarified that the commissioner of lands thereafter issued a revenue receipt acknowledging receipt of the standard premium.

135. The witness further testified that the commissioner of land also processed and issued a grant in favor of Philemon chelagat. The Witness averred that the said grant was issued in 1997. Besides, the witness testified that same has since availed before the court a copy of the memorandum forwarding the application for allocation of the plot to the Permanent secretary and the Minister for clearance of the request for allotment of the land. The witness also referenced a letter from the commissioner of lands requesting the directorate of physical planning to prepare the part development plan.

136. Regarding whether the allotment of the land in question was lawful or otherwise, the witness testified that the allotment of the suit property was procedural and lawful.

137. Further, and in any event, the witness testified that there was also another letter of allotment which had been issued to Mrs Weston in the year 1950. However, the witness averred that Mrs Weston subsequently wrote a letter dated 27th July 1950; and the letter was addressed to the commissioner of lands.

138. It was the further testimony of the witness that in his witness statement, same has detailed the process leading to the alienation of the suit property. In particular, the witness averred that same has since referenced a letter that was written by the East African Common services [EACS] to the commissioner of lands. The witness averred that the letter in question related to the surrender of the land back to the government.

139. Regarding the letter at page 8 of the 2nd Defendant's list and bundle of documents, the witness testified that the document is the letter that relates and speaks to the surrender of the suit properties. Moreover, the witness

testified that the suit property did not have a certificate of title at the time of surrender. The witness further averred that in the absence of certificate of title/ grant, there was no need to prepare a deed of surrender. The witness reiterated that the suit property was surrendered.

140. On cross examination by learned counsel for the Plaintiff, the witness testified that same is the director of land administration. However, the witness clarified that there are several directorate[s] including;- the directorate of land administration; the directorate of physical planning; the directorate of land adjudication and settlement and the directorate of survey.

141. It was the testimony of the witness that the directorate of land administration deals with preparation/generation of leases and which are thereafter forwarded to the chief land registrar for registration. Moreover, the witness testified that as pertains to the matter before court, same has discharged his duties in accordance with the law. In particular, the witness reiterated that the process leading to the issuance of the grant in favor of Philemon Chelagat was lawful.

142. While still under cross examination, the witness testified that one property cannot have more than one correspondence file. In any event, the witness testified that a correspondence file is opened immediately upon the issuance of a letter of allotment. Regarding document number one at the foot of the 2nd Defendant's list and bundle of document, the witness averred that the said document is the letter of allotment in favor of Mrs Weston. Nevertheless, the witness added that the land in question had already been surrendered and assigned a parcel number.

143. Additionally, it was the testimony of the witness that the property had similarly been surveyed. Besides, and upon being referred to the top right corner of the letter of allotment, the witness averred that the document contains a folio. In addition, the witness stated that the document also contains notations.

144. On further cross examination, the witness testified that the notations on the letter of allotment were inserted by the commissioner of lands. Moreover, the witness testified that the notations are for official use/purposes.

145. Upon being referred to the letter of allotment, in favor of Philemon Chelagat, the witness testified that the letter of allotment refers to the folio and the folio is shown/ reflected on the face of the letter of allotment. Moreover, the witness reiterated that the letter of allotment was procedurally and lawfully issued.

146. Regarding the documents which the witness has produced, the witness testified that same has produced a total of 17 documents. However, the witness clarified that there are other documents that are contained in the records of the Ministry of Lands which same has not availed. Nevertheless, the witness testified that if the court were to direct that the said document be availed, same shall be ready to avail the documents.

147. Regarding the process relating to reservation of public land, the witness testified that the reservation of public land would require the preparation of a

Part development plan; survey; and thereafter a letter for reservation of the land.

148. The witness further testified that the letter for reservation would have to be generated by the Office of the commissioner of lands.

149. It was the further testimony of the witness that government land could be alienated by way of reservation. The witness also testified that there are instances where government land would be subject to issuance of certificate of title.

150. Pertaining to the letter at page 7 of the 2nd Defendant's list and bundle of documents, the witness averred that the letter in question is dated 21st September 1967. Furthermore, the witness testified that the letter in question references various plots that were allocated the East African Common services. In addition, the witness averred that the letter confirms that the land had been allocated to the common services for staff housing needs. Moreover, the witness added that the land in question had been reserved for East African Common Services.

151. While still under cross examination, the witness testified that the commissioner of lands would not have written the letter asking for surrender if the land had not been reserved.

152. It was the testimony of the witness that the suit property was allocated to Mr. Philemon Chelagat. In addition, the witness testified that Mr. Philemon Chelagat applied for allocation of the land. The witness added that the application letter by Mr. Philemon Chelagat was acted upon and same contains various notations. Furthermore, the witness testified that the previous letter of allotment was withdrawn.

153. Regarding whether Mr. Philemon Chelagat complied with the term of the letter of allotment, the witness testified that Mr. Philemon Chelagat indeed complied with the letter of allotment. In particular, the witness averred that the allottee wrote a letter of acceptance and also paid the standard premium. The witness added that the letter of acceptance was/ is dated 7th February 1995.

154. While still under cross examination, the witness testified that subsequently, a grant was prepared and issued in favour of Mr. Philemon Chelagat. The witness clarified that a copy of the grant that was issued has since been produced before the court.

155. Concerning the purpose for which the house was to be used, the witness testified that the grant was for residential purposes. In particular, the witness highlighted condition 5 on the face of the grant.

156. It was the further testimony of the witness that there was a request for surrender which was made on 23rd September 1967. However, the witness testified that the status of the file relating to the suit property remained quiet/ inactive between the 23rd September 1967 to October 1994. The witness added that the allotment in favor of Mr. Philemon Chelagat was made in October 1994.

157. As pertains to the regularity of the transfer of the suit property to Philemon Chelagat, the witness testified that the land was lawfully transferred to and registered in the name of Mr. Philemon Chelagat. In addition, the witness testified that the allottee thereafter transferred the land to a company. Nevertheless, the witness stated that the transfer instrument bears the same date as the grant.

158. Regarding the content of paragraph 19 of the witness statement, the witness testified that the said paragraph references a letter that was written to the commissioner of lands. However, the witness conceded that he has not attached/ availed a copy of the letter before the court.

159. It was the further testimony of the witness that the letter in question was written in 1969. Nevertheless, the witness testified that he does not know whether the Commissioner of lands responded to the letter in question. Be that as it may, the witness posited that the commissioner of land proceeded to and allocated the land to Philemon Chelagat.

160. While still under cross examination, the witness testified that the land in question reverted to the government. In addition, the witness averred that the land reverted to the government in accordance with the letter from East African Common Services. Besides, the witness clarified that it is the letter in question that supports the position that there was surrender.

161. Additionally, the witness testified that the letter was written on behalf of East Africa Common services. Nevertheless, the witness conceded that the letter before the court has not been signed. The witness further clarified that the letter before the court is a copy and not the original.

162. Regarding whether there was a surrender letter signed by East African Common Services, the witness testified that same has not come across such a surrender letter. However, the witness reiterated that the land was indeed surrendered. In any event, the witness testified that as pertains to a property that is not registered, a formal letter would suffice.

163. In response to a question whether a formal letter of surrender is provided for in law, the witness stated that same is not aware of the provision in law. However, the witness added that where there is a certificate of title, then a surrender instrument [Deed of Surrender] would be executed and lodged for registration. In respect of the instant matter, the witness pointed out that he did not have any deed of surrender.
164. Regarding the vesting order issued by the minister in respect of the suit property, the witness averred that he has come across the said vesting order. However, the witness posited that he does not recall when he came across the vesting order.
165. Concerning gazette Notices, the witness testified that once published, same are to be presented for registration by the designated parties. In addition, the witness testified that upon publication, the designated department will cause the gazette notice to be filed / placed in the parcel filed.
166. On re-examination, the witness testified that the process leading to the issuance of a new grant was duly followed in respect of the suit property. In particular, the witness referenced and reiterated the contents of paragraph 3 of his witness statement.
167. Upon being referred to paragraph 17 of the witness statement, the witness testified that East African Common Services responded to and averred that same had no objection to the surrender of the various properties including the suit property.

168. Regarding the question of surrender of land where a certificate of title has not been issued, the witness clarified that there would be no basis for execution and lodgment of a deed of surrender. In particular, the witness reiterated that a formal letter of surrender would suffice.
169. Regarding whether the suit property had been reserved, the witness testified that same did not come across any letter of reservation. In addition, the witness averred that there is a practice of reservation of public land as opposed to titling/ issuance of certificate of title.
170. Upon being referred to the letter dated 26th September 1967; the witness testified that the letter in question does not amount to reservation of land.
171. As pertains to whether Mr. Philemon Chelagat complied with the terms of the letter of allotment, the witness reaffirmed his earlier testimony that the allottee duly complied.
172. Regarding the status of the suit property, the witness testified that same was surrendered. Moreover, the witness added that upon surrender the land in question became unalienated government land.
173. It was the further testimony of the witness that East African Common Services are the ones who forwarded the letter. The witness reiterated that the letter came from East African Common Services.
174. The next witness who testified on behalf of the 2nd Defendant was Charles Kipkirui Ngetich. The witness testified as DW4.

175. It was the testimony of the witness [DW4] that same is currently the Deputy chief land registrar. The witness averred that he is at the moment attached to Kuria sub- county land registry in Migori county. The witness added that he has worked with the office of the chief land registrar for more than twenty [20] years. In this regard, the witness posited that he is therefore conversant with the procedures pertaining to land registration.

176. Additionally, the witness testified that in respect of the instant matter same has since recorded a witness statement dated 3rd April 2023; and which witness statement the witness sought to adopt and rely on as his evidence in chief. The witness stamen was thereafter adopted and constituted as the evidence in chief of the witness.

177. Furthermore, the witness adverted to the list and bundle of documents dated 3rd May 2023; containing 2 documents and thereafter, sought to produce the documents as exhibits before the court. The documents under reference were duly produced and admitted as exhibits D18 and D19 on behalf of the 2nd Defendant.

178. On cross examination by learned counsel for the 1st Defendant, the witness testified that he has produced two sets of documents before the court. The witness pointed out that he has produced a copy of the grant dated 1st November 1994 in favor of Philemon Chelagat. In addition, the witness averred that the grant in question was duly signed on 28th April 1997. The witness added that thereafter the suit property was transferred to and registered in the name of Rine hart limited.

179. It was the further testimony of the witness that the suit property is currently registered in the name of the 1st Defendant. Furthermore, the witness testified that he has brought to court a copy of the transfer instrument that was executed between Philemon Chelagat and Rine Hart limited.
180. Regarding whether the Plaintiff herein has any rights or interest over the suit property, the witness averred that the name of the Plaintiff does not appear in any document obtained in at the land registry. In addition, the witness averred that the Plaintiff has never been registered as the owner of the land.
181. Regarding whether the transfer of the suit property was fraudulent, the witness testified that he is not aware of any illegality attaching to the suit property.
182. On cross examination by learned counsel for the Plaintiff, the witness testified that he was employed by the Ministry of Land in April 2006. Nevertheless, the witness clarified that he was not an employee of the ministry of land at the time when the transactions affecting the suit property was undertaken. The witness added that his testimony is derived from the documents under his custody.
183. It was the further testimony of the witness that the suit property was not alienated government land at the time same was allocated to Mr Philemon Chelagat. Furthermore, the witness clarified that he is aware of the role of the chief land registrar under the land registration act 2012.

184. Moreover, the witness testified that the chief land registrar often delegate[s] duties to the county land registrars and subcounty land registrars. The witness added that the duty of the land registrars include: registration of registrable instruments; attending court hearings; conducting boundary proceedings and other statutory duties.

185. While still under cross examination, the witness testified that a deed file is also known as a deed envelop. In addition, the witness averred that a deed file contains a copy of the title; any other registrable instruments; receipts of payments made during the registration process and other related documents. Moreover, the witness averred that the suit property has a deed file. Besides, the witness clarified that the deed file in respect of the suit property has three documents. Thereafter, the witness enumerated the documents as; copy of the original title; and copies of two transfer instruments.

186. As concerns a correspondence file, the witness testified that a correspondents file is ordinarily under the custody of the directorate of land administration. The witness added that a correspondence file contains: copy of the letter of allotment; copy of the part development plan; copy of the valuation report from the government valuer/ director of valuation; copy of receipt of payment of conveyance fees; survey fees; stamp duty and miscellaneous.

187. While still under cross examination, the witness testified that same has availed a copy of the certificate of tile which was executed by the commissioner of lands. In addition, the witness testified that the certificate of title was thereafter registered by the chief land registrar. In any event, the witness reiterated that the chief land registrar undertakes registration of registrable instruments.

188. Regarding whether the suit property could be sold/ charged without the consent of the commissioner of lands, the witness averred that same could not be sold and or charged without the consent of the commissioner of lands[now defunct]. In particular, the witness testified that the consent was a mandatory requirement. Nevertheless, the witness conceded that same has not tendered / produced a copy of the consent before the court.
189. Responding to a question as to special condition 9 in the grant; the witness averred that the office of the chief land registrar does not concern itself with condition 9 and special condition 2 at the foot of the grant. Nevertheless, the witness posited that a rates clearance certificate was a requirement before the transaction/ transfer of the suit property could be effected. Nevertheless, the witness conceded that he has not produced any copy of the rates clearance certificate before the court.
190. As pertains to the registration of the transfer instrument, the witness testified that the transfer instrument was duly executed and same was dated the 28th April 1997. The witness added that the transfer was registered on 30th April 1997. Moreover, the witness clarified that even though the transfer instrument was registered after 2 days of execution, there was nothing irregular or fraudulent about such registration.
191. Regarding the transfer of the suit property to the 1st Defendant, the witness testified that the suit property was duly transferred to and in favor of the 1st Defendant. However, the witness added that he has not produced a copy of the transfer instrument in favor of the 1st Defendant. Nevertheless, the witness reiterated that the transfer of the suit property in favor of the 1st Defendant was procedural; lawful ; legal ; and valid.

192. Upon being referred to the vesting order [exhibit P17], the witness averred that same has never seen the vesting order. Nevertheless, the witness clarified that the vesting order can be issued. In addition, the witness posited that the this is the first vesting order that same has seen. Furthermore, the witness averred that vesting orders are not registerable instruments. Instructively, the witness posited that the ministry of land/the office of the chief land registrar has no register for registration of vesting orders.

193. Regarding surrender, the witness testified that a surrender document would have to be prepared by an advocate; same would have to be signed; thereafter, the surrender instruments would be lodged for purposes of registration. Additionally, the witness testified that there is a booking form for surrender. In this regard, the witness averred that the surrender instruments would have to be booked like any other registrable instrument.

194. In respect of whether same has come across a deed of surrender, the witness testified that same has never seen or come across a deed of surrender in respect of the instant property. Regarding the letter dated 29.09.1967 and which was produced by the director of land administration, the witness averred that same has never seen the letter.

195. While still under cross examination, the witness testified that most government lands, have been titled. Nevertheless, it was the testimony of the witness that some of the government lands have been reserved on the basis of part development plans [PDPs]. In addition, the witness averred that historically, land would be reserved by way of part development lands.

196. Concerning the custody of the part development plans, the witness testified that the said plans are ordinally kept by/under the custody of the

directorate of physical planning and the County Governments. Moreover, the witness averred that developments approvals would be channeled to the directorate of physical planning.

197. Upon being referred to Plaintiff's exhibit P10 [caveat emptors] and the witness averred that he has never seen nor come across the said documents. Nevertheless, the witness added that he often reads newspaper.

198. The last witness who testified on behalf of the 2nd Defendant was Habiba Godana. The witness testified as DW5.

199. It was the testimony of the witness that same works for the Ministry of Lands, Public works, Housing and Urban Development. In addition, the witness testified that she is a registered and qualified valuer. Furthermore, the witness averred that she has worked the directorate of valuation for more than five years. To this end, the witness posited that she is therefore conversant with the matters pertaining to the valuation.

200. Additionally, the witness testified that same is familiar with facts of this case. In particular, the witness averred that she received instructions to value the suit property. Besides, the witness posited that upon receipts of the instructions, same proceeded to and valued the suit property.

201. It was the further testimony of the witness that after undertaking the valuation, same proceeded to and prepared a valuation report dated the 31/10/2023; and which valuation report the witness sought to produce before the court. In the absence of any objection, the valuation report dated 31/10/2023 was tendered and produced in court as exhibit D20 on behalf of the 2nd Defendant.

202. On cross examination by learned counsel for the 1st Defendant, the witness testified that the valuation report under reference was forwarded to the honorable Attorney General. Moreover, the witness averred that the valuation report was in respect of the suit property. In addition, the witness testified that the valuation report has captured the terms of the reference; the location of the suit property; the acreage of the suit property; and the purpose for the valuation.

203. It was the further testimony of the witness that after undertaking the valuation exercise, she arrived at the market value of the property. The witness indicated that the value arrived at was Kshs. 219,000,000/= only. Furthermore, the witness testified that she deployed the comparable approach in coming to the conclusion pertaining to the value.

204. On cross examination by learned counsel for the Plaintiff, the witness testified that arising from the valuation exercise, she prepared a valuation report. In addition, the witness testified that the valuation report, was duly signed by herself and Ann Kamau; who is the assistant director of valuation. Besides, the witness posited that the valuation report has also been signed by Jacinta Mutua.

205. While still under cross examination, the witness testified that the valuation report has referenced/annexed various appendices. Nevertheless, the witness clarified that the appendices have not been presented/availed to court.

206. It was the further testimony of the witness that before preparing the valuation report, she inspected the suit property and thereafter arrived at various conclusions. The witness averred that she pointed out that the suit

property is currently being used for commercial purposes. However, the witness clarified that she did not see or come across the change of user.

207. In addition, the witness testified that it is not possible to conduct a valuation without visiting/inspecting the property. On her part, the witness testified that she inspected the suit property. Besides, the witness averred that she also obtained an official search in respect of the suit property. However, the witness conceded that she has not tendered a copy of the official search before the court.

208. Regarding the methodology deployed, the witness testified that she deployed the comparable approach. In addition, the witness posited that she has mentioned the approach in the body of the valuation report. Nevertheless, the witness conceded that same has not availed evidence of the comparable[s] that were used/relied upon.

209. As pertains to historical valuation, the witness averred that she did not rely on any historical valuation report, in the course of preparing the current valuation report.

210. With the forgoing testimony, the case for the 2nd Defendant was closed.

211. Following the close of the hearing, the advocates for the parties sought time to file and exchange written submissions. To this end, the court proceeded to and issued directions pertaining to the filing and exchange of the submissions. Suffice it to state, that the directions as pertains to the filing and exchange of written submissions were given on the 21/07/2025.

212. Nevertheless, the advocates for the parties failed to comply with the timelines that were set by the court. The subject matter was thereafter

mentioned on more than Three [3] occasions, in an endeavor to discern compliance. In particular, the matter herein came up for mention on the 03.02.2026, on which date it transpired that learned counsel for the Plaintiff had just filed written submission dated the 30.01.2026. On the contrary, the Defendant[s] had not filed written submissions.

213. Arising from the forgoing, the court took a strict position and directed that the parties either do file written submissions on or before the 12.02.2026 or the matter does proceed to judgment. Moreover, the court directed that any default to file written submissions by the Defendants shall be tantamount to forfeiture of the rights to file submissions. In addition, the court also set the date for delivery of the judgment.

214. The Plaintiff file written submissions, dated the 30.01.2026 and wherein same has highlighted Three [3] key issues. The issues highlighted by the Plaintiff are: Whether the allocation of the suit property to Mr. Philemon Chelagat was done legally and procedurally; Whether the 1st Defendant has a good title to the suit property; and Whether the Plaintiff is entitled to reliefs sought or otherwise.

215. The first Defendant filed written submission dated 12.02.2026 and wherein same has highlighted diverse legal issues. The legal issues canvassed on behalf of the 1st Defendant are: Whether this Honourable court has jurisdiction to hear and determine the subject suit; Whether the land was public or private land at the time of the allotment; Whether the Plaintiff is estopped from claiming the suit property; Whether the commissioner of land [now defunct] had legal authority to issue a grant in favour of Philemon Chalegat ; Whether the minister of finance had the requisite authority to make a vesting order against public land; Whether the 1st Defendant acquired a good title for value without notice; and Whether the Plaintiff is entitled to

damages sought, including *mesne profits*, general damages for trespass, loss of business opportunity and advertisement expenses.

216. The second Defendant [the Hon Attorney General] filed written submissions dated the 12.02.2026 and wherein same has highlighted two [2] key issues. The issues highlighted and canvassed by the Attorney General are: Whether the Plaintiff herein is the lawful and legitimate owner of the suit owner and if so, whether the Plaintiff is entitled to exclusive occupation thereof; and Whether the Plaintiff is entitled to the reliefs sought at the foot of the plaint.

217. It suffices to state that the submissions referenced above, have been accompanied by voluminous decisions/case law. On behalf of the Plaintiff, the case law filed run into 261 pages. The 1st Defendant filed case law running into 1343 pages. The Honorable Attorney General was not left behind. Same filed case law running into 843 pages. The sum total of the case law cited and referenced is un-paralleled. Nevertheless, this is testament to the significance of the matter to the parties; and perhaps the complexity of the Issue[s] involved.

218. I have reviewed the pleadings filed by/on behalf of the parties; the evidence tendered [*both oral and documentary*], the written submissions filed, the case law cited and upon consideration of the relevant law, I come to the conclusion that the determination of the subject disputes turns on following key issues. The issues are: **Whether the Plaintiff's suit is prohibited by the limitation of actions act/ statute barred; whether the suit property was duly surrendered back to the Government and if so, whether same became unalienated Government land; whether the**

allocation and ultimate registration of the suit property in favour of Philemon Chelagat was lawful and valid; Whether the Plaintiff has any lawful rights to and in respect of the suit property or otherwise; whether the transfer and registration of the suit property in favour of the 1st Defendant was illegal and fraudulent or otherwise; whether the 1st Defendant is a Bonafide purchaser for value or otherwise; and what reliefs [if at all] ought to issue.

219. Regarding the first issue, learned counsel for the 1st Defendant has contended that the Plaintiff's suit is statute barred and thus the court is divested of the requisite jurisdiction to entertain and adjudicate upon the issue in dispute. In particular, it has been contended that Plaintiff's suit is prohibited by dint of provisions of **section 4 and 7 of the Limitation of Actions Act, Chapter 22 laws of Kenya.**

220. The learned counsel for the 1st Defendant has submitted the Plaintiff's suit is predicated on fraud, which is regulated by the provisions of Section 4 as read together with **sections 26 and 27 of the Limitations of Actions Act, Chapter 22, Laws of Kenya.** In particular, it has been submitted that the Plaintiff herein was privy to and knowledgeable of the fact that the suit property was registered in the name of the 1st Defendant from as earlier as the year 2003. To this end, learned counsel for the 1st Defendant has invited the attention of the court to the Complaint that was made to the Ethics and Anti-Corruption Commission; the Ndungu Land Commission and National Land Commission, respectively.

221. Additionally, it has been submitted that insofar as the Plaintiff knew of the alleged fraud, same was therefore obligated to file and commence the

suit within 3 years *wef* 2003. In this regard, it has been contended that the suit ought to have been filed on or before the year 2007.

222. As pertains to the aspect touching on and concerning recovery of land [if at all], it has been submitted that the suit for recovery of land ought to be filed within 12 years from the date when the cause of action arose or when the claimant discovered the illegal activities complained of. In addition, it has been submitted that the Plaintiff's suit on account of recovery of the suit property, ought to have been filed on or before the year 2015. To this end, the court has been invited to taken cognizance of the provisions of **Section 7 of the Limitation of Actions Act.**

223. Other than the foregoing, learned counsel for the 1st Defendant has contended that the court ought to take judicial notice of the Ndungu Land Commission report and in particular, when the said report was released to the public. Learned counsel has thereafter cited and referenced the provisions of **sections 59 and 60 of the Evidence Act, Chapter 80 Laws of Kenya**, which expound on matters that the court ought to take judicial notice of.

224. The 1st Defendant has thereafter cited and referenced various decisions including **Wamwere and 5 Others versus Attorney General [2023] KESC; Margaret Wairimu Magugu versus Karura Investments Limited & 4 others[2019] KECA 653 ; Iga versus Makerere university [1972] E A 65; Mwalimu and 6 Others versus Halal and another [2025] KECA and Freedom Limited versus Mbarak [2024] KESC**, respectively.

225. The learned counsel for the Plaintiff did not file any rejoinder submissions and thus same has not addressed the issue of Limitation. Similarly, learned counsel for the 2nd Defendant [The Honourable Attorney General] has also not addressed the question of limitation and its legal implications as pertains to the subject matter. Nevertheless, it is not lost on me that the court is still enjoined to address the question and render a finding thereon.

226. It is common ground that learned counsel for the 1st Defendant filed a notice for preliminary objection dated 04.10.2022 and wherein learned counsel for the 1st Defendant contended that the Plaintiff's suit was *inter alia* statute barred on the basis of the provision of section 4 and 7 of the Limitation of Actions Act. The preliminary objection was thereafter canvassed and disposed of *vide* ruling rendered on the 20.12.2022.

227. The court found and held that the preliminary objection was *devoid* of merits. Suffice it to state that the court dismissed the preliminary objection. In the course of the ruling, the court made various observations, whose details are captured at the foot of paragraph, 57, 58, 59, 60, 61, 62 and 63 of the said Ruling. In particular, the court found that the contention as pertains to limitation, was misconceived and legally untenable.

228. Following the delivery of the ruling under reference, the 1st Defendant or such other party, who felt aggrieved was at liberty to mount/lodge an appeal. However, it appears that no appeal was ever taken against the ruling and the decision of the court. To my mind, the 1st Defendant cannot now revert back

to this same court and to canvass the issue pertaining to the question of limitation. Quite clearly, the issue of limitation is Res judicata and thus cannot be revisited.

229. Moreover, the invitation to this court to re-engage with the issue [question] of limitation is tantamount to an invite to sit on appeal on own decision. Such invitation shall amount to an abuse of the due process of the court.

230. In my humble view, the issue of limitation is water under the bridge. Moreover, any endeavor to revisit the issue, shall constitute a disguised attempt to persuade this court to sit on appeal on its own decision. Such an endeavor is antithetical to the rule of law and it prone to create judicial absurdity.

231. The legal implication[s] of the doctrine of res judicata has been the subject of various court decisions. Nevertheless, it is apposite to take cognizance of the holding of the Court of Appeal in the case of , **Independent Electoral and Boundaries Commission v Kiai & 5 others [2017] KECA 477 (KLR)**. The court highlighted the ingredients that underpin the doctrine. In addition, the court also underscored the necessity to satisfy the elements conjunctively and not otherwise.

232. The court stated thus.

74. Thus, *for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all*

be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a)The suit or issue was directly and substantially in issue in the former suit.

(b)That former suit was between the same parties or parties under whom they or any of them claim.

(c)Those parties were litigating under the same title.

(d)The issue was heard and finally determined in the former suit.

(e)The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

75.The learned Judges were fully aware and applied their minds to these elements when, applying this Court’s decision in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR they rendered the elements as;

(a)the former judgment or order must be final;

(b)the judgment or order must be on merits;

(c)it must have been rendered by a court having jurisdiction over the subject matter and the parties; and

(d)there must be between the first and the second action identity of parties, of subject matter and cause of action.”

76.The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The

foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

233. Without belaboring the point, it is my considered finding and holding that the issue of the Plaintiff's Suit being barred by the **Limitation of Actions Act, Chapter 22, Laws of Kenya**; which is being regurgitated by the 1st Defendant is *res judicata*.

234. Moreover, I find and hold that the propagation of the said Issue of Limitation constitutes a subtle, but mischievous endeavor to invite this Court to sit on appeal on its own Ruling. Such an invitation is unwarranted. It is a Legal anathema. It must be eschewed.

235. Consequently, and in this regard, the contention by the 1st Defendant that the Suit is barred/ prohibited by Limitation must fail.

236. The next issue that falls for consideration is the question/issue of whether the suit property was surrendered back to the Government; and if so, whether the suit property became un alienated Government land under the provisions of the Government Land Act, Chapter 280, Laws of Kenya [*now repealed*].

237. The Plaintiff herein contended that what constitutes the suit property, was reserved for use by the East African Posts and Telecommunications [EAP& TC]. In addition, it was contended that

insofar as the suit property had been reserved for use by the said corporation the suit property ceased to be available for allocation or alienation. Simply put, the Plaintiff took the position that the suit property was alienated government land and thus fell outside the purview of the provisions of Section 2 of the Government Land Act.

238. On the other hand, the 1st Defendant posited that the suit property was un alienated government land and thus same was available for allocation. Furthermore, it was contended that the suit property was lawfully allocated to and in favour of Mr. Philemon Chelagat.

239. On behalf of the 2nd Defendant, it was contended that though the suit property was initially reserved to the East African Posts and Telecommunication, the suit property was surrendered to the government of the Republic of Kenya and that upon surrender, the suit property became un alienated government land. In addition, it was posited that insofar as the suit property was un alienated government land, same was therefore available to allocation.

240. In an endeavor to determine whether or not the suit property was surrendered and thereafter became un alienated government land [if at all], it is imperative to take cognizance of the evidence of the DW3 [Gordon Ochieng Odeka]. The said witness testified before the court and intimated to the court that same is currently the director of land administration. In addition, the witness testified that by virtue of his office, same is privy to and conversant with the facts of the suit.

241. While under cross examination by learned counsel for the 1st Defendant, the witness intimated that the suit property had previously been reserved for the use of East African Posts and Telecommunication. However, the witness clarified that the suit property was surrendered back to the government.

242. To appreciate the crux of the testimony of DW3, it is imperative to reproduce the salient aspects thereof.

243. The witness testified thus:

“ I do wish to state that I have detailed the process leading to the alienation of the suit property. I have also referenced a letter that was written by the East African Common Services to the Commissioner of Lands. The letter under reference related to the surrender of the land back to the government. I have also referred to a letter at page 8 of the list and bundle of documents and I wish to state that the letter captured the suit property as one of the properties to be surrendered.”

244. Additionally, and while still under cross examination by learned counsel for the 1st Defendant, the witness stated thus:

“ The suit property herein did not have a title. In the absence of a title/grant there was no need to prepare a deed of surrender. I do confirm that the suit property was duly surrendered.”

245. On cross examination by learned counsel for the Plaintiff, DW3 is on record stating as hereunder:

“ Referred to paragraph 19 of the witness statement and the witness states that same refers to a letter that was written to the commissioner of lands. I do wish to state that

I have not attached the said letter before the court. Nevertheless, I wish to confirm that the letter was written in 1969. I do not know whether the commissioner of land responded to the letter in question. I do confirm, that the commissioner of land proceeded to and allocated the land to Philemon Chelagat. I wish to add that by that time, the land had reverted to the government. The property under reference reverted back to the government in accordance with the letter from East African Common Services. It is the letter in question which supports the position that there was surrender. The letter was written by/on behalf of East African Common Services Limited.”

246. Dw3 proceeded while still under cross examination by learned counsel for the Plaintiff and stated thus:

“ I do wish to state that the letter before the court is a copy and not the original. I did not see the surrender letter signed on behalf of East African Common Services. I do confirm that the land was surrendered. I wish to state that for a property is not registered, a formal letter would suffice.”

247. My understanding of the testimony of DW3 is to the effect that the suit property had been allocated to or reserved for East African Common Services and by extension East African Post and Telecommunication. However, the witness posits that the land in question was surrendered back to the Government by the East African Common Services on the basis of a letter, which included inter alia the suit property.

248. Furthermore, what I hear the witness to be stating is that where the land has not been titled [no certificate of title issued] then such land can be surrendered back to the government informally on the basis of a letter. In addition, I hear the witness to be stating that where no certificate of title has been issued, then no deed of surrender would be required.

249. The law as pertains to surrender was previously provided for under the provisions of **Section 44 of the Land Registration Act, Chapter 281, Laws of Kenya** [*now repealed*].

250. The said provisions stipulated thus:

44 (1) Whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word “surrendered”, with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed

memorandum shall be sufficient evidence that the lease has been so surrendered.”

251. The provisions under reference clearly stipulate the manner in which surrender is to be executed and perfected. Pertinently, the provision underscores the necessity to execute a deed of surrender and thereafter to lodge same for registration. The position denotes the *de jure* surrender. However, a question has often arisen as to whether the informal return of the title documents or instruments of title, would suffice as surrender in the absence of a formal and duly executed deed of surrender.

252. The forgoing question was addressed and answered in the case of **Chief Land Registrar & 5 others v Koech & 3 others [2018] KECA 27 (KLR)**; where the Court of Appeal referenced the decision in the case of **Mwinyi Hamisi Appeal vs. Attorney General, Civil Appeal No. 125 of 1997 (Tunoi, Shah & Bosire JJA)** and stated thus:

*“The land in question was held under the Registration of Titles Act, Cap 281, Laws of Kenya. Section 44 of the Act requires that surrender of land leased by the Government to persons to be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender. **But Section 44 does not envisage a situation whereby lack of such registration would make null and void de facto surrenders. From the evidence before the superior court, there can be no doubt that Captain Townsend and his three co-owners had factually surrendered Plot No. 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr. Hamisi any title to the suit land.....The Commissioner had de facto control of Plot No. 334 and if he proceeded, as he did, to allot the land to***

other persons...., their titles cannot be impugned except as provided for in Section 24 of the Act.....It is on these observations that, in our view, Mr. Hamisi Ali’s claim to the title to the suit land fails.”

86.Guided by the dicta in *Mwinyi Hamisi Appeal vs. Attorney General*, Civil Appeal No. 125 of 1997, it is our considered view that the entry in the Register that Eldoret Municipality Block 15/1 measuring 666.41 was surrendered to the Government ipso jure extinguished all rights and interest of the then registered proprietors over the suit property. We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.”

253. The concept of surrender was similarly highlighted by the Supreme Court of Kenya [the apex court] in the case of **Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others** [2023] KESC 105 (KLR).

254. The court stated thus:

“[Halsburys Laws of England](#) volume 27 at paragraph 444 also notes as follows on ‘surrender’：“A surrender is the yielding up of the term of lease to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion.”

125.Robert Megarry & William Wade, [The Law of Real Property](#) (supra.) page 856 notes that-“Merger is the converse of surrender. A surrender occurs where the landlord acquires the lease; merger occurs where the tenant acquires the reversion. The underlying principle is the same in both; the lease is absorbed by the reversion and destroyed.”

126. The doctrine of merger as codified in section 44 of the [RLA](#) envisaged that as all inferior estates and interests in land are derived out of the fee simple, therefore, whenever a particular estate or limited interest in land vests in him who has the fee-simple of the same land, such particular estate or limited interest is immediately drowned in the fee. Indeed, this is the essence of the principle omne majus continent in se minus, meaning the greater contains or embraces the less. Therefore, there was nothing untoward in Lonrho Agribusiness getting a freehold title in reversion under the RLA.”

255. To my mind, the letter by and on behalf of the East African Common Services which surrendered the suit property back to the government constituted sufficient surrender. It is important to highlight that at the time of the *de facto* surrender, the suit property had neither been registered nor issued with a certificate of title. To this end, no deed of surrender could have been envisaged; executed; or registered. Clearly, there was no register wherein the deed of surrender would have been endorsed.

256. Moreover, it is important to underscore that even though the Plaintiff had contended that the land in question had been reserved and that the same was never surrendered, the Plaintiff herein failed to rebut or controvert the evidence that was tendered by DW3. In any event, it is not lost on me that the Plaintiff herein did not call any witness from the Ministry of Lands or the office of the Chief Land registrar, to impeach the testimony of DW3.

257. The failure by the Plaintiff to call someone [a witness] from the ministry of land or the office of the Chief Land Registrar, was fatal. In the case of **Philemon L. Wambia v Gaitano Lusitsa Mukofu & 2 others [2019] KECA 157 (KLR)** the Court of Appeal considered the importance of such a witness from the Ministry of Lands.

258. The Court stated as hereunder:

40...As the trial court correctly stated, the appellant ought to have called a witness from the Nairobi Lands Office where he claimed he obtained the letter of allotment. Failure on the part of the appellant to call a witness from the lands office means that he did not prove the counter claim on a balance of probabilities.

259. Having found and held that the suit property [or what now constitutes the suit property] was duly surrendered, the next question that falls for consideration is the legal implications of the surrender. I beg to state that by surrendering the suit property back to the government, same became un alienated government land. In any event, no evidence was tendered that post surrender, the land in question was reserved for any government or public purpose.

260. It suffices to state that DW3 tendered evidence to demonstrate the manner in which public land would be reserved. Notably, and in particular, DW3 stated as hereunder:

“ I do confirm that my directorate would ordinarily deal with reservation of public land. The process of reservation of public land would require the preparation of part development plan; survey; and thereafter a letter for reservation of the land. The letter for reservation would have been generated by the commissioner of lands. I am aware that government land could be alienated vide reservation.’

261. The Plaintiff had posited that the land in question had been reserved. In particular, PW1 testified that the land had been reserved for East African Post and Telecommunication; and that on basis of reservation the land was therefore not un alienated government land.

262. PW1 ventured forward and stated that the land stood alienated. Furthermore, the position was supported by One Evans Maghas [PW3]. However, it is not lost on me that despite the contention that the land was

reserved, no evidence was tendered and or placed before the court to demonstrate any such reservation. In any event, the aspect touching on and concerning allotment of the Land to East African Post and Telecommunication, stood superseded by the surrender.

263. As pertains to the question whether the suit land was reserved PW1 was ambivalent in his testimony. On one hand, the witness posited that the land was reserved. However, while under cross examination by learned counsel for the 2nd Defendant [The Honourable Attorney general], the witness stated as hereunder:

“ I also do state that the suit property was alienated for public use. I do not have any evidence to prove /show that the land in question was reserved for public use or purpose. I do not know whether the land was alienated and designed for public use. I do not know whether the land reverted back to the government. I do confirm that the land in question was public land.”

264. It is the Plaintiff who was propagating the position that the suit property stood alienated on the basis of reservation. It was therefore incumbent upon the Plaintiff to place before the court the evidence of such reservation. Suffice it to state that where public land is reserved, then such land cease[s] to be un alienated land. It becomes alienated Land and thus not available.

265. Back to the legal implications. I have already pointed out that the suit land was surrendered back to the government. Similarly, I have found and held that after the surrender, the land was never reserved for any public use or purpose. For good measure, DW3 was apt on the process and procedures that guide reservation of public land.

266. In the premises, it is my conclusion and considered view that the suit property upon surrender, became un alienated government land. The Land therefore fell within the purview of the Commissioner of Lands and could thus be allocated, subject to compliance with the Law that guided allocation, or alienation, at the time in question.

267. What constitutes unalienated government land was expounded on in the case **Frann Investment Limited v Kenya Anti-Corruption Commission & 6 others [2024] KECA 714 (KLR)**.

268. The Court of Appeal stated as hereunder:

“In this respect, section 2 of the repealed [Government Lands Act](#) defined “unalienated Government land” to mean Government land which was not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment. Government land in this context is land that was held by government ministries, departments, statutory bodies and agencies, and land which has not been registered. Section 3 of the then Physical Planning Act defines un-alienated Government land in similar terms. A similar definition is now given to public land under Article 62 of the [Constitution](#), which includes

- a. land which at the effective date was unalienated government land as defined by an Act of Parliament in force at the effective date;*
- b. land lawfully held, used or occupied by any State organ, except any such land that is occupied by the State organ as lessee under a private lease...”*

269. Where the land in question constituted un alienated Government land in terms of **Section 2 of the Government Land Act Chapter 280, Laws of Kenya** [now repealed] such land would be available for allocation or alienation [whichever is applicable]. The foregoing position was underscored by the Supreme Court in the case of **Kiluwa Limited & another v Business Liaison Company Limited & 3 others** [2021] KESC 37 (KLR).

270. The Court stated as hereunder:

*55. A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article 62 of the [Constitution](#) and the Government Lands Act (repealed). This notwithstanding the fact that, the expression “Public Land” only came to the fore with the promulgation of the 2010 Constitution. What article 62 of the [Constitution](#) does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands. Therefore, it is incorrect for the respondents to assert that the lands in question were un-alienated government land but not public land. It is even more inaccurate to argue that the said parcels had never been public land. **Un-alienated government land remains public until it is privatized through allocation to individuals or other private entities.***

271. My answer to issue number two is *twofold*. Firstly, what constitutes the suit property was surrendered back to the government by and the instance of East African Common Services. Lack of a deed of surrender does not negate the fact that the suit property was surrendered.
272. Secondly, upon the surrender, the suit property became unalienated government land and thus same was available to allocation subject to the provisions of the Government Land Act, Chapter 280, Laws Of Kenya [*now repealed*].
273. Turning to third issue, namely; whether the allocation and ultimate registration of the suit property in favour of Philemon Chelgat was lawful and valid. To start with, DW3 testified that what constitute[s] the suit land was upon surrender allocated to Mr. Philemon Chelgat. The witness posited that the said allottee wrote a letter addressed to the Commissioner of Land and sought to be allocated the suit property.
274. While under cross examination by learned counsel for the 1st Defendant, DW3 stated thus:

I have also availed a copy of the letter page 17 of the list and bundle of documents and the letter was authored by one Mr. Philemon Chalagat. The letter was written to the commissioner of Lands. The letter has notations. There is a number namely 34469. The significance of the number is that it shows the correspondence file number for the property. I have also seen the contents of the letter under reference. I do wish to state that the letter was a request for allocation of an alternative plot. The application relates to the allocation of the suit property. The

letter in question is dated 18.10.1994. I do confirm that the commissioner issued a letter of allotment. The letter of allotment was in respect of LR Number 209 /3335. The letter of allotment indicates the stand premium that was to be paid.”

275. It was the further testimony of DW3 that the allottee [Mr. Philemon Chalagat] duly complied with the terms of the letter of allotment.

276. This is what the witness said:

“ The allottee thereafter proceeded to and accepted the letter of allotment. The allottee also proceeded to and paid the stand premium. I do confirm that the commissioner of lands thereafter issued a revenue receipt to confirm acknowledgement. I do confirm that a grant was issued in favour of Philemon Chelagat.

277. Additionally, DW3 is on record stating that the commissioner of land generated a letter directing the Directorate of Physical Planning to prepare a part development plan. Moreover, the witness posited that a part development plan was indeed prepared and thereafter approved.

278. For ease of reference DW3 stated thus:

“I have also availed to the court a copy of the letter from the commissioner of lands requesting for the preparation of the part development plan. The letter was addressed to the director of physical planning. I do confirm that a part development plan was prepared. The allotment of the land in question was procedural and lawful.”

279. What I hear the witness to be stating is that there was an application for allotment of the suit property. The application was addressed to the commissioner of lands. The commissioner of lands acted upon the application letter. The commissioner of lands requested for the preparation of a part development plan. The part development plan was duly prepared and approved. The commissioner of lands generated and issued a letter of allotment. The letter of allotment was duly accepted. The allottee paid the standard premium. Thereafter a grant was prepared, signed, executed and ultimately registered.

280. In my humble view, the testimony of the DW3, and which testimony was never controverted, demonstrates compliance with the procedures that underpinned the process pertaining to alienation/allocation of what was previously un alienated government land. The process and procedure to be followed in allocation of un alienated government land was underscored in the case of **Dina Management Ltd v County Government of Mombasa & 5 others [2023] KESC 30 (KLR)**.

281. The court stated thus:

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 unalienated 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.

282. Before concluding on this issue, I beg to revert to the testimony of DW3. The witness is on record stating thus:

“ I do confirm that the process of obtaining a new grant was duly followed in respect of subject property”.

283. On his part DW4 [Charles Kipkurui Ngetich] testified and stated thus:

“ I do confirm that the grant was registered on the 28 of the April 1997. The grant was registered in the name of Philemon Chelagat. I have also produced the transfer instruments. The transfer instrument is dated the 28th of April, 1997. The transfer is dated before registration. The transfer was legal and valid.”

284. Flowing from the foregoing, it is my finding and holding that the allocation of the suit property to Philemon Chelagat was procedural; lawful; and valid. Further, and in any event, no evidence was tendered by the Plaintiff to negate the evidence of DW3 and DW4, as pertains to the validity of the process underpinning the allocation and ultimate registration of the suit property in favour of the Mr. Philemon Chelagat.

285. The next issue that falls for determination is whether the transfer and registration of the suit property in favor of the 1st Defendant was illegal and fraudulent or otherwise. The Plaintiff herein has contended that the suit property lawfully belonged to East African Post and telecommunication [now defunct] and that thereafter the suit property devolved to and was transmitted in favor of Kenya post and telecommunication commission [now defunct]. In addition, it has been posited that the assets of Kenya post and telecommunication were the subject of a vesting order *vide* legal notice 131 of 14th September 2001.

286. According to the Plaintiff, the suit property was alienated public land and same was therefore not available for alienation or allocation. Moreover, it has been contended that the vesting order vested the suit property in favor of the Plaintiff.

287. Premised in the foregoing, it has been contended that the transfer and registration of the suit property in favor of the 1st Defendant is therefore vitiated by fraud and illegality. Thereafter, the Plaintiff has enumerated particulars of fraud and illegality.

288. Having highlighted and enumerated the various particulars of fraud and illegality, it was incumbent upon the Plaintiff to place before the court cogent, concrete, compelling and credible evidence. However, it is not lost on me that PW1 testified before the court that the Plaintiff herein was only incorporated and registered on 1st July 1997. To this end, there is no gainsaying that the Plaintiff could not have been consulted prior to and before the allocation of the suit property to Philemon Chelagat and the subsequent transfer of the suit property to the 1st Defendant.

289. Additionally, PW1 testified that even though the Plaintiff has contended that the suit property was illegally and fraudulently registered in the name of the 1st Defendant, the witness did not tender any evidence to underpin the fraud/ illegality.

290. While under cross examination by learned counsel for the 2nd Defendant[the Hon Attorney General] PW1 stated thus:

*‘I do confirm that the Plaintiff made various efforts to register the vesting order. However, I don’t have any evidence of any effort that were made by the Plaintiff. **I don’t have any evidence of any fraud and illegality against the 1st Defendant.**’*

291. Other than the foregoing, PW1 is also on record contending that the transfer and registration of the suit property in favor of the 1st Defendant was part of a corrupt scheme. However, the witness conceded that no director of the 1st Defendant has ever been charged with an offence of corruption or fraud.

292. The witness stated as hereunder:-

“ I have stated that the land was registered in favor of the 1st Defendant as part of a corrupt scheme. I don’t have any evidence to confirm the corrupt scheme that I have alluded to.”

293. It is common ground that whosoever impleads and propagates the plea of fraud is called upon to plead and particularize fraud. Importantly, the claimant who espouses the plea of fraud must thereafter prove/ establish fraud to the requisite standard, namely; the intermediate standard. This is the standard that lies in between the balance of probability and beyond reasonable doubt.

294. The law as pertains to proof of fraud, is now well settled. Nevertheless, it suffices to reference the holding in the case of ***Kuria Kiarie & 2 others v Sammy Magera [2018] KECA 467 (KLR)***.

295. The Court of Appeal stated thus:-

25. The next and only other issue is fraud. The law is clear and we take it from the case of Vijay Morjaria vs Nansingh Madhusingh Darbar & Another [2000] eKLR, where *Tunoi, JA. (as he then was)* 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 distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.” [Emphasis added].

The same procedure goes for allegations of misrepresentation and illegality. See *Order 2 Rule 4 of the Civil Procedure Rules*.

26. As regards the standard of proof, this Court in the case of Kinyanjui Kamau vs George Kamau [2015] eKLR expressed itself as follows;-

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

reasonable doubt as in criminal cases...”...In cases where fraud is alleged, it is not enough to simply infer fraud from the facts.”

296. Recently the Court of Appeal revisited the law as pertains to proof of fraud and the applicable standard in the case of *Doshi v Chemutut & 7 others [2025] KECA 776 (KLR)*.

297. The Court highlighted the principle in the following manner. *In the often-cited decision of this Court in the case of Vijay Morjaria v Nansingh Madhusingh Dabar & Another [2000] eKLR, Tunoi, JA. stated that:*

“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.”

42 .In the same vein, the Court in the case of Kinyanjui Kamau v George Kamau Njoroje [2015] eKLR reiterated that:“It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] 1 KLR (G&F) 742 wherein the Court stated that:“...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of

probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases...”

298. Proof of fraud requires direct and incriminating evidence. Where the evidence is circumstantial, it must be plausible; cogent; concrete; compelling; and credible. However, proof of fraud must not be left to be deduced from inference, conjecture, speculation or hypothesis. It must also not be left to assumptions.

299. Be that as it may, the Plaintiff is before the court and same is merely relying on supposition and speculation. Notably, the Plaintiff would want the court to believe that the suit property was reserved and was therefore not available. However, beyond the bare statement/assertion[s], no evidence was provided. [*See the holding of the Court of Appeal in the Case of James Muniu Mucheru versus National Bank of Kenya Limited [2019] eKLR-on the issue of proof on the basis of credible Evidence; and not bare assertions*].

300. On the contrary, the 1st Defendant tendered evidence through its accountant namely; Julius Mwema Kabita. The witness testified that the 1st Defendant undertook due diligence over and in respect of the suit property prior to and before purchasing the same. In particular, the witness stated as hereunder while under cross examination by learned counsel for the 2nd Defendant:-

“I do confirm that crucial properties limited is holding the original grant in respect of the suit property. Referred to page 40 of the 1st Defendant’s bundle of documents and the witness

states that the document is the official search. I wish to confirm that the said official search was issued on the 5th of August 2022. The official search does not indicate any encumbrance or at all. I wish to state that the grant has never been recalled for cancelation. The original grant is still under our custody. I do confirm that the property was transferred to the 1st Defendant on 22nd October 1998.”

301. Other than the evidence of DW1 there is also the evidence of DW4 [Charles Kipkirui Ngetich]. The witness testified and informed the court that he is the deputy chief land registrar. In addition, the witness posited that there was no interest by the Plaintiff herein which had been registered/ endorsed on the register of the suit property.

302. In the absence of any restriction, encumbrance or inhibition, there is no way that the transfer to and in favor of the 1st Defendant can be vitiated on the basis of fraud/ illegality.

303. My answer to the subject issue is as follows: First and for most, the Plaintiff did not tender or place before the court any cogent, plausible or compelling evidence to underpin fraud.

304. Secondly, fraud cannot be proven on the basis of inference; innuendos; speculation; hypothesis; and or imagination. The holding in the case of **Morjoria versus Nansigh** [supra] is apt.

305. Thirdly, the transfer and registration of the suit property in favor of the 1st Defendant was free of any fraud and illegality. In any event, PW1 [Peter Kipyegon Rotich] admitted as much during cross examination.

306. The next issue for consideration is whether the Defendant is *bona-fide* purchaser for value. It was the 1st Defendant's position that same bought/ purchased the suit property from Rine Hart limited. In addition, the witness testified that a transfer instrument was thereafter executed; attested and lodged for registration. Furthermore, DW1 posited that prior to purchase of the suit property the 1st Defendant undertook due diligence and established that the suit property was devoid of any encumbrance.

307. As pertains to due diligence, DW1 stated as hereunder:-

“I do confirm that the 1st Defendant sought for and obtained a legal opinion on the question of surrender. The 1st Defendant herein undertook proper due diligence in respect of the suit property.”

308. Speaking to the legal status of the transfer and registration of the suit property in favor of the 1st Defendant, DW4 is on record stating thus:-

“I do confirm that the transfer to and in favor of the 1st Defendant was lawful valid and legal.”

309. From the testimony on record, I am convinced that the 1st Defendant purchased the suit property and thereafter procured the registration thereof in its name without notice of any prior defect in the

title of its predecessors. Furthermore, no evidence was led to connect the 1st Defendant to any fraud in the allocation and registration of the suit property.

310. Regarding the ingredients/ elements that underpin the doctrine of bona fide purchaser for value, it suffices it to posit that the 1st Defendant has indeed met/ established same.

311. Before concluding on this issue, I beg to highlight the holding in the case of *Sehmi & another v Tarabana Company Limited & 5 others [2025] KESC 21 (KLR)*. The Supreme Court distilled the ingredients/ elements that underpin the doctrine.

312. The court stated thus:-

57. We consider it necessary to clarify and restate the doctrine of “innocent purchaser for value” in view of the Court of Appeal’s pronouncement in certifying this appeal as one involving matters of general public importance, when it stated thus: “Having considered the issues raised, we find that indeed, there is uncertainty in the law with regard to the concept of innocent purchaser for value and the indefeasibility of titles as is apparent in the various decisions cited by the parties.” [Emphasis ours].

58. It is a fundamental principle of the law of property in land that a purchase of a legal estate for value without notice is an absolute, unqualified and unanswerable defence against the claims of any prior equitable owner or encumbrancer. The onus of proof however lies upon the person claiming to be a bona fide purchaser. Three main ingredients must be present for a

claimant to mount a successful defence based on the doctrine. These are, innocence, purchase for value, and a legal estate.

313. I now wish to move to the last issue for consideration. The last issue touches on the reliefs [if at all] that ought to be granted.

314. The Plaintiff has sought a plethora of reliefs. Pertinently, the Plaintiff has sought a declaration that same is entitled to exclusive and unimpeded right of possession, occupation and use of the suit property. What I hear the Plaintiff to be seeking is that same ought to be declared to be the lawful and legitimate owner of the suit property. The Plaintiff is beseeching the court to grant same title to or ownership rights in respect of the suit property.

315. It is important to point out that a party can only approach a court of law in an endeavor to be declared the owner of a designated property if and only if, such a person has the requisite documents. In respect of the instant matter, the Plaintiff has neither tendered nor produced any title document. On the contrary, the Plaintiff lays a claim to ownership of the suit property on [sic] historical basis.

316. This is what PW1 stated while under cross examination by learned counsel for the 2nd Defendant [the Hon Attorney General]. The Witness stated thus:

“The Plaintiff herein lays a claim to the suit property on historical basis I have not availed any documents to show/ establish ownership of the land.”

317. Surely the Plaintiff cannot seek to be declared as being the lawful and legitimate owner of the suit property in *vacuum*. In the case of ***Wreck Motor Enterprises v Commissioner of Lands & 3 others [1997] eKLR***, the Court of Appeal highlighted the manner in which title to land accrues.

318. The Court stated thus:-

“Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of title document pursuant to provisions held.”

319. The Plaintiff is also before this court seeking for protection of its proprietary rights. In particular, the Plaintiff is seeking the right to exclusive possession, occupation and use. Suffice it to state that a court of law is enjoined to protect the proprietary rights of a title holder. However, before the court can be called upon to protect rights, such rights must have been acquired.

320. In the case of ***Nelson Kazungu Chai & 9 others v Pwani University College [2017] KECA 135 (KLR)*** the Court of Appeal highlighted the position in the manner following:-

22....A right can only be protected when it exists in reality and not where it remains an illusion or a mere expectation. Right to property is not one of those rights that inhere to every human being upon birth. They are acquired in different ways after one comes into this world. One cannot acquire property rights over another’s property other than in a manner prescribed in law. In

this case the appellants' claim to the suit property was in our view merely aspirational or rhetorical. This is so both under our very progressive Constitution and also under International Law. Indeed other than call in aid International Law, learned counsel Dr. Khaminwa did not cite any specific instrument that the appellants can leverage on to elevate the appellant's right to practice and enjoy their culture on the respondent's property over the respondent's rights under Article 40 of the Constitution. In the absence of any right under the doctrine of legitimate expectation and of any other valid colour of right, the trial court could not have arrived at any other finding. Our conclusion is that the learned Judge arrived at the right decision based on the evidence placed before him, and he cannot be faulted

321. Other than the fact that the Plaintiff is laying a claim to the suit property, on historical basis, the Plaintiff has also invoked and relied upon the vesting order *vide* legal notice No. 131 of 2014. The said legal notice was gazetted/ published by the Minister of Finance . The net effect of the said legal notice was to vest *inter alia* the suit property in favor of the Plaintiff.

322. Nevertheless, it is instructive to highlight that by the time the vesting order was being made [24th August 2001] the suit property belonged to and was registered in the name of the 1st Defendant. The question that does arise is how a property that belonged to a third party can [sic] be vested in favor of someone else without notice to and consultation with the registered owner.

323. The other aspect that does arise is whether the impugned vesting order can and of itself revoke; cancel; nullify or rectify the register of the suit property and remove the name of the 1st Defendant.

324. To my mind, the law as pertains to revocation of title[subject to due process] is provided for in **Section 80 of the Land Registration Act 2012**.

325. Previously, the law underpinning rectification of tile was provided for in **Sections 23 and 75 of the Registration of Tiles Act** [now repealed]. Be that as it may, there is no gainsaying that only a court of law; and not a Legal notice; or vesting order could cancel title.[See the holding in the case *of Isaac Gathungu Wanjohi & another v Attorney General & 6 others [2012] KEHC 5200 (KLR)* ; and *Kuria Greens Limited v Registrar of Titles & another [2011] KEHC 4290 (KLR)*.

326. I wish to address two more reliefs. There is the relief pertaining to the grant of an order of permanent injunction. It suffices to state that an order of permanent injunction would no doubt issue to protect and vindicate the right[s] of a title holder. However, such an order cannot issue in the absence of proven rights and interest. It cannot issue in vacuum. Moreover, an order of permanent injunction cannot issue for the mere asking.

327. The Plaintiff was enjoined to prove and establish legal right[s] to the suit property. None has been proven or established. In this regard, an order of permanent injunction cannot be procured or be granted.

328. Worse still, the order of permanent injunction is being sought as against the 1st Defendant who is currently the registered proprietor and title holder of the suit property. Can such an order issue or be granted against the tile holder?

329. The answer to this question can be discerned from the holding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] KECA 606 (KLR)*.

330. The Court of Appeal stated thus:

It must also be remembered that it is a serious thing to restrain a registered proprietor of a property over what is undeniably his unless there are justifiable grounds to do so.

331. The final relief that I wish to address concerns revocation/nullification of the certificate of title in the name of the 1st Defendant. The law as pertains to cancelation; revocation or nullification of the certificate of title, has now been codified in terms of **sections 26 of the Land Registration Act 2012**. The claimant seeking cancelation of certificate of title must satisfy either of the two limbs espoused *vide* section 26(1)(a) or (1)(b) thereof.

332. Either way it is common ground that the claimant must discharge the requisite burden and Standard of proof in demonstrating fraud; misrepresentation; irregularity ; unprocedurallity ; illegality or a corrupt scheme.[See the holding of the court of appeal in the case of *Frank Logistics Limited v Golden Lion Real Estate Company & 6 others [2025] KECA 1471 (KLR)*]

333. Before departing from the reliefs that have been sought by the Plaintiff, it is also apposite to state that the prayer for *Mense profit[s]* can only lie where the claimant has proven ownership of the land or entitlement thereto. The prayer cannot issue where the claimant is incapable of being deprived of the land, that is, where the Claimant is not

the owner of the Land. [See ***Embakasi Properties Limited & another v Commissioner of Lands & another*** [2019] eKLR ; ***Attorney General v Halal Meat Products Limited*** [2016] eKLR - Civil Appeal 114 of 2009 and ***Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees*** [2020] KECA 536 (KLR) .]

334. Regarding costs: It is common ground that Costs follow the Event. The terminology that Costs follow the event denotes that the person who succeeds in the Suit is entitled to Costs. However, the Court still retain[s] discretion in the award of Costs. In this regard, it means that the Court may, subject to good reason, deny the successful Party Costs. [See the provisions of Section 27 of the Civil Procedure Act, Chapter 21, Laws of Kenya].

335. The Law as pertains to award of Cost[s], and the fact that the Successful party is entitled to costs, was highlighted by the Court of Appeal in the Case of ***Farah Awad Gullet V CMC Motors Group Limited*** [2018] Keca 158 (KLR).

336. The court stated thus:

*Our construction of this Rule is that as a general rule, an award of costs on appeal follows the event, and a successful litigant will be awarded costs so as to recoup the costs he has undergone in the course of the litigation. In ***John Kamunya and another versus John Ngunyi Muchiri & 3 others*** [2015] eKLR, the Court reviewed a number of its own decisions on the subject which we find prudent to reflect here in as well. In ***Supermarine Handling Services Ltd versus Kenya Revenue Authority*** [2010] eKLR (Civil Appeal 85 of 2006) the Court stated inter alia, that:*

“Costs of any action, cause or other matter or issue shall follow the event unless the Court of Judge shall for good reason otherwise order ... Thus, where a trial Court has exercised its discretion on costs, an appellate Court should not interfere unless the discretion has been exercised injudiciously or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule”.

In that appeal, the Court drew inspiration from the pronouncements of the Court in ***Devram Dattan versus Dawda [1949] EACA 35*** where it was held that:

“It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so, its exercise must be based on facts ... if, however, there be, in fact some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of the sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance”.

337. Bearing in mind the dicta in the decision [supra], I find and hold that the Plaintiff who has failed to prove and establish its case is liable in costs to the adverse parties. In this regard, the Defendants are indeed entitled to costs.

SUMMARY OF FINDINGS

338. In the course of the Judgment, I have made various findings and conclusions. The findings are numerous. However, it is suffice[s] to summarize the findings.

339. Same are summarized thus:

- i. *The question of limitation of actions was disposed of vide ruling of the court delivered on the 20.12.2022.*
- ii. *The issue of limitation is barred by the doctrine of Res judicata.*
- iii. *The suit property was previously allocated to and reserved to East African Common Services and by extension East African Posts and Telecommunications.*
- iv. *The suit property was thereafter surrendered back to the government.*
- v. *The surrender was on the basis of a formal letter addressed to the commissioner of Lands [now defunct].*
- vi. *The surrender denoted consensual return of the property.*
- vii. *The suit property became un alienated government land in line with Section 2 of the Government Land Act.*
- viii. *The suit property became available for allocation or alienation subject to the applicable law.*
- ix. *The suit property was duly allocated to Mr. Philemon Chelagat.*
- x. *The allottee duly complied with the terms of the letter of allotment.*

- xi. The grant was duly processed; engrossed; executed and ultimately registered.***

- xii. The transfer of the suit property to the first Defendant was procedural; lawful and valid.***

- xiii. The 1st Defendant is a bona fide purchaser for value without notice.***

- xiv. The 1st Defendant has been in lawful occupation and possession of the suit property.***

- xv. The legal notice number 131 of 2001 was incapable of divesting the first Defendant of its title to and in respect of the suit property.***

- xvi. Moreover, a legal notice or vesting order is incapable of nullifying a certificate of title.***

- xvii. That the mandate and jurisdiction to nullify or cancel the certificate of titles inheres in court of law [subject to due process].***

- xviii. The Plaintiff did not acquire any title to and in respect of the suit property.***

xix. Title to land can only arise upon issuance of certificate of title or certificate of lease [whichever is applicable].

xx. The Plaintiff's suit was not proven.

xxi. The reliefs sought by the Plaintiff are not available.

REMARKS

340. The pleadings and the documents in respect of the subject matter were diligently prepared; compiled; and paginated. In addition, the learned counsel exhibited professional decorum during the prosecution of the suit. Moreover, the final submissions were elaborate; incisive; and comprehensive. The amount of research expended on this matter was deep and commendable. It is therefore apposite to extend gratitude to all the learned counsel for the commendable work and above all the professionalism displayed.

CONCLUSION

341. Flowing from the analysis in the body of the Judgment, it must have become apparent that the Plaintiff did not prove its case. It bears repeating that the burden of proof fell on the Plaintiff. Same was enjoined to place before the court credible evidence. However, none was tendered before the court. Moreover, it is common ground that a party can only succeed on the strength of its case and not on the weakness of

defence.[See **Caroget Investment Limited v Aster Holdings Limited & 4 others [2019] KECA 79 (KLR)**].

FINAL ORDERS

342. The final orders that commend themselves to the court are as hereunder:

- I. The Plaintiff's suit be and is hereby dismissed.***
- II. Costs of the suit be and are hereby awarded to the Defendants.***
- III. Costs in terms of clause [II] shall be agreed upon and in default, same shall be taxed in the conventional manner.***

343. It is so ordered.

DATED SIGNED AND DELIVERED AT MILIMANI ON THE 19TH DAY OF FEBRUARY, 2026.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Hussein/Benson: Court Assistants

Mr. Jomo Nyaribo [**FCIArb**] for the Plaintiff

Mr. James Wairoto for the 1st Defendant

Mr. Allan Kamau [Deputy Chief Litigation Counsel] for the 2nd Defendant.

