REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 180 OF 2015

CONSOLIDATED WITH 64 OF 2020 AND 65 OF 2020

KENYA RAILWAYS CORPORATION

ETHICS AND ANTI-CORRUPTION

COMMISSION.....PLAINTIFFS

- VERSUS -

1. **ZAHARIA MOHAMED MAWIA**
2. **COUNTY GOVERNMENT OF MOMBASA**
3. **REGISTRAR OF LANDS, MOMBASA COUNTY**
4. **CYKA HOLDINGS LIMITED**
5. **HUSSEIN ABDIRAHMAN.....**

DEFENDANTS

JUDGMENT

I. Preliminaries

1. This is a rather lengthy Judgement by this Honourable Court due to the intricacies surrounding the matter and the detailed written submissions by the parties. It pertains to a civil claim instituted vide a suit by the *Kenya Railways Corporation* and *Ethics and Anti – Corruption Commission*, the 1st & 2nd Plaintiffs herein by way of an Amended Plaint dated 15th June, 2021. The suit which was consolidated with two others being ELC Numbers 64 & 65 of 2020 was against *Zaharia Mohamed Mawia, County Government of Mombasa, Registrar of Lands, Mombasa County, Cyka Holdings Limited* and *Hussein Abdirahman*, the 1st, 2nd, 3rd, 4th & 5th

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Defendants herein over parcels of land known as Mombasa/Block I/525 and Mombasa/Block I/526 situated at Shimanzi, Mombasa (Hereinafter referred to as "The Suit Land"). The 1st & 2nd Plaintiffs filed consolidated List of documents and Witness statements dated 2nd August, 2022.

2. Upon filling and service of the Plaint, the Defendants filed Statement of Defence as follows:-

   a) The 1st Defendant filed theirs dated 30th November, 2015;

   b) The 2nd Defendant filed theirs dated 31st August, 2015 & Amended Defence dated 15th March, 2022;

   c) The 3rd Defendant never filed any defence but agreed to participate in the matter.

   d) The 4th Defendant filed an Amended Defence and Counter - Claim dated 24th October, 2019 and amended on 12th August, 2021; and

   e) The 5th Defendant filed theirs dated 9th July, 2019.

3. It is instructive to note that during the pendency of the proceedings, pursuant to a parties request by parties, the Honourable Court conducted a successful Site Visit (***"Locus in Quo"***) on 7th March, 2025. A report was prepared and shared among the parties. For ease of reference, the said report forms part of this Judgement herein.

II. <u>The description of the Parties</u>

4. The 1st Plaintiff, Kenya Railways Corporation, is a State Corporation established under the State Corporations Act, Cap 446 and the Kenya Railways Act, Cap. 397 Laws of Kenya. The 2nd Plaintiff, Ethics and Anti - Corruption Commission established under the

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provision of Chapter 15 of the Constitution of Kenya, 2010, (Hereinafter referred to as "The EACC"), is a body corporate established under the provision Section 3 (1) of the EACC Act, No. 22 of 2011, which was enacted in accordance with the provision of Article 79 of the Constitution for the sole purpose of prevention, investigation and punishment of corruption, economic crime and related offences in Kenya. It is mandated to recover illegally acquired public property.

5. The 1st Defendant, Zaharia Mohamed Mawia, is described as a female adult of sound mind and understanding. However, the 1st Defendants passed away during the COVID – 19 global pandemic and all the Counsels representing the parties mutually agreed and recorded a Consent this case proceeds for hearing without the 1st Defendant's participation to avoid delaying the expeditious disposal of it. However, all the documents and pleadings filed by her were to be relied on. The 2nd Defendant, County Government of Mombasa, is the legal successor of the defunct Municipal Council of Mombasa. The 3rd Defendant, Registrar of Lands, Mombasa, is a statutory office holder under the provision of Sections 12, 13 & 14 of the Land Registration Act, No. 3 of 2012. The 4th Defendant, Cyka Holdings Limited, is a limited liability company incorporated under the Companies Act, Cap. 486 of the Laws of Kenya while the 5th Defendant, Hussein Abdirahman is an adult male of sound mind and understanding.

III. Court directions before the hearing

6. Upon service of the Amended Plaint dated 15th June, 2021 and the subsequent pleadings, the Honourable Court issued directions

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pursuant to Order 11 of the Civil Procedure Rules, 2010 requiring the parties to comply with pre-trial procedures. The parties duly filed their respective witness statements, lists of documents, and bundles of exhibits.

7. On several occasions, the matter was mentioned for purposes of confirming compliance, and on 10th February, 2021 the Court directed that the Plaint be amended to capture the consolidation with Civil Suit ELC Nos. 64 of 2020 and 65 of 2020 respectively. Thereafter, the Plaintiffs filed the Amended Plaint on 15th June, 2021.
8. The Court further directed that the matter proceed to hearing by way of adducing ***"Viva Voce"*** evidence, with witnesses to testify in open court on the diverse dates as stated herein below. The Plaintiffs confirmed readiness and filed supplementary bundles of documents, while the Defendants filed their respective defences and lists of documents.
9. On the scheduled hearing dates, the Plaintiffs presented their witnesses PW - 1 to PW - 5, who testified and produced documentary evidence in support of their case. The Defendants were accorded opportunity to cross-examine the witnesses. Notably, while summoned the other Defendants, never called any substantive witnesses of their own, save for reliance on filed pleadings and documents.

IV. The Plaintiffs' case

10. From the pleadings filed, the Plaintiffs' case is that at all material times of instituting this suit, the 1st Plaintiff, Kenya Railways Corporation (KR), was and remained the bona fide owner of all land,

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buildings and structures on the unsurveyed plot at Shimanzi within Mombasa Island, having inherited them from its predecessor, the East African Railways and Harbours Corporation. The value of the suit property and the residential houses thereon was approximately worth a sum of Kenya Shillings Four Fifty Million (Kshs. 450,000,000.00). The houses were currently occupied by the 1st Plaintiff's tenants.

11. Kenya Railways Corporation was in possession of the suit premises and houses thereon belong to Kenya Railways Corporation. The 1st and 2nd Defendant by themselves, agents and/or servants and in collusion with officers at the lands office, have illegally sub - divided a portion of the suit property and purported to acquire new Land Reference Numbers now known as Mombasa/Block I/525 and Mombasa/Block I/526.
12. The 1st Plaintiff Corporation owned the property, buildings and structures erected on the suit property well before the purported subdivisions or the 1st and 2nd Defendants purported registration and avers that its predecessor built the said structures in exercise of its rights as the bona fide owner.
13. Further, the 1st Plaintiff averred that the sub - division, issue of the new reference number and the 1st and 2nd Defendants' purported registration by the 3rd Defendant, if any was procured by misrepresentation/fraud and or collusion between the 1st, 2nd, 3rd, 4th and 5th Defendants. It was the 1st Plaintiff's case that the purported registration never conferred any property rights thereon since the alienation of the suit properties: Mombasa/Block I/525 and Mombasa/Block I/526 was illegal, null and void *ab initio*.

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14. The 1st & 2nd Plaintiffs relied on the following particulars of the 1st, 2nd, 3rd, 4th and 5th Defendants' misrepresentation/ fraud and/ or illegality:-

    a. The 2nd Defendant misrepresented to the 1st Plaintiff that a small portion of the suit property was required for expansion of a public road.

    b. The 2nd Defendant misrepresented to the 1st Plaintiff that the 2nd Defendant would take over the small portion of the suit property and use it as a public road only.

    c. Upon the said representations, the 1st Plaintiff allowed the 2nd Defendant to use the suit property as a public road when the need actually arose.

    d. Instead of using the property as a public road, the Defendants sub - divided the property and allocated it to the 1st Defendant amongst others.

    e. The 1st Defendant in collusion with unauthorized junior officers of the 1st Plaintiff attempted to pay a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-) to the Plaintiff without knowledge and consent of the lawfully authorized officers and organs of the 1st Plaintiff Corporation.

    f. The Defendants have never been in possession of the suit property.

    g. The 1st and 2nd Defendants' purported title was obtained by fraudulent acts on their own part in collusion with some government officers and Defendants were naturally aware of their own fraudulent acts and conniving omissions of Government Officers.

    h. Processing the purported title deeds secretly without the knowledge and or consent of the 1st Plaintiff.

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i. Purporting to acquire property rights over suit properties by registration without any or available consideration to the 1st Plaintiff or the Government or any other authority.

j. Purporting to benefit from allocation of unallocated government land despite full knowledge that the suit property is the property of the 1st Plaintiff.

k. Colluding with unscrupulous government officers in committing the irregularities and illegalities aforesaid.

15. The suit properties were not free land that could be legitimately disposed to the Defendants or any other person under any law or by any authority including the Commissioner of Lands or Land Registrar Mombasa since the Kenya Railways Corporation has never surrendered the suit lands to the Commissioner of Lands. The 1st Plaintiff averred that the fraudulent acts of the Defendants were illegal, unlawful, corrupt scheme and did not confer any proprietary interest.
16. The 1st Defendant had purported to transfer title of the suit property unlawfully to the 4th and 5th Defendants through collusion and connivance with the Defendants who are merely agents or partners of the 1st Defendant. The 1st Plaintiff averred that the purported sale if any made by the 1st Defendant must be illegal because the Kenya Railways Corporation was not involved in the purported allotment or sale of the property to the 1st Defendant.
17. Accordingly, the suit properties remained public properties vested in the 1st Plaintiff which is a public corporation. Despite the fraudulent acts of the Defendants, and the purported subdivisions and allocation of the land to the 1st Defendant the Plaintiff remained

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in possession through its tenants. The property was to date occupied by the tenants of the 1st Plaintiff.

18. In an attempt to obtain possession of the property the Defendants by themselves, their agents of servants, on 1st August, 2015 and 2nd August, 2015 trespassed into the suit properties by: -

    i. Used and/or hired violent gangs and rogue police officers to attempt to break into and demolish the structures of the 1st Plaintiff.

    ii. Demolishing as section of the 1st Plaintiff's structures.

    iii. Attempted to take over a section of the suit properties using violence.

    iv. Purporting to arrest security officers of the 1st Plaintiff during the violent attempt of eviction.

    v. Attempting to construct a perimeter wall over a section of the suit properties.

19. In the past, the 1st Defendant had made other unlawful attempts to evict Kenya Railways Corporation and its tenants by abusing the Court process as follows:-

    (i) Obtaining ridiculously irregular order, purporting to be Ex - Parte demolition order from the Magistrate Court in "***CMCC No. 2892 of 2007 Zaharia Mohamed Mawia – Versus - Duncan Kinyua and 4 others"***.

    (ii) The 1st Defendant withdrew the mischievous suit on 5th November, 2007 soon after the 1st Plaintiff had hired a Counsel for the tenants and lodged an appeal on 8th October, 2007 vide Civil Appeal No. 176 of 2007 and obtained a stay of execution on 8th October, 2007 against the Ex - Parte demolition order.

    (iii) Mischievously suing the tenants of the 1st Plaintiff in "***CMCC No. 2892 of 2007"*** and ***"HCCC No. 116 of 2009"*** seeking for eviction orders while avoiding to sue the Kenya Railways Corporation the landlord.

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(iv) On 23rd April, 2009 the 1st Defendant filed a suit against the 1st Plaintiff's tenants vide HCCC. No. 116 of 2009 seeking for eviction orders.

(v) The 1st Plaintiff as the landlord, vide its Application dated 29th June, 2009,sought to be enjoined as a party.

(vi) The Court vide its ruling dated 31st May, 2012 made a finding of fact that the 1st Plaintiff was in exclusive possession of the suit properties through its tenants and further directed that the 1st Plaintiff be enjoined as a 6th Defendant in HCC No 116 of 2009, the Corporation was joined in the suit as the 6th Defendant in a ruling dated 31st May, 2012.

(vii) The 1st Defendant subsequently abandoned the suit and it was withdrawn.

20. The 1st Plaintiff averred that the 1st Defendant deliberately withdrew the filed suits to avoid the scrutiny of the acquisition and has now resorted to the law of the jungle in an attempt to take over the property. The 1st Plaintiff averred that it would suffer irreparable damage if the 1st and 2nd Defendant took possession of the suit properties and/or its staff and tenants were evicted from the suit properties and/or if the intended demolition was carried out because: -

a) The 1st Plaintiff would have been wrongfully disposed of its prime properties by irregular and/or corrupt dealings of the Defendants at the lands office.

b) The 1st and 2nd Defendant would be able to dispose the properties to 3rd parties and deliver vacant possession to the said 3rd parties thereby making it impossible to recover possession and/or title of the suit properties.

c) The 1st Plaintiff will have been left without housing for its tenants.

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d) The 1st Plaintiff's buildings and structures would be demolished.

21. As a result of the foregoing fraud/illegalities, and irregularities, the 1st Plaintiff averred that the title if any held by the 1st and/or the 2nd Defendants was illegal, void and does not confer any proprietary or rights on the Defendant.

22. The 2nd Plaintiff averred that in the course of its investigations its investigators conducted investigative interviews and recorded written statements accordingly and the said investigators also requested and obtained copies of public documents and documentary evidence from public officers and public institutions. The 2nd Plaintiff averred that in the course its aforesaid investigations established the following primary facts in respect to Mombasa/ Block/I/526 that: -

a) The suit property-Mombasa/Block I/526 was vested upon Kenya Railways Corporation vide the Kenya Railways Corporation (Vesting Order) of 1986; which was gazetted on 22nd February, 1986 through Legal Notice No.24;

b) On 3rd December, 1999, the Town Clerk of the then Municipal Council of Mombasa purportedly issued a Lease over the suit property in favor of the 1st Defendant;

c) On 1st November, 1994, the Town Clerk of the then Municipal Council of Mombasa purportedly allocated the 1st Defendant, the suit property;

d) On or about 2nd November, 1999 the suit property was purportedly created vide a Survey Plan F/R No. 366/181;

e) On 3rd December, 1999, the Town Clerk and the Mayor of the then Municipal Council of Mombasa purportedly issued a Lease over the suit in favour of the 1st Defendant;

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f) On 7th December, 1999 leasehold interest was purportedly registered in favour of the 1st Defendant by the 4th Defendant and on the same day, Certificate of Lease was purportedly issued to her;

g) On 30th October, 2005 the 1st Defendant and the 4th Defendant purportedly entered into a Sale Agreement over the suit property;

h) On 4th August, 2011 leasehold interest over the said suit property was purportedly registered in favour of the 4th Defendant and on the same day, Certificate of Lease was issued to it;

i) The alienation of the suit property was undertaken without the consent of the Kenya Railways Corporation contrary to the Kenya Railways Corporation Act;

j) At material time when the said suit property was purportedly created and alienated, the said properties were already alienated for public utility and the same was not available for alienation in favour of any person for that matter;

k) At all material times, suit property-Mombasa/Block 1/526 was corruptly and fraudulently alienated in favour of 1st Defendant and the title purportedly issued to it in respect thereof, is a proceed of corruption and a product of utter illegality;

l) At all material times, the 1st Defendant was not capable of transferring any proprietary interest in suit property to the 4th Defendant;

m) At all material times, suit property was not capable of being acquired by the 1st Defendant in the first instance;

n) Kenya Railways Corporation was in possession of the suit property;

o) Kenya Railways Corporation owned the suit property before the unlawful alienation in favour of the 1st Defendant in the first instance and subsequently in favour of the 4th Defendant;

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p) The Kenya Railways Corporation granted the 3rd Defendant a small portion parcels of the suit property only for expansion for road within the then Municipal Council of Mombasa;

q) The Kenya Railways Corporation never granted the 1st Defendant any part of the suit property for purposes of allocation or alienation to any person including, the 1st Defendant in the first instance and subsequently to the 4th Defendant;

r) The Investigations undertaken by the 2nd Plaintiff never disclosed any factual or legal basis upon which the suit property was alienated in favour of the 1st Defendant in the first instance and subsequently to 4th Defendant;

s) There was imminent, dire and urgent need that the suit property be recovered and title purportedly issued in respect thereof, be cancelled and the said suit property be forfeited back to the Government for purposes of public utility as originally intended;

t) At all material times to this suit, the suit property was and still remained a public land, belonging to the Government of Kenya as held by the Kenya Railways Corporation and investigations never disclosed any evidence that proved otherwise;

u) At all material times to the Plaintiff's suit, the suit property-Mombasa/Block 1/526 belonged to Kenya Railways Corporation;

v) At all material times to the 2nd Plaintiff's suit the suit property-Mombasa/Block I/526 was and remained part of public land originally set aside for public utility; and

w) The suit property was corruptly and fraudulently created out of a road reserve.

23. It was the 2nd Plaintiff's case that at all material time to this suit, at all material time to this suit, the suit property was and still

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remained a public land, belonging to the Government of Kenya. The 2nd Plaintiff contended that the alienation/allocation of the suit property-Mombasa/Block I/526 in the first instance and subsequent issuance of Lease on 07/12/1999 to the 1st Defendant and then the transfer of the said suit property to the 4th Defendant was fraudulent, illegal, null and void ab initio it could not confer any estate, right or interest upon the said 1st Defendant in the first instance and subsequently to the 4th Defendant herein or any other person for that matter.

24. On the particulars of fraud, negligence and illegal against the 1st, 2nd and 3rd Defendant, the 2nd Plaintiff averred that:

    a. On 1st November, 1994 the 3rd Defendant irregularly and corruptly issued a letter of allotment over the suit to the 1st Defendant as unsurveyed commercial plot, yet the said suit property had already been alienated for public utility.

    b. The 1st Defendant deliberately ignored the glaring fact that as at 1st November, 1994 the suit property was not an un- alienated Government Land.

    c. The 1st Defendant deliberately ignored the glaring fact that as at 1st November, 1994 the suit property was a road reserve.

    d. The 1st Defendant deliberately ignored the fact that before the suit property could be alienated/allocated the approval of Kenya Railways Corporation was mandatorily required.

    e. The 3rd Defendant deliberately ignored the glaring fact that as at 1st November, 1994 the suit property-Mombasa/Block I/526 was not an un-alienated Government Land.

    f. The Letter of Allotment dated 1st November, 1994 in favour of the 1st Defendant in the first instance was issued by the 3rd Defendant to the 1st Defendant contrary to the provisions of the

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Government Land Act Cap. 280 (Now Repealed) and Registered Land Act, Cap. 300 (Now Repealed).

g. The Letter of Allotment dated 1st November, 1994 in favour of the 1st Defendant in the first instance was issued by the 3rd Defendant to the 1st Defendant contrary to the provisions of the Kenya Railways Corporation Act.

h. The 3rd Defendant never had authority or power to issue the Letter of Allotment dated 1st November, 1994 in favour of the 1st Defendant.

i. In 3rd December, 1999, the 3rd Defendant vide the then Municipal council of Mombasa lacked the legal authority to lease the suit property to the 1st Defendant.

j. The 3rd Defendant did not have authority or power to issue any Lease over the suit property at all.

k. On 7th December, 1999, the 4th Defendant purportedly registered Leasehold Interest in favour of the then Municipal Council of Mombasa.

l. On 30th October, 2005, the 1st Defendant and the 4th Defendant irregularly entered into a Sale Agreement over the suit property contrary to the provisions of the Government Lands Act, Cap. 280 (Now Repealed), Registered Land Act, cap. 300 (Now Repealed) and the Kenya Railways Corporation Act.

m. The 1st and 4th Defendants severally and respectively executed documents which were used to illegally alienation of the suit property in favour of the 2nd Defendant.

n. The 1st and 4th Defendants on 30th October, 2005 entered into illicit agreement for transfer of the suit property.

o. On or about 4th August, 2011 the 4th Defendant executed and uttered documents that unlawfully led to registration and issuance of Certificate of Lease in its favour over the suit property – Mombasa/Block I/526.

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p. On 4th August, 2011, the 4th Defendant acquired the suit property from the 1st Defendant contrary to the provisions of the Government Lands Act, Cap. 280 (Now Repealed), Registered Land Act, cap. 300 (Now Repealed) and the Kenya Railways Corporation Act.

q. The 3rd Defendant never had authority or power to prepare, cause to be prepared or issue Certificate of Lease on 7th December, 1999 in favour of the 1st Defendant.

r. The 3rd Defendant never had authority or power to prepare, cause to be prepared or issue Transfer of Lease on 4th August, 2011 in favour of the 4th Defendant.

s. The 1st and 4th Defendants severally and respectively uttered documents to the lands office; which documents were actually that were used in illegal alienation of the suit property.

t. The 1st, 2nd, 3rd and 4th Defendants knew or ought to have known that the suit property was not available for alienation outside the confines of the Government Lands Act, Cap. 280 (Now Repealed), Registered Land Act, Cap. 300 (Now Repealed) and the Kenya Railways Corporation Act.

u. The 1st, 2nd, 3rd and 4th Defendants severally and respectively shut their eyes to the obvious and failed to make inquiries for fear of getting the correct information from the relevant public offices.

v. The 1st, 2nd, 3rd and 4th Defendants knew or ought to have known that the suit property was not available for alienation in terms of registration and issuance of the Certificate of Lease in respect to the suit property, without a valid Part Development Plan (PDP).

w. The 1st, 2nd, 3rd and 4th Defendants knew or ought to have known that the suit property was not available for alienation in terms of any registration and issuance of the Lease in respect to the suit property-Mombasa/Block I/526, without a duly prepared and registered Part Development Plan.

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x. The 1st, 2nd, 3rd and 4th Defendants dishonestly and recklessly facilitated the fraudulent alienation in terms of any registration and issuance of the Certificate of Lease over the suit property-Mombasa/Block I/526, outside the confines of the Government Lands Act, Cap. 280 (Now Repealed), Registered Land Act, Cap. 300 (Now Repealed) and the Kenya Railways Corporation Act.

y. The 1st, 2nd, 3rd and 4th Defendants, recklessly failed to comply with the relevant statutes and regulations governing the administration and alienation of Government land.

z. The 1st, 2nd, 3rd and 4th Defendants' failure to proffer any reliable and lawful basis why they severally and respectively participated, facilitated, processed and executed documents that led to alienation of the suit property in favour of the 1st Defendant in the first instance and subsequently to the 4th Defendant.

aa. The Defendants failed to report to the then Kenya Anti – Corruption Commission or the current Ethics and Anti – Corruption Commission over the apparent irregular and unlawful alienation of the suit property to the 1st Defendant in the first instance and subsequently to the 4th Defendant.

25. The 2nd Plaintiff asserted that at all material times, the 1st, 2nd, 3rd and 4th Defendants were actually or constructively aware that the suit property was reserved for government use and that it was not available for alienation outside the confines of the Government Lands Act Cap. 280 (Now repealed),Registered Land Act, Cap. 300 (Now repealed) and the Kenya Railways Corporation Act.
26. The 2nd Plaintiff relied on the following particulars of the 1st, 2nd, 3rd and 4th Defendants knowledge: -
    a. The 1st, 2nd, 3rd and 4th Defendants shut their eyes to the obvious and failed to make inquiries for fear of getting the correct information from the relevant public offices.

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b. The 1st, 2nd, 3rd and 4th Defendants shut their eyes to the fact that the suit property was and still remained alienated for public utility.

c. The 1st, 2nd, 3rd and 4th Defendants shut their eyes to the provisions of Government Land Act governing the procedure to be followed for the allocation and alienation of Government Land, such as the suit property-Mombasa/Block I/526.

d. The Defendants failed to report to the then Kenya Anti-Corruption Commission or the current Ethics and Anti-Corruption Commission over the apparent irregular and unlawful alienation of the suit property to the 1st Defendant in the first instance and subsequently to the 2nd Defendant.

27. The 2nd Plaintiff averred that the 1st Defendant fraudulently acquired the suit property-Mombasa/Block I/526 for profit to the detriment of the Government of Kenya. It was the 2nd Plaintiff's case that the 1st, 2nd, 3rd and 4th Defendants respectively and severally facilitated and willfully participated in a corrupt enterprise with the corrupt aim of fraudulently acquiring part suit property through preparation, execution and registration of title over the suit property from Government of Kenya through fraudulent and corrupt means.
28. The 2nd Plaintiff averred that the 4th Defendant had actual knowledge, or ought to have known through due diligence, that there were defects in the Letter of Allotment over the suit property – Mombasa/Block I/526 – held by the 1st Defendant, and as such the said 4th Defendant assumed the risk of all legal consequences appurtenant thereto.
29. It was the 2nd Plaintiff's case that the 3rd Defendant and/or their official agents had been negligent, thereby leading to the illegal

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and fraudulent alienation of the suit property – Mombasa/Block I/526 – to the detriment of the Government of Kenya.

30. The 2nd Plaintiff relied on the following particulars of negligence against the 3rd Defendant and/ or his official agents: -

    a) Failure to notice and take remedial action over the fact that the suit property had been irregularly and unlawfully alienated to the 1st Defendant in the first instance.

    b) Failure to notice and take remedial action over the fact that the suit property had been irregularly and unlawfully alienated in favor of the 4th Defendant.

    c) Willfully facilitating the alienation of the suit property in favour of the 1st Defendant in the first instance and subsequently to the 4th Defendant.

    d) Failing to stop the irregular and unlawful alienation of the suit property to the 1st Defendant in the first instance and subsequently to the 4th Defendant.

    e) Failing to report to the then Kenya Anti-Corruption Commission or the current Ethics and Anti-Corruption Commission over the apparent irregular and unlawful alienation of the suit property to the 1st Defendant in the first instance and subsequently to the 2nd Defendant.

31. The 2nd Plaintiff averred that the 3rd Defendant, being an office in the public service, had therefore stood in a fiduciary position vis-à-vis all Government land and the public. By purporting to alienate the suit property – Mombasa/Block I/526 – to the 1st Defendant in the first instance and subsequently to the 4th Defendant, the 3rd Defendant had acted fraudulently, illegally, and in abuse of their office, in breach of their duties as a fiduciary by virtue of being a public officer.

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32. The 2nd Plaintiff relied on the following particulars of fraud, irregularity, illegality and breach of trust, abuse of office against the 3rd Defendant and/ or his official agents:-

(i) The 3rd Defendant knew or ought to have known that the suit property-Mombasa/Block I/526 was not available for alienation outside the confines of the Government Lands Act (repealed) and the Registered Land Act (repealed).

(ii) The 3rd Defendant knew or ought to have known that the suit property was not un-alienated Government Land.

(iii) The 3rd Defendant alienated in favour of the 1st Defendant, land that had already been alienated for public utility.

(iv) The 3rd Defendant knew or ought to have known that the suit property was not available for alienation in favour of the 1st Defendant in the first instance.

(v) The 3rd Defendant knew or ought to have known that the suit property was not available for alienation in favour of the 1st Defendant in the first instance without a valid Part Development Plan.

(vi) The 3rd Defendant knew or ought to have known that the suit property were not available for alienation in favour of the 1st Defendants in the first instance without a duly registered Part Development Plan.

(vii) The 3rd Defendant facilitated irregular and unlawful allocation of the suit property to the 1st Defendant in the first instance.

(viii) The 3rd Defendant facilitated irregular and unlawful alienation of the suit property in favour of the 4th Defendant.

(ix) The 3rd Defendant failed to stop registration of Certificate of Lease issued in favour of the 1st Defendant on 14th September, 2012.

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(x) The 3rd Defendant failed to stop registration of Certificate of Lease issued in favour of the 2nd Defendant on 4th August, 2011.

(xi) The 3rd Defendant facilitated registration of Certificate of Leases in favour of the 1st Defendant in the first instance and subsequently to the 4th Defendants respectively outside the confines of the Government Lands Act, Cap. 280 (Now repealed), the Registered Land Act, Cap. 300 (Now repealed) and Kenya Railways Corporation Act.

(xii) The 3rd Defendant recklessly failed to comply with the relevant statutes and regulations governing the administration and alienation of the suit property as a Government land.

(xiii) The 3rd Defendant dishonestly dealt with Government land (suit property-Mombasa/Block I/526) already alienated for public utility.

(xiv) The 3rd Defendant facilitated the alienation of the suit property in favour of the 1st and 4th Defendants respectively without any or any legal authority.

(xv) On 14th September, 2012 the 3rd Defendant issued a Certificate of Lease over the suit property in favour of the 1st Defendant in express breach of the provisions of the Government Lands Act (repealed), the Registered Land Act (repealed) and Kenya Railways Corporation Act.

(xvi) On 4th August, 2011 the 3rd Defendant issued a Certificate of Lease over the suit property in favour of the 2nd Defendant in express breach of the provisions of the Government Lands Act, Cap. 280 (Now repealed), the Registered Land Act, Cap. 300 (Now repealed) and Kenya Railways Corporation Act.

(xvii) The 3rd Defendant alienated the suit property-Mombasa/Block I/526 in favour of the 1st and 4th Defendants respectively, with notice that it was public land that had not been altered or its use changed in accordance with applicable legal requirements.

(xviii) The 3rd Defendant purportedly created and effected a disposition that was prejudicial to a subsisting public interest

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initially secured by alienation of government land for the benefit of the public.

(xix) Wilful failure to ensure that the alienation of the suit property was, transparent and lawful.

(xx) Failing to report to the then Kenya Anti-Corruption Commission or the current Ethics and Anti-Corruption Commission over the irregular and unlawful alienation of the suit property-Mombasa/Block I/526.

33. The 2nd Plaintiff averred that the 1st, 2nd, 3rd and 4th Defendants facilitated the corrupt alienation of the suit property, with knowledge that the 3rd Defendant had no statutory powers and/or he was acting in excess of his statutory powers, and that his actions were likely to occasion loss to the public and the Republic of Kenya, purported to grant title over the suit property-Mombasa/Block I/526.
34. The 2nd Plaintiff relied on the following particulars of loss and damages:-
    a. The suit property had been rendered unavailable for use and benefit of the public.

    b. Due to the impugned conduct of the Defendants, the suit property has been illegally alienated for private use and rendered unavailable for proper and lawful use thereby occasioning loss to the Republic of Kenya.

    c. Due to the illegal alienation of the suit property, the 1st Defendant unduly enjoyed mesne profits arising from the suit property following the unlawful allocation of the said property by the 4th Defendant.
35. The 2nd Plaintiff averred that it had legal and equitable interest over the suit property and title thereto, namely Mombasa/Block I/526, by virtue of its constitutional and statutory mandate. The 2nd Plaintiff

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averred that the actions and omissions of the Defendants, severally and respectively as pleaded by the Plaintiffs, had led to wrongful interference with public land and material loss of user rights by the Government of Kenya.

36. The Plaintiffs contended that, for the reasons stated hereinabove, the 1st, 2nd, 3rd and 4th Defendants' several and respective manner of procuring the allocation and alienation of the suit property, including the preparation of the Letter of Allotment on 1st November, 1994, the Lease on 3rd December, 1999, the Certificate of Lease dated 7th December, 1999 in favour of the 1st Defendant, and the Certificate of Lease dated 4th August.2011 in favour of the 1st Defendant, had been wholly irregular, void ab initio, corrupt, fraudulent and unlawful.
37. By reason of the foregoing, the purported issuance of the Letter of Allotment dated 1st November, 1994 by the 3rd Defendant over the suit property in favour of the 1st Defendant had been void ab initio and incapable of conferring upon the 1st Defendant any estate, interest or right in the suit property Mombasa/Block I/526 at all.
38. By reason of the foregoing, the purported issuance of the Certificate of Lease by the 3rd Defendant on 3rd December, 1999 over the suit property Mombasa/Block I/526 in favour of the 1st Defendant had been void ab initio and incapable of conferring upon the 4th Defendant any estate, interest or right in the suit property at all. Arising from the foregoing, the purported registration and issuance of the Certificate of Lease on 7th December, 1999 by the 4th Defendant over the suit property Mombasa/Block I/526 in favour of the 1st Defendant had been void ab initio and incapable of

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conferring upon the 1st Defendant any estate, interest or right in the suit property at all.

39. By reason of the foregoing, the purported registration and issuance of the Certificate of Lease on 4th August, 2011 by the 4th Defendant over the suit property Mombasa/Block I/526 in favour of the 1st Defendant had equally been void ab initio and incapable of conferring upon the 1st Defendant any estate, interest or right in the suit property at all incapable of conferring on the 1st Defendant any estate, interest or right in the suit property or at all.
40. By reason of the foregoing, the purported Sale Agreement of the suit property-Mombasa/Block I/526 on 30th October, 2005 by the 1st Defendant to the 2nd Defendant was void ab initio, and incapable of conferring on the 3rd Defendant any estate, interest or right in the suit property or at all.
41. The 2nd Plaintiff averred that in the course its aforesaid investigations established the following primary facts in respect to suit property-Mombasa/Block I/525, that:
    a) The suit property-Mombasa/Block I/525 was vested upon Kenya Railways Corporation vide the Kenya Railways Corporation (vesting order) of 1986;which was gazetted on 22nd February, 1986 through Legal Notice No. 24;

    b) On 1st November, 1994, the Town Clerk of the then Municipal Council of Mombasa purportedly allocated the 1st Defendant, the suit property;

    c) On or about 2nd November, 1999 the suit property was purportedly created vide a Survey Plan F/R No. 366/181;

    d) In the year 1999 the 2nd Defendant vide the then Municipal Counci1 of Mombasa lacked the legal authority to lease the suit property to the 1st Defendant;

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e) The 2nd Defendant never had the authority or power to issue any Lease over the suit property-Mombasa/Block I/525, at all;

f) The alienation of the suit property was undertaken without the consent of the Kenya Railways Corporation contrary to the Kenya Railways Corporation Act;

g) On 17th July, 2014 the 1st Defendant purportedly transferred the suit property to 5th Defendant;

h) On 24th July, 2015 leasehold interest over the suit property was purportedly registered in favour of the 5th Defendant by the 3rd Defendant and on the same day, Certificate of Lease was purportedly issued to him;

i) At material time when the said suit property-Mombasa/Block I/525 was purportedly created and alienated, the said property was already alienated for public utility and the same was not available for alienation in favour of any person for that matter;

j) At all material times, suit property was corruptly and fraudulently alienated in favour of 1st Defendant and the title purportedly issued to it in respect thereof, was a proceed of corruption and a product of utter illegality;

k) At all material times, the 1st Defendant was not capable of transferring any proprietary interest in suit property to the 5th Defendant;

l) At all material times, suit property-Mombasa/Block I/525 was not capable of being acquired by the 1st Defendant in the first instance;

m) At all material times, suit property was not capable of being acquired by the 5th Defendant;

n) Kenya Railways Corporation was in possession of the suit property-Mombasa/Block I/525;

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o) Kenya Railways Corporation owned the suit property before the unlawful alienation in favour of the 1st Defendant in the first instance and subsequently in favour of the 5th Defendant;

p) The Kenya Railways Corporation granted the 2nd Defendant a small portion parcels of the suit property-Mombasa/Block I/525 only for expansion for road within the then Municipal Council of Mombasa;

q) The Kenya Railways Corporation did not grant the 1st Defendant any part of the suit property for purposes of allocation or alienation to any person including, the 1st Defendant in the first instance and subsequently to the 5th Defendant;

r) The Investigations undertaken by the 2nd Plaintiff never disclosed any factual or legal basis upon which the suit property was alienated in favour of the 1st Defendant in the first instance and subsequently to 5th Defendant;

s) There was imminent, dire and urgent need that the suit property be recovered and title purportedly issued in respect thereof, be cancelled and the said suit property be forfeited back to the Government for purposes of public utility as originally intended;

t) At all material times to this suit, the suit property was and still remained a public land, belonging to the Government of Kenya as held by the Kenya Railways Corporation and investigations did not disclose any evidence that proves otherwise;

u) At all material times to the 2nd Plaintiff's suit, the suit property-Mombasa/Block I/525 belonged to Kenya Railways Corporation;

v) At all material times to the Plaintiff's suit the suit property was and remained part of public land originally set aside for public utility; and

w) The suit property was corruptly and fraudulently created out of a road reserve.

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42. It was the 2nd Plaintiff's case that at all material times to the suit, the suit property – Mombasa/Block I/525 – had been and still remained public land belonging to the Government of Kenya. The 2nd Plaintiff contended that the alienation and/or allocation of the suit property in the first instance, and the subsequent issuance of a Lease on 14th September, 2012 to the 1st Defendant and thereafter the transfer of the said suit property to the 5th Defendant, had been fraudulent, illegal, null and void ab initio. It had not conferred any estate, right or interest upon the said 1st Defendant in the first instance and subsequently to the 5th Defendant or any other person for that matter.

43. The 2nd Plaintiff relied on the following particulars of fraud negligence and illegality against the 1st, 2nd, 3rd and 5th Defendants: -

    a. On 1st November, 1994 the 2nd Defendant irregularly and corruptly issued a Letter of Allotment over the suit property- Mombasa/Block I/525 to the 1st Defendant as unsurvey commercial plot, yet the said suit property had already been alienated for public utility.

    b. The 1st Defendant deliberately ignored the glaring fact that as at 1st November, 1994 the suit property was not an un-alienated Government Land.

    c. The 1st Defendant deliberately ignored the glaring fact that as at 1st November, 1994 the suit property was a road reserve.

    d. The 1st Defendant deliberately ignored the fact that before the suit property - Mombasa/Block I/525 could be alienated/allocated the approval of Kenya Railways Corporation was mandatorily required.

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e. The 2nd and 3rd Defendants deliberately ignored the glaring fact that as at 1st November, 1994 the suit property was not an un-alienated Government Land.

f. The Letter of Allotment dated 1st November1994 in favour of the 1st Defendant in the first instance was issued by the 2nd Defendant to the 1st Defendant contrary to the provisions of the Government Land Act Cap. 280 (Now repealed) and Registered Land Act, Cap. 300 (Now repealed).

g. The Letter of Allotment dated 1st November, 1994 in favour of the 1st Defendant in the first instance over the suit property-Mombasa/Block I/525, was issued by the 2nd Defendant to the 1st Defendant contrary to the provisions of the Kenya Railways Corporation Act.

h. The 2nd Defendant did not have authority or power to issue the Letter of Allotment dated 1st November, 1994 in favour of the 1st Defendant.

i. In the year 1999 the 2nd Defendant vide the then municipal council of Mombasa lacked the legal authority to lease the suit property-Mombasa/Block I/525 to the 1st Defendant.

j. The 2nd Defendant did not have authority or power to issue any title over the suit property at all.

k. On 17th July, 2014, the 1st Defendant irregularly transferred the suit property to the 2nd Defendant contrary to the provisions of the Government Lands Act, Cap. 300 (Now repealed), Registered Land Act, Cap. 300 (Now repealed) and the Kenya Railways Corporation Act.

l. The 1st and 5th Defendants severally and respectively executed documents including, Transfer of Land document dated 17th July, 2014; which document was used to illegally alienation of the suit property - Mombasa/Block I/525 in favour of the 5th Defendant.

m. On 17th July, 2014, the 1st Defendant lacked the capacity to transfer the suit property to the 5th Defendant.

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n. On 17th July, 2014, the 5th Defendant lacked the capacity to transfer the suit property to the Defendant lacked the legal capacity to acquire the suit property from the 1st Defendant.

o. The 1st and 5th Defendants on 17th July, 2014 entered into illicit agreement for transfer of the suit property-Mombasa/Block I/525.

p. On or about 24th July, 2015 the 5th Defendant executed and uttered documents that unlawfully led to registration and issuance of Certificate of Lease in his favour.

q. On 24th July, 2015 the 5th Defendant acquired the suit property from the 1st Defendant contrary to the provisions of the Government Lands Act, Cap. 300 (Now repealed), Registered Land Act, Cap. 300 (Now repealed) and the Kenya Railways Corporation Act.

r. The 3rd Defendant never had authority or power to prepare, cause to be prepared or issue Certificate of Lease on 7th December, 1999 in favour of the 1st Defendant in the first instance.

s. The 3rd Defendant never had the authority or power to prepare, cause to be prepared or issue Transfer of Lease on 24th July, 2015 in favour of the 5th Defendant over the suit property-Mombasa/Block I/525.

t. The 1st and 5th Defendants severally and respectively uttered documents to the lands office; which documents were actually that were used in illegal alienation of the suit property.

u. The 1st, 2nd, 3rd and 5th Defendants knew or ought to have known that the suit property was not available for alienation outside the confines of the Government Lands Act, Cap. 280 (Now repealed), Registered Land Act, Cap. 300 (Now repealed) and the Kenya Railways Corporation Act.

v. The 1st, 2nd, 3rd and 5th Defendants severally and respectively shut their eyes to the obvious and failed to make inquiries for fear of getting the correct information from the relevant public offices.

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w. The 1st, 2nd, 3rd and 5th Defendants knew or ought to have known that the suit property was not available for alienation in terms of registration and issuance of the Certificate of Lease in respect to the suit property, without a valid Part Development Plan.

x. The 1st, 2nd, 3rd and 5th Defendants knew or ought to have known that the suit property was not available for alienation in terms of any registration and issuance of the Lease in respect to the suit property, without a duly prepared and registered Part Development Plan.

y. The 1st, 2nd, 3rd and 5th Defendants dishonestly and recklessly facilitated the fraudulent alienation in terms of any registration and issuance of the Certificate of Lease over the suit property-Mombasa/Block I/525, outside the confines of the Government Lands Act, Cap. 280 (Now repealed), Registered Land Act, Cap. 300 (Now repealed) and the Kenya Railways Corporation Act.

z. The 1st, 2nd, 3rd and 5th Defendants, recklessly failed to comply with the relevant statutes and regulations governing the administration and alienation of Government land.

aa. The 1st, 2nd, 3rd and 5th Defendants' failure to proffer any reliable and lawful basis why they severally and respectively participated, facilitated, processed and executed documents that led to alienation of the suit property in favour of the 1st Defendant in the first instance and subsequently to the 5th Defendant.

bb. The Defendants failed to report to the then Kenya Anti-Corruption Commission or the current Ethics and Anti-Corruption Commission over the apparent irregular and unlawful alienation of the suit property-Mombasa/Block I/525 to the 1st Defendant in the first instance and subsequently to the 2nd Defendant

44. The 2nd Plaintiff asserted that at all material times, the 1st, 2nd, 3rd and 5th Defendants were actually or constructively aware that the suit property was reserved for government use and that the same was not available for alienation outside the confines of the

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Government Lands Act, Cap. 280 (Now repealed),Registered Land Act, Cap. 300 (Now repealed) and the Kenya Railways Corporation Act.

45. The Plaintiffs relied on the following particulars of 1st, 2nd, 3rd and 5th Defendants knowledge: -

    a) The 1st, 2nd, 3rd and 5th Defendants shut their eyes to the obvious and failed to make inquiries for fear of getting the correct information from the relevant public offices.

    b) The 1st, 2nd, 3rd and 5th Defendants shut their eyes to the fact that the suit property was and still remained alienated for public utility.

    c) The 1st, 2nd, 3rd and 5th Defendants shut their eyes to the provisions of Government Land Act governing the procedure to be followed for the allocation and alienation of Government Land, such as the suit property-Mombasa/Block I/525.

    d) The Defendants failed to report to the then Kenya Anti-Corruption Commission or the current Ethics and Anti-Corruption Commission over the apparent irregular and unlawful alienation of the suit property to the 1st Defendant in the first instance and subsequently to the 2nd Defendant.

46. The 2nd Plaintiff averred that the 1st Defendant had fraudulently acquired the suit property – Mombasa/Block I/525 – for profit to the detriment of the Government of Kenya. It was the 2nd Plaintiff's case that the 1st, 2nd, 3rd and 5th Defendants respectively and severally had facilitated and willfully participated in a corrupt enterprise with the corrupt aim of fraudulently acquiring part of the suit property – Mombasa/Block I/525 – through preparation, execution and registration of title over the suit property from the Government of Kenya by fraudulent and corrupt means.

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47. The 2nd Plaintiff averred that the 1st, 2nd, 3rd and 5th Defendants had actual knowledge, or ought to have known through due diligence, that there were defects in the Letter of Allotment held by the 1st Defendant, and as such the said Defendants had assumed the risk of all legal consequences appurtenant thereto. It was the 2nd Plaintiff's case that the 3rd Defendant and/or their official agents had been negligent, thereby leading to the illegal and fraudulent alienation of the suit property – Mombasa/Block I/525 – to the detriment of the Government of Kenya.

48. The Plaintiffs relied on the following particulars of negligence against the 4th Defendant and/ or his official agents: -

    i. Failure to notice and take remedial action over the fact that the suit property had been irregularly and unlawfully alienated to the 1st Defendant in the first instance.

    ii. Failure to notice and take remedial action over the fact that the suit property had been irregularly and unlawfully alienated in favor of the 2nd Defendant.

    iii. Wilfully facilitating the alienation of the suit property- Mombasa/Block I/525 in favour of the 1st Defendant in the first instance and subsequently to the 5th Defendant.

    iv. Failing to stop the irregular and unlawful alienation of the suit property to the 1st Defendant in the first instance and subsequently to the 5th Defendant.

    v. Failing to report to the then Kenya Anti-Corruption Commission or the current Ethics and Anti-Corruption Commission over the apparent irregular and unlawful alienation of the suit property to the 1st Defendant in the first instance and subsequently to the 5th Defendant

49. The 2nd Plaintiff averred that the 3rd Defendant, being an office in the public service, had therefore stood in a fiduciary position

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vis-à-vis all Government land and the public. By purporting to alienate the suit property – Mombasa/Block I/525 – to the 1st Defendant in the first instance and subsequently to the 2nd Defendant, the 3rd Defendant had acted fraudulently, illegally, and in abuse of their office, in breach of their duties as a fiduciary by virtue of being a public officer.

50. The Plaintiffs relied on the following particulars of fraud, irregularity, illegality and breach of trust, abuse of office against the 3rd Defendant and/ or his official agents: -

a) The 3rd Defendant knew or ought to have known that the suit property was not available for alienation outside the confines of the Government Lands Act, Cap. 280 (Now repealed) and the Registered Land Act, Cap. 300 (Now repealed).

b) The 3rd Defendant knew or ought to have known that the suit property-Mombasa/Block I/525 was not un-alienated Government Land.

c) The 3rd Defendant alienated in favour of the 1st Defendant, land that had already been alienated for public utility.

d) The 3rd Defendant knew or ought to have known that the suit property was not available for alienation in favour of the 1st Defendant in the first instance.

e) The 3rd Defendant knew or ought to have known that the suit property-Mombasa/Block I/525 was not available for alienation in favour of the 1st Defendant in the first instance without a valid Part Development Plan.

f) The 3rd Defendant knew or ought to have known that the suit properties were not available for alienation in favour of the 1st Defendants in the first instance without a duly registered Part Development Plan.

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g) The 3rd Defendant facilitated irregular and unlawful allocation of the suit property to the 1st Defendant in the first instance.

h) The 3rd Defendant facilitated irregular and unlawful alienation of the suit property in favour of the 5th Defendant.

i) The 3rd Defendant failed to stop registration of Certificate of Lease over the suit property-Mombasa/Block I/525 issued in favour of the 1st Defendant on 14/09/2012.

j) The 3rd Defendant failed to stop registration of Certificate of Lease over the suit property-Mombasa/Block I/525 issued in favour of the 5th Defendant on 24th July, 2015.

k) The 3rd Defendant facilitated registration of Certificate of Leases over the suit property-Mombasa/Block I/525 in favour of the 1st Defendant in the first instance and subsequently to the 2nd Defendants respectively outside the confines of the Government Lands Act, Cap. (Now repealed), the Registered Land Act, Cap. 300 (Now repealed) and Kenya Railways Corporation Act.

l) The 3rd Defendant recklessly failed to comply with the relevant statutes and regulations governing the administration and alienation of the suit property as a Government land.

m) The 3rd Defendant dishonestly dealt with Government land (suit property-Mombasa/Block I/525) already alienated for public utility.

n) The 3rd Defendant facilitated the alienation of the suit property in favour of the 1st and 5th Defendants respectively without any or any legal authority.

o) On 14th September, 2012 the 3rd Defendant issued a Certificate of Lease over the suit property in favour of the 1st Defendant in express breach of the provisions of the Government Lands Act, Cap. 280 (Now repealed), the Registered Land Act, Cap. 300 (Now repealed) and Kenya Railways Corporation Act.

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p) On 24th July, 2015 the 3rd Defendant issued a Certificate of Lease over the suit property - Mombasa/Block I/525 in favour of the 1st Defendant in express breach of the provisions of the Government Lands Act, Cap. 280 (Now repealed), the Registered Land Act, Cap. 300 (Now repealed) and Kenya Railways Corporation Act.

q) The 3rd Defendant alienated the suit property-Mombasa/Block I/525in favour of the 1st and 2nd Defendants respectively, with notice that it was public land that had not been altered or its use changed in accordance with applicable legal requirements.

r) The 3rd Defendant purportedly created and effected a disposition that was prejudicial to a subsisting public interest initially secured by alienation of government land for the benefit of the public.

s) Willful failure to ensure that the alienation of the suit property-Mombasa/Block I/525 was, transparent and lawful.

t) Failing to report to the then Kenya Anti-Corruption Commission or the current Ethics and Anti-Corruption Commission over the irregular and unlawful alienation of the suit property.

51. The 2nd Plaintiff averred that the 1st, 2nd, 3rd and 5th Defendants, with knowledge that the 3rd Defendants had no statutory powers and/or was acting in excess of his and/or his official agents' statutory powers, and that their actions were likely to occasion loss to the public and the Republic of Kenya, purported to grant title over the suit property-Mombasa/Block 1/525.
52. The Plaintiffs relied on the following particulars of loss and damage: -

i. The suit property had been rendered unavailable for use and benefit of the public.

ii. Due to the impugned conduct of the Defendants, the suit property has been illegally alienated for private use and

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rendered unavailable for proper and lawful use thereby occasioning loss to the Republic of Kenya.

53. The 2nd Plaintiff averred that it had legal and equitable interest over the suit property – Mombasa/Block I/525 – and title thereto, by virtue of its constitutional and statutory mandate. The 2nd Plaintiff averred that the actions and omissions of the Defendants, severally and respectively as pleaded by the 2nd Plaintiff, had led to wrongful interference with public land – Mombasa/Block I/525 – and material loss of user rights by the Government of Kenya.
54. The Plaintiffs contended that, for the reasons stated hereinabove in respect of the suit property – Mombasa/Block I/525 – the Defendants' several and respective manner of procuring the allocation and alienation of the suit property, including the preparation of the Letter of Allotment on 1st November, 1994, the Lease in 1999, the Certificate of Lease dated 7th December, 1999 in favour of the 1st Defendant, and the Certificate of Lease dated 24th September, 2015 in favour of the 1st Defendant, had been wholly irregular, void ab initio, corrupt, fraudulent and unlawful.
55. By reason of the foregoing, the purported issuance of the Letter of Allotment dated 1st November, 1994 by the 3rd Defendant over the suit property in favour of the 1st Defendant had been void ab initio and incapable of conferring upon the 1st Defendant any estate, interest or right in the suit property at all. By reason of the foregoing, the purported issuance of the Lease by the 3rd Defendant in 1999 over the suit property – Mombasa/Block I/525 – in favour of the 1st Defendant had been void ab initio and incapable of

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conferring upon the 5th Defendant any estate, interest or right in the suit property at all.

56. By reason of the foregoing, the purported registration and issuance of the Certificate of Lease on 7th December, 1999 by the 3rd Defendant over the suit property in favour of the 1st Defendant had been void ab initio and incapable of conferring upon the 1st Defendant any estate, interest or right in the suit property at all. By reason of the foregoing, the purported registration and issuance of the Certificate of Lease on 24th July, 2015 by the 3rd Defendant over the suit property Mombasa/Block 1/525 in favour of the 1st Defendant was void ab initio, and incapable of conferring on the 1st Defendant any estate, interest or right in the suit property or at all.
57. By reason of the foregoing, the purported transfer of the suit property- Mombasa/Block 1/525 on 17th July, 2014 by the 1st Defendant to the 5th Defendant was void ab initio, and incapable of conferring on the 3rd Defendant any estate, interest or right in the suit property or at all.
58. Despite demand and notice of intention to sue being duly served, the Defendants had failed, neglected, refused and/or ignored to make good the 1st Plaintiff's claim rendering this suit necessary.
59. The 1st Plaintiff averred that there is no other suit pending, and that there has been no previous proceedings, in any court between the 1st Plaintiff and the Defendants over the same subject matter save for "***Mombasa CMCC No. 2892 of 2007-Zaharia Mohamed Mawia – Versus - Duncan Kinyua & 4 others;*** and ***"Mombasa H.C.C No. 116 of 2009 -Zaharia Mohamed Mawia – Versus - Kenya Railways Corporation & 5 others",*** which suits were linked to this matter but effectively

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withdrawn by the 1st Defendant herein, and that the cause of action relates to the 1st Plaintiff in the Plaint.

60. Despite knowledge of the 2nd Plaintiff claim against the Defendants, severally and respectively, they had refused, failed and/or neglected to make amends of their fraudulent actions and failed to admit liability and/or to surrender the suit property and title thereto, together with the accrued mesne profits over the said properties to the Government of Kenya hence necessitating the filing of this suit.
61. It was the 2nd Plaintiff case that it was within the tenets of public interest that the corruptly and fraudulently acquired public property as the suit property herein by the Defendants severally and respectively should be promptly recovered and returned back to the Government of Kenya in accordance with the law. On 8th June, 2020 the 2nd Plaintiff had sued the 4th Defendant herein in Mombasa ELC No. 65 of 2020 wherein the suit property was Mombasa/Block 1/525 and pretrial directions on compliance with Order 11 of Civil Procedure Rules, 2010 were yet to be taken.
62. On 8th June, 2020 the 2nd Plaintiff had sued the 5th Defendant herein in Mombasa ELC No. 64 of 2020 wherein the suit property was Mombasa/Block I/525 and pre - trial directions on compliance with Order 11 of Civil Procedure Rules, 2010 were yet to be taken. The 2nd Plaintiff's cause of action against the Defendants in this present suit occurred during the currency of the provisions of the Government Lands Act, Cap. 280 (Now repealed) and the Registered Lands Act, Cap. 300 (Now repealed) as read with

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provisions of Sections 106 (2), (3); 107 (1),(2),(4); 108 and 109 of the Land Registration Act, No. 3 of 2012.

63. The suit property is situated in Mombasa and the cause of action arose in Mombasa hence this Honourable Court has the requisite jurisdiction to hear and determine the 1st Plaintiff's cause of action against the Defendants. The 2nd Plaintiff's cause of action accrued within the jurisdiction of Honourable Court.

64. The 1st & 2nd Plaintiffs prayed for Judgment to be entered against the 1st, 2nd, 3rd, 4th & 5th Defendants jointly and severally for:-

(a) A permanent injunction to restraining the Defendants, by themselves, their agents, servants, employees and/or agents from dispossessing the 1st Plaintiff from the suit properties, entering into, occupying, evicting the 1st Plaintiff's tenants, demanding rent from the tenants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any other development and/or demolishing any structure or building in the suit properties or in any other way interfering with the suit properties and/or 1st Plaintiff's quiet possession and enjoyment of the suit properties now registered as land reference numbers: Mombasa/Block 1/525 and Mombasa/Block 1/525.

(b) A declaration that the sub - division and the 1st and 2nd Defendants' purported Titles on the suit properties are illegal null and void and does not confer any proprietary interest upon the 1st and 2nd Defendants or any other person.

(c) An order directing that the 3rd Defendant to rectify the Land Register and to strike out the 1st and 2nd Defendants' names therefrom the Register or such Order as will effectively restore the 1st Plaintiff's title and interest in the suit properties.

(d) Costs and interest incidental to this suit.

65. The Plaintiffs testified as PW - 1 on 24th May, 2022 who testified as follows: -

A. <u>Examination in Chief of PW - 1 by M/s. Abdirahman Advocate:</u>

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66. PW - 1 was sworn and testified in English language. He is called PIUS NYANGI MAITHYA, a citizen of Kenya and holder of the national identity card bearing the particulars as shown to Court during the hearing. He had been a registered Valuer working with the Ethics and Anti - Corruption Commission for many years. He indicated that he had worked for 32 years as a Valuer; 16 years as a Private Valuer and 18 years with EACC. He asserted that he had visited the suit property in the year 2021. He further asserted that he had collected the RIM, obtained the searches, and visited the site. Using the RIM Map, he identified the suit properties as MBA/I/525 and MBA/I/526.
67. PW - 1 contended that, on the site, he had found parcel No. 525 to be close to the Railway with a semi-structure, and that parcel No. 526 had three permanent structures and several semi-permanent structures. Notably, two of the permanent structures were marked KRC 19134 and 19135 respectively. PW - 1 further confirmed that, with his experience, the structures had been too old and not worth considering for valuation as they had not ultimately been utilized. Hence, he proceeded to value the land.
68. Another factor PW - 1 had considered was that these properties were under investigation. He assumed the title had been regular, as that was the only way one could obtain market value. Hence, this did not affect his valuation on 17th March, 2021, having considered data and property within that region. PW - 1 prepared a Valuation Report with the following values:

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- Parcel No. 525 – Kshs. 18,000,000/- (measuring approximately 0.015 acres)
- Parcel No. 526 – Kshs. 100,000,000/- (measuring approximately 0.97 acres)

69. PW - 1 contended that he had only considered the land and not the structures in concluding the value given to the properties. He had produced the Valuation Report prepared by the 2nd Plaintiff, which was admitted in evidence and marked as Exhibit 1.

B. Cross examination of PW - 1 by Mr. Mbogo Advocate.

70. PW - 1 confirmed that he had been a qualified valuer for 32 years. He further stated that he did not have any proof of his qualification and did not have any proof of employment with the Ethics and Anti-Corruption Commission.
71. PW - 1 stated that "KRC" referred to Kenya Railways Corporation and that the asset number had not been documented. He indicated that the asset number had not been his own creation, that he had never written it anywhere as he had not been conducting any investigations. He added that it could have meant that the land and property had belonged to Kenya Railways Corporation.

Cross examination of PW - 1 by Mr. Wachira Advocate.

72. PW - 1 reiterated that he did not know Mr. Justin Wamole. He stated that he could not comment on another valuer's report which he had not seen.
73. PW - 1 confirmed that he had seen the official searches and that he had not observed any encumbrances or restrictions. He

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indicated that he had seen that there were many occupants on the parcels but could not tell their identity.

C. Cross Examination by Mr. Kariuki Advocate.

74. PW - 1 confirmed that he conducted a search which showed the land was Hussein A. Abdirahman's the 5th Defendant.

D. Re – examination of PW - 1 by M/s. Abdirahman Advocate.

75. PW - 1 asserted that he was experienced and that he had been prepared to provide documents. He further confirmed that he had been gazetted and could avail the documents. He contended that, if he had not been employed by the Ethics and Anti-Corruption Commission, the report would have read "consultant" instead of appearing on the official letterhead of the EACC.

76. The Plaintiffs called their second witness on the same day and he testified that:

A. Examination in Chief of PW - 2 M/s. Abdirahman.

77. PW - 2 testified under oath and in English language. She was called HASHIM GOT SAT. He was a Land Registrar in Mombasa between the years 1985 to 1997 before he was transferred to Lamu, then back to Mombasa. He had also worked in Kisumu, Nairobi, Mombasa, Narok and now was based in Machakos. He asserted that he has served for 38 years. PW - 2 testified that he recorded a statement with regard to the two parcels of land Numbers 525 and 526. He stated that he was the custodian of all the property under Registered Land Act Cap. 300 (Now Repealed); hence the record as at that time indicated MSA/BLOCK 1/525 on first registration was done on 7.12.1999. At the time,

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the Lessor was the Municipal Council of Mombasa and the Lessee was Zahariah Mohamed Mawia for 99 years. This plot measures 0.015 HA. The Leases for Plot Numbers 525 and 526 were presented on 7th December, 1999. The acreage for plot number 526 was 0.398 HA and the Lessee was Zahariah Mohamed Mawia.

78. Subsequently, Plot No. 525 was transferred to Hussein Abdullahi Abdirahman on 24th July, 2015 and on the same day a Certificate of Lease was issued to him. On 3rd August, 2015 a restriction was placed on title under the provision Section 76 of Land Registration Act, No. 19 of 2011 by EACC. Up to that level there had been no dealing on plot number 525. PW - 2 wished to have his statement adopted by court. He further testified that with regard to plot number 526, on 4th August, 2011 the plot was transferred to CYKA Holding Ltd., the 4th Defendant at a price of a sum Kenya Shillings Five Million (Kshs. 5,000,000/-) and on the same day a Certificate of Lease was issued.

79. PW - 2 stated that a caution had been registered by one Cyrus Waithaka claiming purchaser's interest. On 4th August, 2011 there was a withdrawal of the caution. He explained that during colonial period title deeds issued in Mombasa were under the Land Titles Act. But after independence land in Mombasa island was converted to Registered Land Act and the one outside the Island remained Registered Tiles Act, Cap. 281. He further testified that "Block 1" within the Shimanzi area land was all leasehold for residential and commercial purposes. He asserted that there were no other documents found in the register, he could not attest to any other matter on the record.

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80. PW - 2 indicated that from the time of recording his statement, he was able to go to the Land Registry and was able to get the then current Certified copy of the green card. He indicated that the Leases were registered on 3rd December, 1999 and Stamp Duty paid on the same day. He further asserted that in terms of procedure the lands office was not concerned with the conferring of ownership. He stated that the conferment of the land is by the Lessor, the Municipal Council. The role of the Land Registry is to ensure payment of rates, rents and stamp duty.

B. Examination in Chief of PW - 2 by Mr. Karina Advocate.

81. PW - 2 indicated that he could not adduce evidence on what transpired before the registration and transfer of these 2 leases to the 1st and 4th Defendants or when the land was allegedly allocated by the Municipal Council of Mombasa. He produced the 10 documents on Item Numbers 8, 9, 10, 11, 12, 13, 23, 24, 25 and 26 of the 1st and 2nd Plaintiff's Bundle and marked as Plaintiff Exhibits No. 2 to 11 of the Plaintiff's Documents.

C. Cross examination of PW - 2 by Mr. Mbogo Advocate.

82. PW - 2 attested that he had adduced evidence based on the records at the Land Registry, Mombasa and also in his capacity as the custodian of the records there. By then, the head Lessor was the Municipal Council of Mombasa. He confirmed that there were no records on any other registered entities or person to these properties found in the registrar.

D. Cross Examination of PW - 2 by Mr. Mwandeje Advocate.

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83. PW - 2 asserted that he was the Land Registrar Mombasa from the year 1985 to 1987. He further testified that he was not present during the period when the entry was made in December, 1999 and the Land Registrar then was Mr. Nyangau. He stated that the role of the Land Registrar is to process documents based on authenticity. The two leases were signed and common seals affixed by the Mayor and the Land Registrar had no role.

E. <u>Cross Examination of PW - 2 by Mr. Mbogo Advocate.</u>

84. PW - 2 stated that the title was opened on 6th December, 1999. He asserted that the first edition of the Green and White Card were opened in December 1999 and that was the same position since then until the time of his statement. The 1st entry was Municipal Council and now the County Government of Mombasa. He stated that by the time of handing over there was no other documents apart from the ones he had indicated. He maintained that after the registration of Plot No. 526, there had never been any formal complaint from anyone including EACC.
85. PW - 2 stated that when he visited the Registry on the day of the hearing on 23rd September, 2022 he confirmed it was still CYKA Holdings Limited as the registered owner as per the green card but not white card.

F. <u>Cross Examination of PW - 2 of Mr. Kariuki Advocate.</u>

86. PW - 2 confirmed that Plot No. 525 was in the name of 5th Defendant. He affirmed that to be the position, from his statement and stated that accordingly that from the record there was nothing to show the property belonged to Kenya Railways and that was the position on that date. However, on 3rd August,

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2015, there was an inhibition registered by EACC and that was the then current status.

G. Re - Examination of PW - 2 by Mr. Karina Advocate.

87. PW - 2 stated that the Lessor was Municipal Council of Mombasa if there was any Reversionary Interest it was not indicated.

88. The Plaintiffs called PW - 3 who testified that:-

A. Examination in Chief of PW – 3 by M/s. Abdirahman Advocate.

89. PW - 3 sworn and testified in English language. He was called ENGINEER ALBERT T. KENO, a Citizen of Kenya and holder of the National Identity card bearing all the particulars as shown to Court during the hearing. He had been the Chief Officer in charge of Transport at the County Government of Mombasa. His responsibility had been oversight of the transport function. He stated that he had written a letter dated 19th October, 2019. He also confirmed that he had received a letter dated 11th September, 2019 – Ref. EACC/MSA/6/15/2 Vol. 11(36) – requesting certain documents in relation to the land at Shimanzi. He read out the reply to the said letter addressed to the Deputy Director of the EACC in detail, and the Court made reference to the letter.

90. PW - 3 asserted that this had been the position regarding the land. He stated that the area had been designated as a road reserve, that it experienced serious traffic congestion, and that it was a major carriageway. He further stated that it was an industrial area and that it affected the drainage system. He added that, from information obtained from his office, the area had been reserved for transport functions since the year 1950s.

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B. Examination in Chief of PW - 3 by Mr. Karina Advocate.

91. PW - 3 concluded that the two plots had been created from a road reserve.

C. Cross Examination of PW - 3 by Mr. Mbogo Advocate.

92. PW - 3 stated that he had received a letter dated 11th September, 2019 from the Ethics and Anti-Corruption Commission. He further stated that he had had nothing to prove his appointment to work for the County Government of Mombasa. He stated that he had not been aware that the County Government of Mombasa had been a party to the proceedings. He explained that he had only been asked to come to court to produce the letter.
93. PW - 3 confirmed that the letter had been written to the Chief Officer, County Government of Mombasa, and that it had not borne his name. He stated that he had not been aware of the proceedings of the case and that the letter had touched on traffic and drainage issues in the area and the consequent need for expansion. He clarified that the letter had not been about ownership of the land.

D. Cross Examination of PW - 3 by Mr. Wachira Advocate.

94. PW - 3 stated that the Ethics and Anti-Corruption Commission had been concerned about many other plots which had been causing transport problems. He further stated that he had not been sure whether the letter from the EACC had only targeted the two Plots – Mombasa/Block I/525 and Mombasa/Block I/526. He stated that those plots might have been allocated by other departments.
95. He further confirmed that six survey plans had been approved by the Government. He stated that he had come to court solely to

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present the letter and that he had executed the same to the best of his ability.

E. Cross Examination of PW - 3 by Mr. Kariuki Advocate.

96. PW - 3 stated that he had not had the power to investigate matters in other departments and had only dealt with the documents from his own department. He indicated that the plans had shown some of the plots that had been created from the road reserve, including the referred plots No. Mombasa/Block I/525 and Mombasa/Block I/526 respectively.
97. PW - 3 stated that there had been many other departments within the County Government of Mombasa, all co - ordinated by the County Secretary. He posited that the Ethics and Anti-Corruption Commission had known that fact but, to the best of their knowledge, had opted to approach his department exclusively. Thus, his department had specifically responded to their requests and had covered the two plots, though there had been many other plots that had also caused the problem, which had also been on the road reserve and had consequently contributed to the nuisance of the traffic menace within the Shimanzi area, as he had indicated in his letter in detail.

F. Re - Examination of PW - 3 by Mrs. Abdirahman Advocate.

98. PW - 3 reiterated that the letter written to the County Government of Mombasa by the Ethics and Anti-Corruption Commission had only focused on the two plots, specifically Nos. 525 and 526 respectively, and that was why they had concentrated on those two and not on the other sub - divided

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plots. He confirmed that, indeed, the County Government of Mombasa, like all other counties, had several departments dealing with different aspects. He clarified that his department had only dealt with matters of transport within the County Government of Mombasa and that he had not had the capacity to comment on the allocation or conferment of plots to others.

G. Re-Examination of PW - 3 by Mr. Karina Advocate.

99. PW - 3 stated that the conclusion which he had arrived at in his letter, to the effect that the survey plans had shown that some of the plots had been created from the road reserve, including the two plots, and that the whole road reserve would be restored to its original status to facilitate improvement and expansion works, had been based on the information contained in the survey plan and documents within his department. As far as he had been concerned, the Kenya Railways had been a State Corporation.

100. PW - 3 produced the letter dated 19th October, 2019, which was marked as Plaintiff Exhibit No. 12 in the 1st and 2nd Plaintiffs' documents.

101. The Plaintiffs called PW - 4 who testified that:-

A. Examination in Chief of PW - 4 by Mr. Karina Advocate.

102. PW - 4 was sworn and testified in English language. He was called JUSTINE OYAGI OMOKE, a citizen of Kenya and holder of the national identity card with al the particulars as shown to Court. He had worked for Kenya Railways as an Estate Project Property Manager. He stated that he had filed his witness statement dated 21st March, 2022 on the same date and wished to adopt it. He also confirmed that he had filed a List of Documents dated 2nd

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August, 2022. PW-4 stated that the location of the property had been at Shimanzi Area within Mombasa. He indicated that it had been un - surveyed land. He further stated that Kenya Railways had been the owner of the property and had had Vesting Orders of years 1963 and 1986 conferred upon it. He indicated that the property had been intended for housing employees of Kenya Railways.

103. PW - 4 explained that Kenya Railways had come to court upon realizing that people had been acquiring titles for the land without its consent. PW - 4 stated that there had been two previous cases involving the same parties: -

(a) CMCC No. 2892 of 2007, Zahariah Mohamed Mawia – Versus – Duncan Kinyua (Page 66 of the Bundle); and

(b) HCCC No. 116 of 2009, Zahariah Mohamed Mawia – Versus – Duncan Kinyua & Others (Page 71). He further stated that Kenya Railways had sought to be joined in both cases. Immediately Kenya Railways had sought to be joined, the suit HCCC No. 116 of 2009 had been abandoned or withdrawn. He referred to the ruling of the matter at Page 761, stating that the Court (Justice Ibrahim) had made a finding that Kenya Railways had been in possession of the suit property.

104. As for the 1st Defendant's defence, she had held that she had acquired the property from the Municipal Council of Mombasa pursuant to Minute No. 335/93. PW - 4 stated that Kenya Railways had never given the Municipal Council authority to dispose of the property under Minute No. 335/93. He emphasized that Kenya Railways had not been in the list and neither had its property been mentioned in the list. He added that, if one visited the site,

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they would find leases conducting business under the blessing of the Defendant. He concluded that the title issued ought to be cancelled, having been given out illegally, as the land had still remained un - surveyed.

B. <u>Examination in Chief of PW - 4 by M/s. Fatuma Advocate.</u>

105. PW - 4 explained that, for a property to be acquired, there had to be a Board resolution and consent by Kenya Railways, together with approval by the Ministry of Transport. He referred to three documents: a letter dated 28th May, 2002 from the Minister of Transport and Communication signed by the Permanent Secretary (Page 29), a letter dated 15th April, 2002 to the Chief Valuer (Page 30 of the Bundle), and a letter dated 1st May, 2002 by the Chief Valuer (Page 31). PW - 4 also referred to a cheque for Kenya Shillings One Fourty Thousand (Kshs. 140,000/-) dated 6th February, a cheque for a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 740,000/-), and a deposit slip dated 7th February, 2007, together with a letter by Mr. Mutua. He testified that the procedure had not been followed, as there had been no board minutes, no Ministry of Transport approval, and no Cabinet meeting.

106. PW - 4 contended that, if the properties were not granted to Kenya Railways, it would lose revenue equal to the value of the property and for its operations, as the property had been given away without following due process. PW - 4 noted that, from the vesting orders on Pages 5 and 6, the suit property mentioned had been for East African Railways and Harbor Administration

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and not Kenya Railways. By then, the suit properties had not been surveyed and hence had not been mentioned in 1963. He further stated that, on Page 6 – Vesting Orders of 22nd February, 1986 – the properties had not been mentioned, though some of them had later been surveyed and registered in the name of Kenya Railways. He explained that Kenya Railways had been initiating the process for registration of property into its name.

107. PW - 4 referred to the statement of the Land Registrar, Mr. Hassim Got, which read that the property belonged to the Municipal Council. He emphasized the last line, which read that there had been nothing to show that the land had belonged to Kenya Railways. PW - 4 stated that the Court should believe Kenya Railways, as it had Vesting Orders of 1963 and 1986 which conferred ownership of the suit property.

108. PW - 4 referred to Page 9 of the letter dated 2nd November, 1999 by the Director of Survey on parcels Nos. 525 and 526, i.e. Improved Survey Plan F/R No. 366/181, and stated that Kenya Railways had never initiated the surveying of the land and that the said survey had been illegal and irregular. He added that matters of land had been under the Ministry of Lands and not the Ministry of Transport.

109. PW - 4 further asserted that, from his witness statement, there had been a letter dated 19th October, 2019 by the County Government of Mombasa to the Director of Anti-Corruption, but there had been no letter to the Municipal Council to show that Kenya Railways had granted the grant for road reserve, which had instead been converted to commercial use. He stated that

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Kenya Railways had nothing to show of its complaint after 30 years, though there had been many letters. He noted that 27 plots had been given by the Municipal Council, but Kenya Railways had only complained of two plots, as they were the ones which belonged to it.

110. When asked about the Valuation Report for a sum of Kenya Shillings Four Hundred Fifty Million (Kshs. 450,000,000/-), PW - 4 stated that there had been a Valuation Report, but it had not been attached. With regard to the cheque paid to Kenya Railways for a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-), PW - 4 stated that Kenya Railways had been compensated for the structures, but the issue had been that Zahariah had never been allocated the land, which Kenya Railways was still in possession of to date through its tenants. PW 4 stated that, as indicated in his statement, there had been collusion with some staff members in receiving a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-). He stated that he had not known the staff members and further confirmed that Kenya Railways had not refunded the money to the person who had paid it.

111. PW - 4 stated that the 4th Defendant had never been a party to the civil cases filed in court which he had referred to above. He stated that the Survey FR 355/1818 referred to Paragraph 5 of the statement by Athman Tahmani Ali had been an illegal survey. He referred to Pages 12 and 13, which, according to those documents, showed that the land had belonged to the Municipal Council.

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112. PW - 4 noted that, on Page 19, Zahariah Mahamod Mawia had been given the Certificate of Lease dated 7th December, 1999. From the official search conducted at the Land Registry, there had been nothing to show that the land had belonged to Kenya Railways. On Page 29, the letter dated 28th May, 2002, he maintained that the procedure for disposal of the land had not been followed. He stated that he had had nothing on the procedure. From the letters on Pages 29 and 30 of the Plaintiffs' Bundle, he stated that Kenya Railways had only become aware of these matters from the year 2002.
113. PW - 4 referred to a letter dated 18th May, 1995 by the Ministry of Lands – Paragraph 4 – on compensation to the owners, and stated that Kenya Railways had never written any complaints. On Page 17 of the 4th Defendant's documents dated 28th October, 2002, he referred to a letter dated 14th September, 1999 by Kenya Railways to the Municipal Engineers, Paragraph 2, which had been a letter of no objection to the survey provided that Kenya Railways was compensated for the existing structures before full possession of the plot was taken.
114. PW - 4 stated that Kenya Railways had come to court in the year 2015. He noted that there had been no proceedings at the EACC and no arrest of anyone so far. He referred to a letter by the National Land Commission dated 17th June, 2017 by the Chairman, Prof. Swazuri. He testified that there had been a mosque on the land, but he had not been aware of it.

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115. The 4th Defendant had bought the property from Zaharia Mohamed and had proof, while Kenya Railways had no proof of ownership of the property.

C. <u>Cross Examination of PW - 4 by Mr. Kairuki Advocate.</u>

116. PW - 4 stated that he had been aware that titles had been issued in year 1999 and that Kenya Railways had never raised any case challenging the title deeds. He confirmed that Kenya Railways had never claimed ownership of the properties and that there had been no restriction registered against them.
117. PW - 4 indicated that he had not been aware when the property had been transferred to the 5th Defendant. He explained that Kenya Railways had sought to be joined in the two cases which were subsequently withdrawn, but that Kenya Railways had never filed any case challenging ownership when the 5th Defendant had bought the land. He stated that the 5th Defendant had acquired the title in July 2015 as an innocent purchaser for value, at the same time that Kenya Railways had come to court in August 2015.
118. As the Estate Manager of Property at Kenya Railways, he stated that, had he placed a restriction on the property, he was not sure whether the property would have been transferred from Zahariah to the 5th Defendant. He maintained that, to him, the properties Nos. 525 and 526 had still remained in the possession of Kenya Railways. He added that, when he had written his statement, he had consulted people on the ground, but he had not been informed whether there had been a mosque on Plot No. 525.

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D. Cross Examination of PW - 4 by Mr. Oduso Advocate.

119. PW - 4 stated that he had started working with Kenya Railways in 2007. He explained that he had never been involved in the activities relating to the Vesting Orders of 1960 and 1986, but that he had obtained the information from records held by Kenya Railways. He testified that Kenya Railways had information concerning the un-surveyed land and the ongoing transactions. He stated that Kenya Railways had been established in year 1977 after the dissolution of the East African Railways.

120. PW - 4 further stated that Kenya Railways had not initially been a party to the two cases, but had later been joined, and that there were documents to show that Kenya Railways had become a party. He stated that the Defendants in the Civil case HCCC No. 116 of 2009 had been sued as tenants of Kenya Railways, though they had been described in the pleadings as tenants based on Kenya Railways' records which were not before the Court.

121. PW - 4 further stated that the procedure for acquisition of property had been anchored in the Kenya Railways Policy, an internal document. He stated that Kenya Railways had inherited the property from the East African Harbors and Management. He informed the Court that the properties had been in the process of being registered in the name of Kenya Railways, though some had still remained in the name of East African Harbors and Management. He confirmed that the suit properties had still been under East African Harbors and Management.

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E. Re - Examination of PW - 4 by Mr. Karina Advocate.

122. Upon re-examination, and with reference to the ruling on Page 73, PW - 4 asserted that Kenya Railways had been in possession of the properties through its tenants. With reference to the Vesting Orders at Pages 5 and 6, he stated that Kenya Railways' tenants had still remained there up to date.

123. PW - 4 further indicated that the Kenya Railways property had still been un-surveyed. He referred to Page 8, dated 1st November, 1999, which had been written by the Municipal Council. He also referred to a letter dated 14th September, 1999 concerning proposed Plots No. A, B, and C adjacent to Plots 293 and 294, Block 1, Mombasa Island, as contained at Page 17 of the Defendant's documents. He noted that, from the minutes, the name of Zaharia had been missing.

124. PW - 4 referred to the letter dated 19th October, 2019 at Page 10, and to Page 37 of the Plaintiffs' Bundle, which had mentioned three plots – A, B, and C – adjacent to Plots 295 and 294. On the issue of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-), he stated that there had been no demand letter for its refund. He concluded that it would be retrogressive to recall the title by Kenya Railways.

F. Re - Examination of PW - 4 by M/s. Fatuma Advocate.

125. PW - 4 confirmed that the subject properties had been the same ones in the previous cases and that they had been in the possession of Kenya Railways. He asserted that, if at all there had been any surveying, it had not been undertaken with the involvement of Kenya Railways. He stated that there had never

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been any compensation. He confirmed that he had been shown the letter by the National Land Commission indicating Zaharia as the owner, though Kenya Railways had been the owner.

126. PW - 4 further stated that he had been informed that the 1st, 4th and 5th Defendants had been innocent purchasers by virtue of searches, but he asserted that they had never been in possession of the suit property. She testified that she had recorded a statement on 11th November, 2015. She further testified that the Ethics and Anti - Corruption Commission had requested various documents, including minutes and several letters from the Ministry of Transport and Communication as well as a letter from the Town Clerk. She stated that the County Government of Mombasa had not been the custodian of the minutes and had therefore been unable to trace them. She testified further that she had managed to obtain the rest of the letters.

127. The Plaintiffs called PW - 5 on 24th May, 2023 who testified that: -

A. <u>Examination in Chief of PW - 5 by M/s. Abdirahamin Advocate.</u>

128. PW - 5 was sworn and she testified in English language. She identified herself as M/s. ROSE MUNUPE. She was the Director Land Administration working for the County Government Mombasa. PW - 5 indicated that she had obtained the letter from Mr. Muhongo dated 24th October, 2003, addressed to the Managing Director of Kenya Railways, being No. 18 of the Bundle. In that letter, the Municipality had confirmed that Shimanzi had been a road reserve and had not belonged to

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Kenya Railways, and that, according to the law, all such roads had belonged to the Local Authority. The letter had mentioned Minutes No. 335/93. She referred to the third and fourth paragraphs of the letter, noting that it had been the letter used to allocate the plot to Zaharia Mohamed Mawia.

129. PW - 5 further referred to another letter dated 21st May, 2002, written by J.K. Mwinzi of the Ministry of Transport and Communication. From that letter, she stated that it should have been for the Municipality, making reference to the Railway Land Committee. She also referred to a letter of allocation dated 1st November, 1994, whose last paragraph had read that the approval of Kenya Railways Corporation was required, thereby indicating that the plot had belonged to Kenya Railways. She produced her statement as evidence in support.

B. <u>Examination in Chief of PW - 5 by Mr. Karina Advocate.</u>

130. PW - 5 on being referred to the Letter of Allotment dated 1st November, 1994, the Part Development Plan (PDP) had not been one of the documents she had referred to. She further referred to the Defence by the 1st Defendant, noting that she had been allocated the plot through Minute 335. She referred to the minutes of 7th September, 1993 – Minute 335/93 – and observed that the name of Zaharia Mohamed had not appeared therein.

C. <u>Cross Examination of PW - 5 by Mr. Wachira Advocate.</u>

131. PW - 5 stated that she had not been the custodian of the documents requested by the Ethics and Anti-Corruption Commission. She indicated that, at the time, she had not been the Director of Lands, though she had since acted as Director of

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Lands for twelve years. She referred to Document - 3 at Page 7, being an application dated 16th October, 1994, through which she had applied for plot allocation. On 1st November, 1994, she had received a letter from the Municipal Council indicating that she had been allocated the plot. She testified that it had not mattered whether she had been in the minutes or not.

132. PW - 5 referred to the condition on the approval of Kenya Railways from the Letter of Allotment, and to the letter dated 14th September, 1999 by the Managing Director of Kenya Railways (Page 17), which had meant that the condition had been satisfied. She explained that the only condition by Kenya Railways had been that existing structures be compensated, and that this had been communicated to the Municipal Engineer. In summary, she stated that she had applied on 16th October, 1994, received allocation on 1st November, 1994, obtained Kenya Railways' approval on 14th September, 1999, and had been issued with the title on 7th December, 1999.

133. PW - 5 referred to the Town Clerk's letter dated 24th October, 2003 regarding the status of the plot and its conclusion. She confirmed that the plots had been endorsed by His Excellency the President in a letter dated 1st September, 1993, and stated that there had been nothing to show that the land had belonged to Kenya Railways.

D. <u>Cross Examination of PW - 5 by Mr. Kariuki Advocate.</u>

134. PW - 5 stated that, when she had received the letter from the Kenya Anti - Corruption Commission, the plot had belonged to Zaharia. She explained that there had been a system of transfer

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and rates payment, but at that moment they had not checked. By the time they had checked, it had been necessary to establish who the rate payers had been. She added that she would have been surprised to learn that the plot had been transferred to the 4th and 5th Defendants.

E. Cross - Examination of PW - 5 by Mr. Onduso Advocate.

135. PW - 5 asserted that her mandate had been to check all land records and resolve any dispute on land within Mombasa. She indicated that the position of the County Government of Mombasa had been that the land had been irregularly allocated, as the County had always been aware that it had been a road reserve. She further asserted that she had not been the author of the documents requested by the Kenya Anti-Corruption Commission and confirmed that she had not been the custodian of those documents, nor had they been in the custody of the County. She affirmed that the County had not supplied the minutes.

F. Re - Examination of PW - 5 by M/s. Abdirahman Advocate.

136. Upon being shown the letter dated 14th September, 1999, she asserted that she had never come across it before and had only seen it in court. She stated that the Municipal Council, in the letter of allotment and the letter by Kenya Railways, had indicated that there had been structures belonging to Kenya Railways.

137. PW - 5 referred to the letter dated 24th October, 2003, which had indicated that the land had been a road reserve and had

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mentioned Minutes No. 335/93. She confirmed that she had been a custodian of those records, but that they had been in the possession of the Council and could have been obtained by any member of the public.

G. Re - Examination of PW - 5 by Mr. Karina Advocate.

138. PW - 5 stated that she had not been shown any Part Development Plan (PDP). She referred to the lease dated 3rd December, 1999 and the title deed dated 7th December, 1999, and explained that, from her affidavit, she had held that she had obtained the plots on the strength of Minutes No. 335/1993. She further referred to a letter dated 19th October, 2019 by the County Government of Mombasa to the Ethics and Anti-Corruption Commission, as contained at Page 11 of the letter.

139. On 24th May, 2023, the Plaintiffs called PW - 6 who testified that:-

A. Examination in Chief of PW - 6 by M/s. Abdirahman Advocate.

140. PW - 6 was sworn and testified in English language. He was called AMANI ALI ATHMANI a citizen of Kenya holding a national identity card bearing the particulars as shown to Court during the hearing. He had been a Senior Surveyor based at the Survey of Kenya in Nairobi. He asserted that he had been authorized to testify and stated that he had recorded a statement on 28th January, 2022 regarding Plots Nos. 524 and 526, which he wished to adopt. He further stated that the Ethics and Anti-Corruption Commission had written to the Survey of Kenya requesting to be given the Folio Plan and Survey Plan. From the

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Survey Plan, he had been able to establish that it had been prepared by F.N. Kimotho.

141. PW - 6 testified that there had been a letter dated 18th May, 2020 from the Survey of Kenya approving the Survey Plan – known as Sheet 1 and 2 – Mombasa Block 1 (large sheets). He further testified that the land on RIM 294 and 293 had been road reserves. He noted that, on the upper part of the Plan/Map and on Sheet 1, the southern part comprising Plots 521, 524, and 526 had been incomplete. He asserted that, from the RIM, it had been clear that it was an incision from the road reserve. He confirmed that the land had been part of a road reserve.

142. PW - 6 referred to the letter dated 19th October, 2019 by the County Government of Mombasa to the Kenya Anti-Corruption Commission. He also referred to several survey plans:

    a. FR 61/7 of year 1951;

    b. FR 68/55 of year 1956;

    c. FR 82/63 of year 1958;

    d. FR 83/21 of year 1958;

    e. FR 83/22 of year 1958;

    f. FR 84/25 of year 1958.

143. PW - 6 explained that these survey plans, covering about 60 meters, had been referred to in the letter. He produced the copies as contained in the further consolidated List of Documents dated 4th May, 2023.

B. <u>Examination in Chief PW - 6 by Mr. Karina Advocate.</u>

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144. PW - 6 testified that the parcel was earmarked for road reserved. He referred to the FR of 1951. He further testified that the survey had come before and not after a letter of allotment. He testified that the Part Development Plan (PDP) had been intended to guide the Surveyor and that it had been the document to come first. He noted that the Letter of Allotment had not had the PDP attached to it. He stated that the land had been recorded for a road and nothing else. He observed and concluded that the plots in question had been derived from a road reserve.

C. <u>Cross Examination of PW - 6 by Mr. Wachira Advocate.</u>

145. PW - 6 asserted that the land had been surveyed in the year 1994. He further asserted that he had only dealt with boundaries and not ownership. He stated that the survey had been submitted through the Provincial Officer in Mombasa. He affirmed that the Municipal Council had been the custodian of road reserves. He confirmed that Kenya Railways would not have owned land marked as a road reserve, and that, if Kenya Railways were to own such land, it would have had to be formally allocated.

146. PW - 6 stated that he had not been aware that the matter before court had been about a road reserve. He added that he had not been competent to answer the question of whether the Municipality could allocate Transport and Communication land for use as parking. He confirmed that the road reserve had been converted into a business aspect, which had been allocated to people who had been displaced from the buildings of the Nyali

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Bridge. He clarified that the suit before the Court had been about ownership of the land and not a complaint by the Municipal Council regarding its road reserve.

147. PW - 6 testified that, from the survey plans and maps of years 1951, 1956, and 1958, there had been no suit land indicated. He referred to FR 68/55, which had shown East African Railways and Harbours (E.A.R. & H.), but stated that there had been nothing to show that the land had belonged to E.A.R. & H.

D. Cross-Examination of PW - 6 by Mr. Kariuki Advocate.

148. PW - 6 stated that, from his statement, he had meant the place that had been set aside for the expansion of the road.

E. Re - Examination of PW - 6 by Ms. Abdirahman Advocate.

149. PW - 6 further asserted that his role had only been to approve the survey plan. He stated that the two titles had arisen from excision. He explained that most of the excisions had been undertaken by the Municipal Council where land had been reserved as a road reserve. He emphasized that there had had to be gazettement, but that he had never seen any such publications.

F. Re - Examination of PW - 6 by Mr. Karina Advocate.

150. PW - 6 stated that, from his statement, the land in question had been an excision from the road reserve. He referred to FR 68/55, noting that it had shown East African Railways and Harbours (E.A.R. & H.) siding which had extended to the road. He testified that the plan had indicated that the land had belonged to E.A.R.

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& H. He clarified that Mr. Kimotho had worked for the County, whereas he himself had not. He emphasized that all the parcels in question had been road reserves.

151. PW - 6 further stated that it had been his department that had approved the title deed and that, with a court order, rectification could be effected.

152. The Plaintiffs called PW - 7 on 19th October, 2023 who stated that:

A. Examination in Chief of PW - 7 by M/s Abdirahman Advocate.

153. PW - 7 was sworn and testified in English language. He was called ELIAS KIPYEGON. He had been an Investigating Officer II, P. No. 2013023, with the Ethics and Anti-Corruption Commission for the past ten (10) years. He testified that he had participated as part of the team investigating the two suit properties and had recorded a statement dated 16th June, 2022 on his findings, which he wished to adopt. He testified that, during the investigations, the Ethics and Anti-Corruption Commission had requested documents from the County Government of Mombasa, the Director of Survey, the Physical Planning Department, among other institutions. He further testified that EACC officers had recorded statements from Kenya Railways, the Land Officer, and other witnesses, and that those statements had been filed.

154. PW - 7 stated that there had been an application by Zahariah Mohamed Mawia for a plot, which she had intended to use for industrial purposes. The Municipal Council had accepted the application subject to the payment of rates. He referred to a

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letter dated 2nd November, 1999 seeking amendment of the parcel of land. He testified that, from the survey plan, he had been able to identify the two plots, Nos. 525 and 526. He testified that his team had made inquiries from the Municipal Council and had received letters dated 24th October, 2003 and 17th September, 2003, contained at Pages 33 and 34. He asserted that the Municipal Council had commented on the two plots under Paragraph 3, under the sub-heading "Authority to Allottee." He stated that, on Pages 77 to 90 of the Minutes of the Budget Committee, the names had been considered, but the name of Zahariah Mohamed Mawia had not appeared.

155. PW - 7 further testified that, from all the minutes shown to the team, the name of Zahariah Mohamed Mawia had not appeared anywhere. He referred to Page 29, being a letter from the Ministry of Transport dated 25th May, 2002 by S.P.I. Ndemo to the Managing Director of Kenya Railways. He referred to a second letter dated 15th April, 2002 requesting valuation of the plot, at Page 30, and a third letter dated 1st May, 2002 by the Chief Valuer to the Permanent Secretary, Transport, on the valuation of the two plots. He stated that the allocation had been done in the year 1984 and the payment effected.

156. PW - 7 asserted that, for allocation to take place, there had to have been a ground report to show whether the plot, being public land, had been available for allocation. Further, if the plot had been allocated by Kenya Railways, there would have had to be a resolution by the Board to that effect. He asserted that the letter by the Chief Manager had been illegal. He stated that the

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team had obtained survey maps from 1994 and had noted that all the parcels of land had been owned by Kenya Railways. He referred to the road measuring FR No. 256.

157. PW - 7 testified that, from his investigation, the Municipal Council had not had authority to re-allocate public land meant for road reserves. He referred to the lease document of 3rd December for Plot No. 525 at Page 44 and the Certificate of Lease for Plot No. 524 at Page 41, which had later, on 24th July, 2015, been transferred to Hussein Abdullahi Abdirahaman. He testified that Plot No. 526 had been transferred to CYKA Holdings Ltd.

158. PW - 7 further testified that the plots had been valued during a site visit, and it had been found that Plot No. 524 had been developed using galvanized material, while Plot No. 526 had been occupied by many unidentified persons. From his findings, he stated that the properties had been owned by Kenya Railways and had been meant for road reserve, and he asserted that this had been the reason for traffic congestion today. He further testified that the allocation to Zahariah Mohamed Mawia had been irregular, as the road had already been allocated for road reserve. He asserted that there had been efforts to sanitize the illegal acts and the wrongs committed. He pleaded that the Court grant the orders sought.

B. Cross - Examination of PW - 7 by Mr. Karina Advocate.

159. PW - 7 contended that allocation of land had to have been supported by documents. He testified that it had been possible for the Municipal Council and Kenya Railways Corporation to

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have owned the same land, and that the Municipal Council would always have referred to Kenya Railways Corporation.

160. PW - 7 further asserted that the purpose of the road had been to provide access to the port, but unfortunately this purpose had never been achieved. He referred to a letter dated 10th May ... by the District Land Officer concerning the proposed plots. He further testified that he had visited the land and had found that it had been a dual carriageway. He added that the area had been vested with go-downs for goods to be transported by Kenya Railways to the Kenya Ports Authority. He pleaded with the Court to nullify the papers and to grant the title to Kenya Railways.

C. Cross - Examination of PW - 7 by Mr. Wachira Advocate.

161. PW - 7 stated that he had understood the matter before court to have been about the ownership of the land. He testified that the client had purchased the land from a second owner, making her a third owner. He asserted that she had held a title from the Municipal Council and, if it had been fraudulently acquired, then the Municipal Council had been liable. He emphasized that it had been Kenya Railways and its tenants who had lodged the complaint.

162. PW - 7 testified that he had asked Kenya Railways for ownership documents, but Kenya Railways had never given him any documents showing ownership of the land. He stated that the East African Harbours Administration or Railway had not had ownership documents either, but only a vesting order. He explained that the vesting order had not mentioned the specific

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parcels of land, as it had been crown land vested in the East African Railways and Harbours Administration and not in Kenya Railways. He contended that government land had never had title.

163. PW - 7 testified that Zahariah Mohamed Mawia had been allocated land on 16th October, 1994, while the minutes he had referred to had been from the year 1993, before she had applied. He stated that the minutes had not mentioned the two plots. He asserted that the plots had been surveyed land and registered land. He referred to a statement from the Land Registrar, Hashim Got, who had been the custodian of land records, and who had held that the land had never belonged to Kenya Railways.

164. PW - 7 referred to the Defendant's bundle at Page 34, Paragraph 3, being a letter dated 24th October, 2003 by the Town Clerk. He stated that there had been 27 plots, but that he had only been dealing with two plots. He explained that the investigation had been triggered by complaints lodged by tenants. He testified that the titles had been issued by the Government of Kenya.

165. PW - 7 questioned why, if the allocation had been done in the year 1994, Kenya Railways had taken 24 years to come to court. He stated that Kenya Railways had had no ownership documents and had not issued any letter of objection to the Municipal Council regarding the alienation of land to Zahariah Mawia. He testified that Kenya Railways had been compensated through a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/-) for structures and not for the land. He added that he

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had not received or seen any letter returning or rejecting the sum of Kenya Shillings Six Hundred and Fourty Thousand (Kshs. 640,000/-), and that the Managing Director had asked to receive the money, with no objection ever seen.

166. PW - 7 testified that the valuation had been done by the Chief Valuer of the Government himself and not by a junior officer. He referred to his witness statement, noting that in his prayers he had only mentioned Plot No. 526 and no other plots. He stated that Plot No. 525 had since become a mosque, while the matter had still been pending before court. He testified that there had been no prosecution of the other 25 plots by Kenya Railways, nor had any caveat been registered against them. He stated that there had been no statement implicating CYKA Holdings Limited. He further testified that the Land Registrar had said that the land had not belonged to Kenya Railways, according to his records.

167. PW - 7 referred to a letter dated 14th September, 1999 by P.K. Mutua, Chief Estate Manager, to the Municipal Council, being a letter of no objection to Zahariah Mawia's title dated 7th December, 1999. He stated that the letter of no objection had preceded the issuance of the title. He emphasized that it had been Zahariah who had been paying rates and not Kenya Railways.

168. PW - 7 referred to Page 65, being a letter dated 17th June, 2015 by the National Land Commission, which had confirmed that the land had belonged to Zahariah Mohamed Mawia. He explained that he had still come to court because the due process had not

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been followed. He referred to the map showing the two plots, FR 68/55 dated 1953, for the East African Harbours. He testified that the map had later been amended and a RIM created adjacent to Plot 294, which had created two plots, B and C, in 1999, and had left a small stretch. This had resulted in the creation of 27 plots, which had been given to the Municipal Council, who had subsequently allocated them to third parties.

D. Re - Examination of PW - 7 by M/s. Abdirahman Advocate.

169. PW - 7 testified that, from the vesting order, Plots Nos. 525 and 526 had not been mentioned. He explained that, by then, those plots had not yet been created, and in the year 1994 there had already been structures on the ground. He added that, even as late as now, the structures were still in existence. He stated that the minutes referred to No. 335/93, but there had been no allocation to Zahariah Mawia, and that had been the irregularity he had noted. He referred to the letter dated 19th October, 2019, which had stated that the two plots had been among those created from the road reserve.

170. PW - 7 testified that, from the statement of the Land Surveyor, it had been confirmed that the plots had been excised from the road reserve. He confirmed that the Municipal Council had denied that there had been any approval from Kenya Railways. He stated that he had never found any letter from the Head of State allocating the land on behalf of the President of the Republic of Kenya. He explained that, during the investigation, he had come across the other plots, being 25 in number.

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171. PW - 7 asserted that the Chief Estate Manager of Kenya Railways had not been capable of issuing a letter of no objection to the Municipal Council dated 14th September, 1994.

E. Re - Examination of PW - 7 by Mr. Karina Advocate.

172. PW - 7 testified that Plots Nos. 525 and 526 had come into being in 1999, while the Vesting Orders had been issued in years 1963 and 1986. He referred to the Vesting Order and stated that, when he had visited Plot No. 526, there had been three permanent structures, two of which had been labelled KRC – 19134 and 19135. He referred to the ruling by Justice Ibrahim. He also referred to the map of 1953, which had shown that the whole area had belonged to the East African Harbours and Railways.

173. PW - 7 clarified that he had been investigating and not determining ownership. He testified that the payment of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-) had been irregular, as the process had been flawed, and that it had been wrong for any payment to have been made. He added that the Municipal Council had not had a title, as the land had been given for the purposes of expanding the road.

174. The 1st & 2nd Plaintiffs marked their case closed on 19th October, 2023 through their legal counsels M/s Abdirahman and Mr. Karina Advocate.

V. The 1st Defendant's case

175. The 1st Defendant responded to the Plaintiffs' claim through a Statement of Defence where it averred that:

a. Save as expressly admitted herein, the 1st Defendant (Hereinafter referred to as "The 1st Defendant") denied each

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and every allegation contained in the Plaint as set out therein and traverses the same seriatim.

b. The 1st Defendant admitted the descriptive parts of the Plaint.

c. The 1st Defendant denied the Plaintiff's allegations contained in Paragraphs 5, 6 and 7 of the Plaint, and the Plaintiff is put to strict proof thereof.

d. The 1st Defendant denied the contents of Paragraph 8 of the Plaint and, in particular, denied that there had been collusion or illegality resulting in the creation of Plot Nos. Msa/Block 1/525 and Msa/Block 1/526 as alleged or at all. The Plaintiffs was put to strict proof thereof.

e. The 1st Defendant was a stranger to the allegations contained in Paragraph Numbers 8, 9 and 10 of the Plaint. All particulars of misrepresentation, fraud and illegality were denied, and the Plaintiffs was put to strict proof thereof.

f. The Defendant vehemently denied the allegations contained in paragraphs 11, 12, 13, 14, 15 and 16 of the Plaint, and the Plaintiffs was put to strict proof thereof.

g. The 1st Defendant denied that she had made any unlawful attempts to evict the Plaintiff from the suit premises as alleged in paragraph 17 of the Plaint or at all, and the Plaintiffs was put to strict proof thereof.

h. The 1st Defendant denied the Plaintiffs' allegations in paragraph 18 of the Plaint, and the Plaintiffs were put to strict proof thereof.

i. The 1st Defendant was a stranger to the Plaintiffs' allegations of loss in paragraph 19 of the Plaint, and the Plaintiffs were put to strict proof thereof.

j. The 1st Defendant denied the contents of paragraphs 20 and 21 of the Plaint and stated that the Certificates of Lease relating to Title Nos. MSA/BLOCK 1/525 and MSA/BLOCK 1/526, issued to the Plaintiffs in the year 2012 and 1999

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respectively, had been valid titles for which the 1st Defendant had had no role in acquiring other than as a citizen of Kenya being granted titles upon due payment.

k. Without prejudice to the foregoing, the 1st Defendant stated that, upon fulfilling the requisite conditions of the Municipal Council of Mombasa and vide Confidential Minute No. 335/93, the Municipal Council of Mombasa had issued the Certificates of Lease being:

- Title No. MOMBASA/BLOCK 1/525.
- Title No. MOMBASA/BLOCK 1/526.

l. The 1st Defendant further stated that these two plots had been part and parcel of 27 plots along Shimanzi Road that had been allocated under Government of Kenya authority endorsed by the Head of State on 1st September, 1993. Full particulars thereof had been within the Plaintiffs knowledge.

m. The 1st Defendant stated that, pursuant to the allocation formalities and requisite valuation done vide letters under reference No. MOTC/CONF 8.012 VOL. II/49 (from the Plaintiff's parent ministry, i.e., Ministry of Transport & Communications) and the Chief Valuer in the Ministry of Lands & Settlement, the Defendant had been required to make payment of a sum of Kenya Shillings Seven Hundred and Forty Thousand (Kshs. 740,000/-) to the Plaintiffs' account.

n. In compliance with the valuation of the structures and developments thereon, and vide Cheque No. 005621 for of a sum of Kenya Shillings Seven Hundred and Forty Thousand (Kshs. 740,000/-), the 1st Defendant had deposited the said sum in the Plaintiff's Account No. 229972769 at KCB Moi Avenue Branch, Nairobi. To date, the Plaintiffs had never returned the proceeds thereof and was thereby estopped from averring otherwise.

o. The 1st Defendant stated and maintained that, after obtaining the titles herein, the Plaintiff had proceeded to frustrate the Defendant's efforts to take possession, resulting in the

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institution of various suits which had since been overtaken by events, as the 1st Defendant had transferred her titles as follows: -

- Mombasa/Block 1/526 – CYKA HOLDINGS LTD.
- Mombasa/Block 1/525 – HUSSEIN A. ABDIRAHAMAN.

p. In the premises, the 1st Defendant stated that the Plaintiffs had had no justiciable cause of action against the 1st Defendant and further stated that the owners of the said plots had been bona fide purchasers for value whose proprietors had been entitled to quiet possession as enshrined in the Constitution. The 1st Defendant asserted that any orders made in these proceedings might adversely affect their interests in breach of one of the cardinal rules of natural justice, whereby a party is condemned without a hearing.

q. The 1st Defendant stated that the Plaintiffs' suit had not only been misconceived but had also been a gross abuse of the court process. The Plaintiffs, having known of the Defendant's proprietorship of the plots since 7th December, 1999 (Msa/Block 1/526) and 14th September, 2012 (Msa/Block 1/525), and having failed to actively challenge the bona fide title of the 1st Defendant, had been caught up in laches and had not been amenable to the remedies sought. The 1st Defendant further stated that the said orders could not be enforced against her, and that the 2nd and 3rd Defendants had received rates, annual rent, and stamp duty.

r. The 1st Defendant denied having received any notification of suit and, being improperly enjoined in these proceedings, stated that she would crave leave to raise a preliminary objection to be removed from the proceedings, with the Plaintiffs bearing the costs thereof.

176. The 1st Defendant prayed that the Plaintiffs' suit be dismissed with costs.

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177. Nonetheless, the 1st Defendant never called any witness (es) to tender evidence in support of her case whatsoever.

VI. The 2nd Defendant's case

178. The 2nd Defendant responded to the Plaintiffs' claim through a statement of defence where they stated that: -

a. Save as expressly admitted herein, the 2nd Defendant denied each and every allegation contained in the Plaint as if the same had been set out verbatim and traversed seriatim.

b. The 2nd Defendant admitted the contents of Paragraphs 1, 2, 3 and 4 of the Plaint in so far as they had merely been descriptive of the parties.

c. The 2nd Defendant denied the contents of Paragraphs 5, 6, 7, 8, 9 and 10 of the Plaint in their entirety, and the Plaintiff was put to strict proof thereof. Without prejudice to the foregoing, the 2nd Defendant denied all particulars of misrepresentation, fraud and/or illegality under paragraph 10 (a) to (k) of the Plaint.

d. The contents of paragraph 11 of the Plaint were denied in toto. The 2nd Defendant averred that the suit property had been an adopted road reserve belonging to the defunct Municipal Council of Mombasa under the Mombasa Road Planning Scheme of 1926, and that the suit property had not belonged to the Plaintiff.

e. Paragraph 13 of the Plaint was denied, and the Plaintiff was put to strict proof thereof.

f. The 2nd Defendant denied the contents of paragraphs 14 and 15 of the Plaint, and the Plaintiff was put to strict proof thereof.

g. The 2nd Defendant was a stranger to the contents of paragraphs 16, 17 and 18 of the Plaint.

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h. The contents of paragraph 19 of the Plaint were denied, and the Plaintiff was put to strict proof thereof.

i. The 2nd Defendant denied the contents of paragraphs 20 and 21 of the Plaint.

j. The 2nd Defendant admitted the contents of paragraph 22 of the Plaint to the extent that there had been no other suit pending between the Plaintiff and the 2nd Defendant. The 2nd Defendant averred that it had been a stranger to ***"Mombasa CMCC No. 2892 of 2007 Zaharia Mohamed Mawia – Versus - Duncan Kinyua and 4 others"***, and ***"Mombasa HCC No. 116 of 2009 Zaharia Mohamed Mawia – Versus – Kenya Railways Corporation and 5 others"***.

k. The contents of paragraph 23 of the Plaint were admitted.

179. Likewise, the 2nd Defendant never summoned any witness to testify on its behalf and to support its case. They intended to call one Gilbert Munjunga Nderitu but abandoned this process and closed its case. The 2nd Defendant prayed that this Honourable Court be pleased to dismiss the suit herein with costs.

VII. The 4th Defendants' case

180. The 4th Defendant opposed the Plaintiff's claim by way of filing a Statement of Defence and Counter - Claim wherein it was averred that:-

a. Save as expressly admitted herein, each and every separate allegation contained in the Amended Plaint was denied as if the same had been set out verbatim and traversed seriatim.

b. The 4th Defendant admitted the contents of paragraphs 1, 2, 3, 4, 5 and 6 of the Amended Plaint in that they had merely been descriptive of the parties.

c. The 4th Defendant denied the contents of paragraph 7 of the Amended Plaint, put the Plaintiff to strict proof thereof, and

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further stated that the 4th Defendant had been the legal registered owner of Title No. MOMBASA/BLOCK 1/526, having been issued with a Certificate of Lease on 4th August, 2011 by the Government of Kenya through the Mombasa Lands Registry.

d. The 4th Defendant further stated that it had purchased the suit property from the 1st Defendant after conducting due diligence. The 1st Defendant had been categorical and had indeed produced evidence to the 4th Defendant to the effect that she had owned the suit plot together with all the structures thereon, as she had already compensated the Plaintiff to the tune of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-) way back in February, 2007 for the said structures pursuant to a government-sanctioned valuation.

e. The 4th Defendant denied the contents of paragraphs 8 and 9 of the Amended Plaint, put the Plaintiff to strict proof thereof, and stated that the Plaintiff had been intent on reclaiming the structures thereon whereas he had officially accepted compensation. The 4th Defendant further stated that the Plaintiff had been inciting squatters not to vacate, which had caused the 4th Defendant anguish, damage, and loss.

f. The 4th Defendant denied the contents of paragraph 9 of the Amended Plaint and stated that the Plaintiff had not been in possession of the suit plot, Title No. MOMBASA/BLOCK 1/526. The Plaintiff had indeed confirmed and admitted that the 4th Defendant had been the registered owner and, as such, had been entitled to mesne profits.

g. In reply to paragraphs 10 and 11 of the Amended Plaint, the 4th Defendant stated that it had been a stranger to the allegations therein.

h. The 4th Defendant denied the particulars of fraud and irregularities as enumerated under paragraph 12 (a–k) of the Amended Plaint and put the Plaintiff to strict proof thereof. The 4th Defendant further stated that it had been a bona fide purchaser for value without notice, and that the search

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conducted prior to purchase had not exhibited any encumbrance on the title by the Plaintiff, a clear indication that the suit had been an afterthought punctuated with malice and bad faith.

i. The 4th Defendant relied on the following particulars of bad faith and malice on the part of the Plaintiff: -

   (i) The Plaintiff seemed to suggest and acknowledge that there had been other beneficiaries of the purported illegal subdivisions but had curiously and maliciously elected to pursue only the two suit plots belonging to the 4th and 5th Defendants.

   (ii) The Plaintiff had waited over 25 years to bring the suit, yet it claimed that the 2nd Defendant had illegally subdivided the plots in the 1990s, which was a clear malicious afterthought.

   (iii) The 1st Defendant, from whom the 4th Defendant had purchased, had been the registered owner for over 12 years (since 1999) without any challenge from the Plaintiff.

   (iv) The Plaintiff had never lodged any caveat on the suit properties for over 25 years, yet it claimed that it had always been aware that subdivision had been done "illegally."

   (v) Accepting compensation for the structures to the tune of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-) way back in the year 2007 and filing the suit in 2015 clearly showed that the suit had been a malicious afterthought.

   (vi) Accepting compensation for the structures and, 12 years later, purporting that the same had been accepted or authorized by "junior officers of the Plaintiff" was self-defeatist.

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(vii) Accepting compensation for the structures and then inciting squatters against vacating the suit land had been malicious conduct..

(viii) Maliciously and corruptly purporting to pass proprietary or licence rights to unsuspecting third parties during the pendency of the suit, while knowing very well that the 4th Defendant had been the current registered owner of the suit land, was irregular and unlawful.

(ix) Maliciously and corruptly intimidating the 4th Defendant by roping in "collaborating" officers of the Ethics and Anti-Corruption Commission to purport to investigate and caveat the 4th Defendant's suit land was improper and unlawful.

j. The 4th Defendant had been a stranger to the averments in paragraphs 13 and 14 of the Amended Plaint and had put the Plaintiff to strict proof thereof.

k. The 4th Defendant had denied the contents of paragraphs 15, 16 and 17 of the Amended Plaint and had reiterated that it had been a bona fide purchaser for value and that its title had been genuine, legal, and indefeasible. The Plaintiff had been put to strict proof of any contrary allegations.

l. The 4th Defendant had denied that the Plaintiff or its tenants had been in possession and had put the Plaintiff to strict proof of the allegations contained in paragraphs 18 and 19 of the Amended Plaint.

m. The 4th Defendant had been a stranger to the contents of paragraphs 20, 21 and 22 of the Amended Plaint and could not vouch for the veracity thereof, and the Plaintiff had been put to the strictest proof.

n. The 4th Defendant had denied the contents of paragraph 23 of the Amended Plaint and had stated that, in any event, the Plaintiff would not have suffered any loss because it had been a trespasser for all intents and purposes. The 4th Defendant

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had further stated that it had been the one suffering loss for lack of full enjoyment of its proprietary interest.

o. The 4th Defendant had denied the contents of paragraphs 27 and 28 of the Amended Plaint and had stated that the investigations and the purported findings had been erroneous and inconsequential for the following reasons: -

a) The letter dated 16th October, 1994 clearly indicated that the 1st Defendant had formally applied to the Municipal Council for allocation, and as such the issue of grabbing had not arisen.

b) The application for registration dated 6th December, 1999 clearly showed that the Municipal Council of Mombasa had formally applied to be registered as the owners and head lessor of the suit plots, and the application had been allowed as evidenced by the White Cards.

c) The White Cards and Lease annexed on the record clearly indicated that the Municipal Council, on 3rd December, 1999, had officially leased the suit plot to the 1st Defendant and subsequently to the 2nd Defendant.

d) The letter dated 15th April, 2002 from the Permanent Secretary to the Chief Valuer had confirmed that the dispute between Kenya Railways and the 1st Defendant had been settled.

e) The letter dated 28th May, 2002 from the Permanent Secretary to Kenya Railways had directed them to accept the compensation as per the Government Valuer's report. It was therefore clear that Kenya Railways had participated through their Railway Land Sale Committee. Public land had not therefore arisen, and any claim to that effect had been misconceived, as they had been fully aware of the transfer to the 1st Defendant. The issue of grabbing had been dishonest.

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f) The letter dated 1st May, 2002 from the Chief Valuer had confirmed the valuation of Railway structures at a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-), and the same had been paid in February 2007 by the Defendant.

g) The letter dated 24th October, 2003 from the Municipal Council had clearly indicated that the creation of the plots had been authorized by the Municipal Council vide Minute 416/80, by the National Government through the President vide letter dated 1st September, 1993, and further approved by the Council vide Minute 335/93. It was noteworthy that the letter had stated that 27 plots had been created and most of them had been fully developed. The Defendant contended that the Commission and the Plaintiff had maliciously focused only on the suit plots under the guise of "grabbed public land."

h) The letter dated 17th September, 2003 from the Municipal Council had clearly indicated that the plots had been legally leased to the 1st Defendant and, by extension, to the 4th Defendant.

i) The letter dated 10th June, 1999 from the Ministry of Lands had confirmed that the Municipal Council had been given final approval to create the plots.

j) The suit property had never been registered in the name of the Interested Party.

k) The suit property had never been a road reserve.

l) There had been no report by the Plaintiff indicating that the 4th Defendant had corruptly dealt with the suit property.

p. The 4th Defendant denied the contents of paragraph 29 of the Amended Plaint and averred that the land had originally been registered in the name of the 2nd Defendant, who had transferred it to the 1st Defendant, and later on the 1st

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Defendant had transferred the property to the 4th Defendant. The suit property had therefore not been in any way public land. The 2nd Plaintiff was put to strict proof to the contrary.

q. The 4th Defendant denied the contents of paragraph 30 of the Amended Plaint and averred as follows: the Defendant had regularly and legally issued the 1st Defendant with an allotment:-

   i. The 2nd letter dated the 1st November, 1994.

   ii. The suit property was alienated land and not a road reserve. The interested party was not the registered owner of the property and no consent was to be sought from the authority.

   iii. The 2nd Defendant and her predecessor acted within its powers to issue the allotment letter dated 1st November, 1994 in favour of the 1st Defendant.

   iv. The 3rd Defendant and her predecessor had the authority and legal mandate to issue a lease over the suit property as the registered owner.,

   v. The 4th Defendant was legally and regularly registered as the owner of the suit property upon purchasing it from the 1st Defendant for value.

   vi. The 3rd Defendant acted within its powers to prepare and effect transfer of the suit property from the 1st and 2nd Defendants.

   vii. The 4th Defendant had not unduly accrued any mesne profits from the suit property since he was the registered owner therefore entitled to the accrued benefits from the suit property.

   viii. The 2nd Defendant did not shut her eyes to anything as she duly did her due diligence and established that the suit property was available for alienation and that it was registered in the 1st Defendant's name and she

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proceeded to have it transferred in her name upon conclusion of the sale transaction from the 1st Defendant.

ix. The 2nd Defendant procured the transfer of the suit property within the confines of the law and she fully complied with all the laws governing the transfer of the suit property then.

x. The 2nd Defendant had no reason whatsoever to report anything to the plaintiff or its. predecessor since the transfer of the suit property was legally procured.

r. The sale agreement entered between the 1st and 4th Defendants was legal and regular, duly endorsed by the 3rd Defendant and with no objections from the 2nd Defendant who is the head lessor.

s. The 4th Defendant denied the contents of paragraph 31 of the Amended Plaint and averred that, upon conducting her due diligence, she had established that the suit property had been registered in the name of the 1st Defendant and therefore there had been no other enquiries to be made by the 4th Defendant. The 2nd Plaintiff was put to strict proof to the contrary.

t. The 4th Defendant denied the contents of paragraphs 32, 33 and 34 of the Amended Plaint and averred that she had conducted her due diligence and that there had been no defects on the Certificate of Lease or the White Card extracts. She further averred that she had not in any way participated in any corrupt enterprise nor had she facilitated any fraudulent activities during the acquisition of the suit property, which she had legally acquired from the 1st Defendant. The 2nd Plaintiff was put to strict proof thereof.

u. The 4th Defendant had been a stranger to the 2nd Plaintiff's averments in paragraphs 35 and 36 of the Amended Plaint and averred that the 3rd Defendant, in lawful compliance with the law, had facilitated the transfer of the suit property from the 1st Defendant's name to her name, and a Certificate of

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Lease had been issued in her favour on 4th August, 2011. The 2nd Plaintiff was put to strict proof thereof.

v. The 4th Defendant denied the contents of paragraph 37 of the Amended Plaint and averred that the public had not suffered any loss or damage since the suit property had been registered under the 2nd Defendant, who had transferred it to the 1st Defendant, who in turn had transferred it to the 4th Defendant. The 2nd Plaintiff was put to strict proof to the contrary.

w. The 4th Defendant denied the contents of paragraph 38 of the Amended Plaint and averred that the Plaintiff had had no right or interest over the property. It had been the 1st Plaintiff who had alleged to have had proprietary interest in the suit property, which interest was vehemently denied by the 4th Defendant. The 2nd Plaintiff had had no proprietary interest or any form of interest over the suit property. The 2nd Plaintiff was put to strict proof to the contrary.

x. The 4th Defendant denied the contents of paragraphs 39 and 40 of the Amended Plaint and averred that there had been no wrongful interference with any public property and that the ownership and documents conferring proprietary rights to the 1st and 4th Defendants had been legally procured and correctly issued by the 3rd Defendant. The 2nd Plaintiff was put to strict proof to the contrary.

y. The 4th Defendant denied the contents of paragraphs 41 and 42 of the Amended Plaint and averred that the issuance of the Certificate of Lease to the 1st Defendant and subsequently to the 4th Defendant by the 3rd Defendant had been proper, regular, and legal. The 2nd Plaintiff was put to strict proof to the contrary.

z. The 4th Defendant denied the contents of paragraphs 43 and 44 of the Amended Plaint and averred that she had not issued any Certificate of Lease in favour of the 1st Defendant as alleged by the 2nd Plaintiff, since that power had been conferred upon the 3rd Defendant only. She further averred that she had been issued with a Certificate of Lease by the 3rd

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Defendant upon successful transfer from the 1st Defendant. The 2nd Plaintiff was put to strict proof to the contrary.

aa. The 4th Defendant denied the contents of paragraph 45 of the Amended Plaint and averred that she had not been privy to any sale agreement between the 1st and 2nd Defendants. She further averred that she had voluntarily entered into a sale agreement with the 1st Defendant over the suit property in February, 2007, and a Certificate of Lease had been issued in her favour on 4th August, 2011. The 2nd Plaintiff was put to strict proof thereof.

bb. The 4th Defendant had been a stranger to the contents of paragraphs 46–62 of the Amended Plaint, more so to the allegations of negligence on her part or on the part of her agents in regard to Title No. MOMBASA/BLOCK 1/526, in which she had had no interest. The 2nd Plaintiff was put to strict proof thereof.

cc. The 4th Defendant denied the contents of paragraph 65 of the Amended Plaint and averred that the suit property had been duly registered in her name and that she had been lawfully entitled to it. She further averred that it had been the 1st Defendant who had unlawfully occupied her property and had thus accrued mesne profits through rent paid to it by tenants. The 2nd Plaintiff was put to strict proof to the contrary.

dd. The 4th Defendant denied the contents of paragraph 66 of the Amended Plaint and averred that the 2nd Plaintiff had not established public interest as alleged, since there had been no shred of evidence to back up its unfounded and baseless allegations that the suit property had been public land. The 2nd Plaintiff was put to strict proof to the contrary.

ee. The 4th Defendant admitted the contents of paragraphs 67 and 68 of the Amended Plaint and averred that the two suits filed by the 2nd Plaintiff had been sub judice to this suit and a gross abuse of the Honourable Court's process. The parties, subject matter, and contents of the plaints had all been similar to this Amended Plaint, and the 4th Defendant would

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seek consolidation of those suits with this suit as they had all been related. The 2ndPlaintiff was put to strict proof to the contrary.

ff. The 4th Defendant denied the contents of paragraph 69 of the Amended Plaint and averred that the Government Lands Act and the Registered Lands Act had not been applicable, since the suit had been instituted after they had been repealed. The 2nd Plaintiff was put to strict proof to the contrary.

gg. The 4th Defendant stated that no demand or intention to sue had been served upon her.

hh. The jurisdiction of this Honourable Court was admitted.

ii. The 4th Defendant averred that, in the light of the foregoing, the Plaintiff's suit against her had been frivolous, malicious, an afterthought, and had amounted to an abuse of the Court process. She therefore prayed that the suit be dismissed with costs.

181. On the Counter - Claim, the 4th Defendant contended that: -

i. The 4th Defendant (now Plaintiff in the Counter - Claim) reiterated the contents of paragraphs 1 to 16 of the Defence hereinabove and, by reason of the contents thereof, averred as follows:

ii. The 2nd to 6th Defendants in the Counter - Claim had been adults of sound mind, living and working for gain in Mombasa. Service of process had been effected through the Plaintiff's advocates' offices.

iii. At all material times relevant to the suit, the 4th Defendant (now Plaintiff) had been and still was the registered owner of Title No. MOMBASA/BLOCK 1/526, having been issued with a Certificate of Lease on 4th August, 2011 by the Government of Kenya through the Mombasa Lands Registry.

iv. The said Certificate of Lease had been issued after the Land Registrar (3rd Defendant) had been satisfied that the transfer

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by the 1st Defendant to the 4th Defendant had been legal and compliant with all requisite conditions.

v. The 4th Defendant (now Plaintiff) had conducted due diligence before purchase and had confirmed that the 1st Defendant, Zaharia Mawia, had been the bona fide registered owner of the suit plot.

vi. The 4th Defendant (now Plaintiff) had been a bona fide purchaser for value without notice and prayed for protection of its proprietary rights by the Honourable Court.

vii. The Plaintiff (now 1st Defendant), in a bid to defeat the 4th Defendant's (now Plaintiff's) proprietary rights, had introduced the 2nd to 6th Defendants into the suit property in the guise of being "tenants" in the structures for which the Plaintiff (now 1st Defendant) had been compensated to the tune of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-) way back in the year 2007 and had accepted the compensation.

viii. The said 2nd to 6th Defendants had accordingly claimed purported "tenancy rights" under the Plaintiff (now 1st Defendant), and an order of eviction ought to have issued against them, hence this counterclaim.

ix. Whereas the Plaintiff (now 1st Defendant) had known very well that the 4th Defendant (now Plaintiff) had been the current registered owner, it had been using the 2nd to 6th Defendants, who had been trespassers and squatters, to frustrate and intimidate the 4th Defendant from taking full possession and enjoyment of its land.

182. The 4th Defendant prayed for Judgment to be entered jointly and severally against the Defendants in the Counter – Claim for: -

a) The Plaintiff's suit against the 4th Defendant be dismissed.

b) A Declaratory Order that the 4th Defendant is the Legal registered owner of Land TITLE NO.MOMBASA/BLOCK 1/526

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and that the Land Registrar Mombasa do maintain the records as such.

c) A permanent injunction restraining the Defendants in the Counterclaim by themselves, their agents, servants, employees, advocates or anyone claiming under them from selling, leasing, letting, transferring or interfering in any manner with the Plaintiff's ownership, quiet possession and enjoyment of the suit property TITLE NO. MOMBASA/BLOCK 1/526.

d) An order for eviction of the Defendants in the Counter - Claim from TITLE NO. MOMBASA/BLOCK 1/526 and Mesne profits since 4th August 2011.

e) Costs of this suit and of the Counter - Claim together with interest thereon until payment in full.

183. The 4th Defendant called 4th Defendant - DW 1 on 24th January, 2025 who testified that: -

A. <u>Examination of 4th Defendant - DW - 1 by Mr. Wachira Advocate.</u>

184. DW - 1 testified under oath and in English Language. He identified himself as DENNIS MITHAMO KARIUKI, a citizen of Kenya holding the national identity card bearing all the particulars as indicated thereof and shown to court during the hearing. He was the witness for the 4th Defendant. He testified being a businessman and the Managing Director of CYKA Holding Limited. From the documents produced, the company had applied for the property in the year 2011, and the date on the title had been 4th August, 2011. He testified that the 4th Defendant had purchased the suit property from Zaharia Mohamed, whose title had been dated 7th December, 1999, issued by the Council of Mombasa for a term of 99 years from 1st November, 1994.

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185. DW - 1 asserted that due diligence had been carried out, including a search and verification of rates and ownership of the land at the Survey of Kenya. He stated that he had filed in court a bundle of documents dated 24th October, 2019 containing 15 documents. Among them had been the Transfer of Lease to his company from Zahariah, consent to transfer dated 20th May, 2011, Rent Clearance showing that rent had been at zero, and a clearance certificate of land rates.

186. DW - 1 further testified that he had obtained a letter dated 17th September, 2003 addressed to his Advocate (page 14 and page 15 of the bundle), which had been from the Town Clerk. He also referred to another letter dated 18th May, 1995, noting that the 4th and 5th conditions therein had been crucial. He testified that the condition given by the Council to be fulfilled had been for a letter from Kenya Railways. He further testified that a reply had come from Kenya Railways signed by Mr. Mutua, Chief Estate Manager. He testified that he had seen two cheques issued by Zahariah.

187. DW - 1 asserted that the authorization had been given by a senior officer, and further authorized by the Permanent Secretary to the Managing Director of Kenya Railways, a senior officer. He asserted that he had not seen any letter from Kenya Railways contravening this position. He referred to page 18 of the bundle, being a letter dated 18th May, 1995, which had given final approval. He referred to the letter relating to the valuation of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-) and testified that, on the basis of that

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valuation, they had proceeded to purchase the property. He also referred to supplementary documents dated 21st October, 2021, being minutes of a meeting attended by the Permanent Secretary, A.M. Muthaura, and representatives of Kenya Railways.

188. DW - 1 testified that a banker's cheque had been paid on 6th February, 2007 for compensation. He referred to the statement by the Land Registrar, Hashim Got, which had indicated that there had been nothing to show that Kenya Railways had owned the land. He testified that Kenya Railways had not produced any documents evidencing ownership of the suit property, nor had they brought any proceedings in respect of the property through the EACC.

189. DW - 1 stated that he had filed a Counter - Claim seeking to evict squatters and occupants from the land he had purchased 14 years earlier. He testified that he had only seen a letter claiming the structures on the land, but those structures had already been compensated. He asserted that a claim for mesne profits by Kenya Railways had not been justifiable, as compensation had already been paid. He concluded that the land had only come to the Municipal Council as a road access, but there had been no documentation to that effect.

B. Cross examination of DW - 1 by Mr. Karina Advocate.

190. DW - 1 confirmed that, from the documents produced, none had referred to CYKA Holdings. He confirmed that CYKA had purchased the property on 4th August, 2011 and had been issued with the title on the same date. He stated that the transaction

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had not happened in a single day but had taken a long period. He added that the Sale Agreement had not been in the bundle before court, as it had been with his Advocate.

191. DW - 1 referred to page 15 of the documents, which contained a paragraph relating to approval to allocate. He also referred to page 83, being minutes of meeting No. 335/93, which had shown the allocation of the plot to Zahariah. He confirmed that the names of 37 people had been listed therein, but the name of CYKA Holdings had not appeared in the list.
192. DW - 1 referred to page 17 of his documents, being a letter from Kenya Railways. It was a “no objection” letter that had given him the plot, identified as Plot No. 526. He clarified that his property had existed as Plot A, though it had not been expressly stated as Plot No. 526. He referred to page 10 of the 1st Plaintiff’s bundle, being a letter dated 19th October, 2019 from the County Council of Mombasa. He testified that Zahariah had been allocated the land by the Municipal Council of Mombasa. He admitted that the letter had indicated that the plots had been created from road reserves.
193. DW - 1 referred to page 66 of the 1st Plaintiff’s bundle, being a court document in which the Plaintiff had been Zaharia Mohamed in the year 2007. He testified that he had not been a party to that case. He referred to page 74, being proceedings from the year 2009, and stated that he had been in the process of buying the property in 2011. He noted that the Plaintiff had been Zaharia Mohamed, who had sued five people. On page 74, the first paragraph had referred to CYKA Holdings Ltd. He

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explained that, although the reference had been made in the year 2009, he had purchased the land in 2011, which had been considered as having an interest in the property.

194. DW - 1 referred to the ruling on page 75 by Justice Ibrahim dated 31st May, 2012, specifically the second-last page, third line, which had stated: ***"in fact they have not completed the payment and are already in occupation of the land …"*** He testified that CYKA Holdings had only been a potential purchaser at that time, but that he had eventually purchased the property in the year 2011. He acknowledged that the purchase had initially been an intention, but explained that he had taken a calculated risk in the year 2009. He stated that he had not been idle, but had been following whether the parties had complied, and that he had been aware of the contention over the property. He testified that due diligence had been conducted and the results had been shared with his Advocate. He admitted that the application for search had not been filed in court and that there had been no copy of the search in the bundle.

195. The testimony by DW - 1 was that consideration for the land had been paid through issuance of cheques and transfer of case to Zahariah. He admitted that there had been no proof of transfer of the money in the 4th Defendant's bundle, but explained that the payments had not been in contention and that he had the documents in his possession. He testified that although he had purchased the property in 2011, nearly 15 years earlier, but had not undertaken any development on it. This was because he had been denied access to the land by third parties, including Kenya

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Railways. He admitted that he had never filed any cases in court showing that he had been hindered, but explained that Zahariah had acted on their behalf. He stated that, after 2011, they had filed the Counter - Claim.

C. Cross-Examination by M/s. Abdirahman Advocate.

196. The witness testified that, when he had purchased the properties, there had been a dispute over its ownership. Further, there had been structures on the land. He stated that the structures had been paid for by way of compensation, which had been done satisfactorily. He admitted that he might not have known of the judgment and ruling in favour of the ownership of the land, but confirmed that the 1st Defendant held a title.

197. DW - 1 referred to paragraph 14 of the Defence and stated that he had relied on a number of documents from their list of documents which had given her ownership of the land. He mentioned a confidential letter dated November, 1994, which he read out loudly. He testified that he had not come across any Kenya Gazette Notice by Kenya Railways conferring ownership of the land to Zahariah, or consenting to such ownership. He referred to the letter by the Chief Secretary contained in the 2nd Plaintiff's list of documents at pages 29 and 30, dated 15th April, 2022, which had borne a stamp but had not been signed. He also referred to page 23 of the 2nd Plaintiff's documents, which had shown an irregularity in the issuance of the title to Zahariah, as the lease had been obtained before clearance by Kenya Railways.

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198. DW - 1 averred that, as far as he had been concerned, the title deed had been issued in the year 2011. He noted that the Permanent Secretary had indicated that there had been irregularities in the year 2002, but had nonetheless referred to Zahariah as the owner. He explained that, by 2002, he had not been interested in the property and had only come to the fore in 2011. He referred to page 34 of their bundle and read the letter therein. He testified that he had been receiving notices on land rates and communications from the Council of Mombasa. He referred to paragraph 2 of minute 4616 of 1980, noting that Zahariah's name had not appeared therein.
199. DW - 1 was referred to the Letter of Acceptance, which had been written confidentially, and questioned whether it had been open or not. He testified that he had not been present during the allocation, and if there had been irregularities, he might not have known. He added that the Municipal Council, and not the Survey of Kenya, had never raised any contention. He testified that Kenya Railways had been in court claiming the property, even after the dispute had been known and settled. He explained that the disputes had been with squatters, and that Zahariah had been referred to as the owner of the land and had been in the process of evicting the squatters. He stated that there had been no court order to that effect.
200. DW 1 stated that he had never written any letter to Kenya Railways on the status of the property, and that his role had only been to confirm the verification of documents.

D. <u>Re – examination of DW - 1 by Mr. Wachira Advocate.</u>

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201. The witness testified that the suits shown by Mr. Karina had never involved the EACC as a party. He stated that Kenya Railways had never filed any proceedings against CYKA Holdings or Zaharia prior to the present case. He referred to the minutes and explained that the Council of Mombasa had never raised any complaint regarding the issuance of the title. He added that the absence of Zaharia's name in the minutes had been immaterial, since she had nonetheless been issued with the title.
202. He confirmed that the Registrar had come to court and had confirmed that the plot had first been transferred to Zaharia and thereafter to CYKA Holdings. He testified that there had been 26 plots in total, but none of them had been brought to court apart from his plot. He stated that Mr. Karina had only produced/referred him to a ruling and not a Judgment on the final decision. He explained that his comfort had been that the only risk had been the removal of squatters, so long as compensation to Kenya Railways had already been effected.
203. DW - 1 testified that the EACC had never shown any interest in the matter. He added that the 1st and 2nd Plaintiffs had not produced any documents from Kenya Railways Corporation or the Ethics and Anti-Corruption Commission showing ownership of the land. He concluded by stating that he wished to produce the bundle of documents numbered 1 to 15 dated 24th October, 2015, together with the supplementary bundle of documents dated 28th October, 2021 containing six documents.
204. The 4th Defendant marked their case closed on 7th February, 2025 by Mr. Wachira Advocate.

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VIII. The 5th Defendant's case

205. The 5th Defendant opposed the Plaintiffs' claim by way of a Statement of Defence wherein it was averred that:-

a. Save and except what was expressly admitted herein, the 5th Defendant denied each and every allegation of fact and law pleaded in the Plaint as if the same had been set out seriatim and traversed verbatim.

b. In answer to paragraphs 1, 2, 3, 4, 5 and 6 of the Plaint, the 5th Defendant admitted the contents therein as they had merely been descriptive of the parties hereto.

c. The 5th Defendant denied the contents of paragraphs 7 and 8 of the Plaint and invited strict proof thereof.

d. In answer to paragraph 9, the 5th Defendant asserted that the Plaintiff had not been in possession of Plots Nos. Msa/Block 1/525 and Msa/Block 1/526.

e. The 5th Defendant had been a stranger to the contents of paragraphs 10 and 11 of the Plaint. Further, without prejudice to the preceding paragraphs, he averred that he had been the registered owner of Plots Nos. Msa/Block 1/525 and Msa/Block 1/526, having purchased the same from Zaharia Mohamed Mawia.

f. The 5th Defendant averred that he had been a bona fide purchaser for value without notice. As a prerequisite for the purchase, he had instructed Counsel who had conducted postal searches of the plots but had not noted any encumbrances against the titles Msa/Block 1/525 and Msa/Block 1/526.

g. The 5th Defendant denied any knowledge of the averments raised by the Plaintiff under paragraph 12 of the Amended Plaint. He had been a stranger to the pleaded particulars of fraud and/or illegality and invited the strictest proof thereof.

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h. The 5th Defendant had been a stranger to the assertions under paragraphs 13, 14, 15 and 16 of the Amended Plaint and invited the strictest proof thereof.

i. The 5th Defendant had been a stranger to the contents of paragraphs 17, 18, 19, 20, 21 and 22 of the Amended Plaint.

j. The 5th Defendant denied the contents of paragraphs 23, 24 and 26 of the Amended Plaint and invited strict proof thereof.

k. The 5th Defendant had never been served with any demand notice or any notice intending to commence the instant proceedings.

l. The 5th Defendant admitted the jurisdiction of the Honourable Court.

m. The 5th Defendant stated that his plots Msa/Block 1/525 and Msa/Block 1/526 had been legally acquired and that the requisite stamp duty, all relevant rates and rent, and all taxes due had been paid.

n. It had been the 5th Defendant's contention that he had been discriminated against and maliciously sued over the suit plots herein, despite the fact that his plots had fallen on a strip where twenty-seven (27) other plots had been excised. The other plots had been developed, and none of their owners had been sued, while he had severally attempted to develop his portions but had continuously been harassed by agents of the Plaintiff herein.

o. The 5th Defendant averred that he had been entitled to peaceful and quiet possession of his properties Msa/Block 1/525 and Msa/Block 1/526, that he had been a bona fide purchaser for value, and that his titles had never been challenged in any Court of law.

206. The 5th Defendant prayed that the suit herein be dismissed with costs as it did not raised any cause of action against him.

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207. The 5th Defendant called the 5th Defendant DW - 2 on 7th February, 2025 who testified that: -

A. <u>Examination of DW - 1 by Mr. Kiarie Kariuki Advocate.</u>

208. DW - 1 testified under oath and in English Language, He was called HUSSEIN ABDULLAHI. He was a businessman residing in Mombasa. He stated that he had recorded a statement on 23rd July, 2019 and had filed three documents on the same date, which he wished to rely upon as part of his evidence in the case. He testified that he had purchased the land from Zaharia Mohamed Mawia, and that transfer had been duly effected. The land had been Mombasa/Block/1525. He stated that Zaharia Mohamed Mawia had executed the transfer on 24th July, 2014, and a Certificate of Lease had thereafter been issued. The transaction had been handled through Muthama Advocate. He confirmed that a search had been conducted and had revealed no encumbrances. He testified that he had purchased the property for a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) in cash.

209. DW - 2 stated that he had never undertaken the business he had intended to carry out on the land. Instead, the community had requested that he donate the land for use as a mosque. He agreed, and a mosque had been constructed thereon, from which the community had greatly benefited. He prayed that the court conduct a site visit to the property. He testified that he had no claim over the land anymore, as it had been vacant at the time of purchase, without squatters save for one toilet, and that

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it had since been dedicated to mosque and community purposes.

210. DW - 2 wished to produce the documents in support of his ownership of the land, marked as 5th Defendant's Exhibits 1, 2 and 3. He concluded by stating that he had only later come to hear that Kenya Railways had been claiming the land.

E. Cross examination of DW - 2 by Mr. Wachira Advocate

211. DW - 2 confirmed that the community had started building the mosque in the year 2016, around the time the case had just commenced. He stated that Kenya Railways had never objected to the construction of the mosque. He further testified that, in court, he had not seen any application for injunction restraining the construction of the mosque, and that he had left everything to the community.

212. He stated that he had begun constructing a perimeter wall, but due to thefts occurring on the site, the construction had been stopped. He testified that, when he had purchased the land, there had been a toilet belonging to Zaharia Mawia and not to Kenya Railways. He added that the EACC had never arrested him in relation to the land, and that this had been the first time he had seen them in court.

F. Cross-Examination of DW – 1 by Mr. Karina Advocate.

213. The witness testified that, from the documents in his possession, he had had an agreement for sale from Zaharia Mohamed Mawia, but that agreement had not been filed in court. He stated that, before the purchase, his Advocate had conducted a search, but the search document had not been produced in court. He

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confirmed that he had paid a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) in cash for purchase of the suit property.

214. DW - 2 testified that the plot had been in the name of the community of the mosque, but that he had not effected any transfer from himself to the community. He admitted that he had not brought any witness from the community to testify. He further stated that although he had photographs of the mosque, but that he had not filed them in court.

G. Cross-Examination of the 5th Defendant – DW - 2 by M/s. Abdulrahman Advocate.

215. The witness testified that he had known Zaharia to have held a title deed and that he had believed it had been obtained regularly. He stated that Zaharia had informed him that she had obtained the title deed from the Municipal Council of Mombasa. He testified that the land might have been intended for the purpose of an access road. He stated that the mosque had begun construction in the year 2016 and that he had given the community the documents relating to the land.

216. DW - 2 referred to the 2nd Plaintiff's documents, specifically the valuation report dated 17th March, 2021. He testified that, at that time, the report had shown there had been no mosque on the land, but only a few iron-sheet structures, as reflected in pages 1 to 112 of the report. He stated that he had not known this, since after giving the papers to the community he had not followed up further. He added that he had known there had been a government hospital nearby. He admitted that he had had nothing to show approval for the construction of the mosque.

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217. DW - 2 testified that he had used his own money to purchase the land and had not formally given it to the mosque because he had known there had been a dispute. He explained that he would never have wanted the mosque to suffer. He stated that he had not known that the land had belonged to Kenya Railways. He concluded by testifying that they had arrested people who had been attempting to build a perimeter wall on the property.

218. The 5th Defendant marked their case closed on 7th February, 2025 by Mr. Kiarie Kariuki Advocate.

IX. Submissions

219. On 7th February, 2025 after the Plaintiffs and Defendants marked the close of their cases, the Honourable Court directed that the parties file their submissions within stringent timeframe thereof on.

220. Pursuant to that all parties fully compiled and the Honourable Court has proceeded to make a summary of them as hereinbelow. Thereafter, the Honourable Court proceeded to reserved a date to deliver its Judgement on its own merit and on notice.

A. The Written Submissions by the 1st & 2nd Plaintiff.

221. The Plaintiffs through the Law firm of Messrs. Ndegwa, Katisya and Sitonik & Associates Advocates and M/s. Fatuma Abdulrahim S, HSC Advocate from the Ethics and Anti – Corruption Commission filed their written submissions dated 4th July, 2025. Both Mr. Karina & M/s. Abdulrahim Advocates commenced their submission by providing a brief background of the case. They stated that the 1st Plaintiff had filed Civil suit "***ELC 180 of 2015,***

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Kenya Railways Corporation – Versus - Zaharia Maawviya & 3 others, and the 2nd Plaintiff had filed ELC 64 & ELC 65, EACC – Versus - Zaharia Maawiya & 2 Others, for recovery of parcels of land referenced Mombasa/Block 1/525 and Mombasa/Block 1/526, which were situated in the Shimanzi area on Mombasa Island within Mombasa County.

a. The three cases had been consolidated pursuant to the Court's directions issued on 10th February 2021, and the 1st and 2nd Plaintiffs then filed an Amended Plaint dated 15th June 2021 sought for the above stated orders against the 1st, 2nd, 3rd, 4th and 5th Defendants jointly and severally.

222. The 1st and 2nd Plaintiffs had also filed a Consolidated List of Documents containing 57 exhibits (from pages 1–120) and a Consolidated List of Witness Statements dated 2nd August, 2022 and seven other documents in the Plaintiffs' Further List of Documents dated 4th May 2023 in support of their case.

223. The Learned Counsel submitted that it was common ground that the 1st Defendant was deceased. She had passed away during the COVID-19 pandemic, and all the counsels representing the parties had agreed and recorded a consent that the case proceed for hearing without the 1st Defendant's participation as it would delay the expeditious disposal of the matter. However, all the documents and pleadings filed by her were to be relied upon by the parties. The 2nd Defendant had filed its Amended Statement of Defence dated 15th March 2022. It had relied on a List of Documents dated 3rd December 2021 in support of its case. The 2nd Defendant had intended to call one Galbert Munjuga Nderitu,

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but it had abandoned that process and closed its case without calling any witnesses.

224. The 3rd Defendant had not filed a Statement of Defence but had agreed to participate in the hearing. The 4th Defendant was alleged to be the current registered owner of the suit property Mombasa/Block 1/526, having purchased it from the 1st Defendant. The 4th Defendant had filed an Amended Statement of Defence and Counterclaim dated 12th August 2021, and the 4th Defendant's List of Documents and List of Witnesses dated 24th October 2019, respectively, for the case. The Director of the 4th Defendant had testified during the hearing and had closed their case.

225. The 5th Defendant was an adult of sound mind residing in Mombasa. He was alleged to be the current registered owner of the suit property Mombasa/Block 1/525, having purchased it from the 1st Defendant. The 5th Defendant had filed his Defence, List of Witnesses and List of Documents dated 23rd July 2019 and had testified before the court. The Court had conducted a site visit of the suit properties on 7th March 2025, with counsel for both the Plaintiffs and the Defendants, and had compiled its report on the current status dated 25th May 2025.

226. On the background of the Plaintiff's case, the Learned Counsels averred that the Plaintiffs' case was that at all material times the 1st Plaintiff had been, and remained, the bona fide owner and occupier of all land, buildings and structures on an unsurveyed plot in Shimanzi within Mombasa Island that bordered a road, having inherited the said land from its predecessor, the East

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African Railways and Harbours Corporation, by virtue of the Kenya (Vesting of Lands Regulations) Legal Notice 245 of 1963 and a vesting order (Legal Notice No. 24) gazetted on 22nd February 1986.

227. The Learned Counsels submitted that at some point the defunct Municipal Council of Mombasa (now the 2nd Defendant) had requested the 1st Plaintiff to grant it part of its unsurveyed property for purposes of expanding Shimanzi Road for public use and for construction of a dual carriageway in the future. The 1st Plaintiff had granted the portion of the unsurveyed land to the Municipal Council on the understanding that the portion would be used for expansion of the public road, and if not, the said property would be returned to the 1st Plaintiff as required by law. The 1st Plaintiff had agreed to grant the said part of land to the Council, which had structures and buildings that were being occupied by its tenants at the time the expansion might arise. Subsequently, the 1st Plaintiff had continued to possess, maintain and let its property to its tenants who paid rent to it to date.

228. The Learned Counsels held that instead of the defunct Municipal Council using the land for the intended public use, it had purported to sub - divide the land, create plots and allocate the same to private persons, including the 1st Defendant, without the 1st Plaintiff's knowledge, consent or authority.

229. The Learned Counsels submitted that the purported allocation and sub - division of the suit properties had emanated from the 1st Defendant's application for allocation to the then defunct

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Municipal Council of Mombasa (now the 2nd Defendant) on or about 16th October 1994. In her application the 1st Defendant had purported to apply to be allocated the suit properties as unsurveyed properties A and B adjacent to Plot 294, Section 1 Mombasa Island and on 1st November 1994 the Town Clerk of the defunct Municipal Council of Mombasa (now the 2nd Defendant) had unlawfully, fraudulently and through a corrupt scheme and/or without the consent, authority and notice to the 1st Plaintiff purportedly allocated the suit properties to the 1st Defendant.

230. The Learned Counsels posited that on 2nd November 1999 the 1st and 2nd Defendant (the defunct Municipal Council of Mombasa), by themselves, their agents and/or servants in collusion with officers at the Land Office (3rd Defendant), had illegally subdivided a portion of the unsurveyed public land occupied by the 1st Plaintiff into new Land Reference Numbers Mombasa/Block 1/525 measuring approximately 0.0607 hectares and Mombasa/Block 1/526 measuring approximately 0.3908 hectares, created via a Survey Plan Folio Register No. 366/81. On 3rd December 1999 the Town Clerk and the Mayor of the defunct Municipal Council of Mombasa (the 2nd Defendant) had purportedly endorsed a lease agreement over Land Reference Number Mombasa/Block 1/526, while Land Reference Number Mombasa/Block 1/525 had been endorsed on an undated lease agreement.

231. On 7th December 1999 and 14th September 2012, respectively, Certificates of Lease had purportedly been issued and registered

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on Land Reference Mombasa/Block 1/526 and Land Reference Mombasa/Block 1/525 in favour of the 1st Defendant. The Learned Counsel further held that the 1st Defendant, via two letters referenced MOTC/CONF8.012 VOL II/43 dated 15th April 2002 and MOTC/CONF8.012 VOL II/49 dated 28th May 2002 respectively, had purportedly induced the office of the Permanent Secretary, Ministry of Transport and Communication and junior officers of the 1st Plaintiff to covertly and unlawfully make payment of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/=) as compensation for the buildings and structures on the 1st Plaintiff's land as a way of settling the ownership dispute between her and the 1st Plaintiff.

232. The Learned Counsels submitted that on 30th October 2005 the 1st Defendant had purportedly entered into an agreement with the 4th Defendant to sell Land Reference Mombasa/Block 1/526, and on 4th August 2011 a leasehold interest had been registered in favour of the 4th Defendant. On 17th July, 2014, the 1st Defendant had purportedly transferred Land Reference Number Mombasa/Block 1/525, and on 24th July, 2014 a leasehold interest had been registered in favour of the 5th Defendant.

233. The Plaintiffs therefore contested that the purported allocation, subdivision, registration and disposal of the suit properties by the 2nd Defendant to the 1st Defendant and the subsequent transfers of the suit properties to the 4th and 5th Defendants were tainted with fraud, illegality and/or irregularity as they had not complied with the 1st Plaintiff's legal processes and procedures for disposal of public assets under the Government Lands Act, the Kenya

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Railways Corporation Act, the Land Registration Act, the Local Government Act and other laws; hence they were null and void ab initio and did not confer any legal interest or lawful rights to the 1st Defendant and subsequently to the 4th and 5th Defendants.

234. The Learned Counsels posited that the allocation of the suit properties to the 1st Defendant had been done with misrepresentations of fact that the land was unalienated, free, undeveloped government land held in trust by the defunct Municipal Council of Mombasa, while on the ground there had been developments of buildings and structures occupied by tenants of the 1st Plaintiff who, to date, remained in occupation and paid rent to the 1st Plaintiff. The purported registration of the suit properties to the 1st Defendant and the subsequent transfer and registration of the same to the 4th and 5th Defendants by the 3rd Defendant had been tainted with procedural irregularity, illegality and/or a corrupt scheme by way of misrepresentation and collusion between the 1st, 2nd, 3rd, 4th and 5th Defendants; hence they were illegal, null and void ab initio and did not confer any proprietary rights to the 1st, 4th and 5th Defendants.

235. The Plaintiffs had set out the nature of the misrepresentation, fraud and illegality by the 1st, 2nd, 3rd, 4th and 5th Defendants and breach of trust and abuse of office by the 3rd Defendant as set out in Paragraphs 13 (a–k), 15, 16, 17, 18, 30 (a–aa), 35 and 36 of the Amended Plaint. The Learned Counsel submitted that the 1st and 2nd Defendant (the defunct Municipal Council of Mombasa) had purportedly disposed of the 1st Plaintiff's land with knowledge that the suit properties had structures and buildings of the 1st

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Plaintiff that were being occupied by its tenants who paid rent to the 1st Plaintiff. The suit properties had, at the time of allocation, already been alienated public land and therefore were not free land that could legitimately be disposed of by the 2nd Defendant to the 1st and later transferred to the 4th and 5th Defendants. The 2nd Defendant, the 3rd Defendant, the Commissioner of Lands and the President of Kenya had had no authority to allocate the suit properties since the 1st Plaintiff had not formally surrendered the same to the Commissioner of Lands to date for change of use or private use for the benefit of the 1st Defendant.

236. On the evidence, the Learned Counsels informed Court that the Plaintiffs had called seven (7) witnesses, namely Pius Maithya (PW - 1), Hashim Got (PW - 2), Engineer Albert T. Keno (PW - 3), Justine Omoke (PW - 4), Athmani Amani Ali (PW - 5), Rose Munupe (PW - 6) and Elias Kipyego (PW - 7), who had testified on diverse dates (29th September 2022, 24th May 2023, 19th July 2023 and 19th October 2023) and had produced both documentary and secondary evidence in the Plaintiffs' Consolidated List in support of the case.

237. PW1 — Pius Nyange Maithya. He was a Registered Valuer working with the Ethics and Anti-Corruption Commission (the 2nd Plaintiff). He stated that he had inspected the suit properties on 9th March 2021 under instructions of the 2nd Plaintiff's Lower Coast Regional Manager for purposes of investigations to assess the current best market value of the suit properties and had produced a Valuation Report dated 17th March 2021 (Exhibit No. 57). He described the suit properties as being situated within

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Mombasa Island at the junction of Shimanzi Road and Voi Street, and as neighbours to the Railways Dispensary.

238. PW - 1 further stated that at the time of inspection he had found some developments on Plot No. 525 consisting of semi-permanent galvanized iron sheet structures, and on Plot No. 526 there had been three old permanent buildings, two of which had been marked KRC 19134 and KRC 19135, and several semi-permanent structures occupied by various persons whose identity and nature of occupancy he had been unable to establish as his assignment had been mostly on valuation. He stated that the Land Reference Numbers Mombasa/Block 1/525 had been valued at a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/=) and Mombasa/Block 1/526 had been valued at a sum of Kenya Shillings One Hundred Million (Kshs. 100,000,000/=).

239. He further stated that the land registry records had reflected Hussein Abdulrahman as the registered owner of Mombasa/Block 1/525, measuring approximately 0.0607 hectares on leasehold interest for a term of 99 years with effect from 1st November 1994 at an annual ground rent of a sum of Kenya Shillings Three Thousand (Kshs. 3,000/=), and CYKA Holdings Limited as the registered owner of Mombasa/Block 1/526, measuring approximately 0.3908 hectares for a term of 99 years with effect from 1st November 1994 at an annual ground rent of a sum of Kenya Shillings twenty Thousand (Kshs. 20,000/=). He had assumed that all procedures for allocation and ownership had been duly followed.

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240. PW - 2 — Hashim Got. He had been a Land Registrar at Mombasa Land Registry on 6th November 2015 and had recorded his statement at that time; he was then working at the Land Registry in Machakos County Government. He stated that the records in the Mombasa Land Registry had indicated that Mombasa/Block 1/526 measured 0.3908 hectares and had been registered in the name of Cyka Holdings Limited as confirmed via transfer entry no. B5 on the white card dated 4th August 2011. It had initially been allocated to Zaharia Mohamed Maawia as per Entry No. B1 dated 7th December 1999. He further stated that the Registry records had reflected that Plots Mombasa/Block 1/526 and Mombasa/Block 1/525 had belonged to the Municipal Council of Mombasa (now County Government of Mombasa) as head lessors. He indicated that the registration of the leases had been an end process. Upon chief examination by the 1st Plaintiff, he had been informed that the lease instruments upon which the land had been claimed to have been registered had structures of the Kenya Railways properties on the ground, and he had indicated that the Registry records had had no such information; but if that had been the position then the land had not been available for allocation.

241. PW - 3 — Engineer Albert T. Keno. He had been the Chief Officer in Charge of Transport and Roads at the County Government of Mombasa. He had produced a letter Ref: CGM/TI & PW/EACC/CONF/04/2019 dated 19th October 2019 (Exhibit No. 7) addressed to the 2nd Plaintiff's Deputy Director, Lower Coast Region, on the request for documents for Shimanzi Road. He had

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stated that Shimanzi Road was about 1.6 km long and linked the Port of Mombasa to the Northern Transport Corridor through gate No. 12 and gate No. 9. He had stated that the road had played an important role in transportation but had faced heavy congestion due to large volumes of trucks operating in the surrounding industrial area which hosted several warehouses, grain handling facilities, oil terminals and other port-related facilities. He had stated that the records in their office had indicated the original road had been 200 feet wide, of which 7 metres (22.97 feet) had been used to construct the road pavement/carriageway. The rest of the corridor had been reserved for the second carriageway and had been used for construction of other utility services like water, storm drains and power lines. Other facilities, like pedestrian walkways and bicycle lanes, had also been planned to be located in the road reserve. He had referred to and produced Survey Plans F/R Nos. 61/7 of 1951, 68/55 of 1956, 82/21 of 1958, 83/21 of 1958, 84/25 of 1958 and 253/87 of 1994 in the Plaintiffs' further Consolidated List of Documents in support of these facts.

242. In examination-in-chief on the actual status on the ground, PW - 3 had confirmed that a larger portion of the road reserve had since been allocated to private developers, leaving less than half of the original road reserve for use as the road. He had been referred to FR 253/87 of 1994, FR 366/181 and Registry Index Maps (RIM) (Exhibits 51, 52, 53, 54) for Mombasa Block 1 and had confirmed that Plots Mombasa/Block 1/525 and Mombasa/Block 1/526 had been created from a road reserve. He

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had further testified that his department had been the custodian of all records of roads and road reserves within the Municipality (now County) to date. He had stated that as a common process during allocation consultations had to be done with their department; however, for this allocation there had been no records of correspondence in their department to indicate that consultations had been done. According to him, records from their office had indicated that the area had remained a road reserve of 200 feet wide as per the original survey plan. He had recommended that the road reserve be restored to its original status to facilitate improvement and expansion works, as they faced challenges of heavy traffic in that area and expansion would improve infrastructure of the County and the Country.

243. On further examination-in-chief by the 1st Plaintiff, he had been able to confirm from old maps that the surrounding area reflected some old railway line zones and transit extensions that had supported transportation of goods from the port in this country to East African countries.

244. PW - 4 — Justine Omoke. He had been the Estate Manager with the 1st Plaintiff and in charge of the Corporation's Assets Management. He had adopted his statement dated 21st March 2022. In his testimony he had stated that the 1st Plaintiff had at all material times been the bona fide owner of all the unsurveyed plots/land, buildings and structures in Shimanzi within Mombasa Island, having inherited them from its predecessor, the East African Railways & Harbours Corporation. He had further stated that according to their recent valuation

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the current value of the suit properties had been approximately a sum of Kenya Shillings Four Fifty Thousand Million (Kshs. 450,000,000/=). He had stated that the 1st Plaintiff had always been and still was in exclusive possession and occupation of the suit properties and had leased the same to various tenants/individuals who paid rent to the 1st Plaintiff.

245. PW - 4 had stated that the 1st and 2nd Defendants, by themselves, their agents and/or servants and in collusion with the Land Office, had illegally subdivided a portion of the public land and had created the suit properties and purportedly acquired new Land Reference Numbers now known as Mombasa/Block 1/525 and Mombasa/Block 1/526. The 1st Plaintiff had owned the suit properties including the buildings and structures erected on them well before the purported subdivisions and registration to the 1st Defendant and subsequently to the 4th and 5th Defendants.

246. It had been PW - 4's evidence that the purported sub - division, issuance of new reference numbers and registrations had been procured by way of fraud and misrepresentation of facts that the 2nd Defendant had requested a small portion of the 1st Plaintiff's land as a road reserve for future expansion of Shimanzi Road. He had stated that the 1st Plaintiff had agreed to give the small portion requested when the need arose, but had not officially or formally surrendered the same to the Government of Kenya or the 2nd Defendant. He had stated that allocation of the suit properties had been done in collusion with the 1st, 2nd and 3rd Defendants when the said land had been public land belonging

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to the 1st Plaintiff and such allocation and registration of the interest to the 1st Defendant and later to the 4th and 5th Defendants had not conferred any proprietary rights and were illegal, null and void ab initio.

247. He had stated that the 2nd Defendant, instead of using the property for the intended public road use and without consent, notice or authority of the 1st Plaintiff, had proceeded to allocate and facilitate the subdivision of the suit properties in favour of the 1st Defendant.

248. PW - 4 had stated that the 1st Defendant, in collusion with unauthorized junior officers (i.e., the Estate Manager of the 1st Plaintiff), had attempted to legalise the allocation process by supporting the 1st Defendant by making payments of a sum Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/=) to the 1st Plaintiff. This informal process had been undertaken without the notice, knowledge and consent of the lawful authorised officers (the Board) of the 1st Plaintiff. This process had been contrary to the laid-down procedures of disposal of the 1st Plaintiff as set out in the Kenya Railways Corporation Act and the Government Act.

249. PW - 4 had stated that the 1st, 4th and 5th Defendants had never been in possession of the suit properties. The 1st and 2nd Defendants had purportedly obtained Certificates of Title by way of fraudulent action in collusion with some government officers, without the knowledge and consent of the 1st Plaintiff. The 1st Defendant had purported to acquire proprietary rights over the

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suit properties by registration without any valuable consideration to the 1st Plaintiff or the Government.

250. PW - 4 had stated that although the 1st Defendant had purported to benefit from the allocation of the alleged suit properties which were alienated government land, she had had knowledge that the suit properties belonged to the 1st Plaintiff and were not free land that could legitimately be disposed of by the 1st and 2nd Defendants or any other person under the law or by any authority including the Commissioner of Lands or Land Registrar Mombasa since the 1st Plaintiff had never surrendered the land to the Commissioner of Lands.

251. He had stated that the process of allocation of the 1st Plaintiff's land had been tainted with fraudulence, illegality, unlawfulness, and by way of a corrupt scheme and the same could not confer any proprietary interest to the 1st Defendant or any other person. Accordingly, the suit properties had remained public land vested in the 1st Plaintiff, which was a public corporation, and despite the fraudulent acts by the Defendants and the purported sub - division and allocation to the 1st Defendant, the 1st Plaintiff had remained in possession to date. The suit properties to date had been occupied by the 1st Plaintiff's tenants.

252. PW - 4 had contended that in an attempt to obtain possession of the suit property, the 1st Defendant, by themselves, their agents or servants, on 18th August 2015 and 2nd August 2015, had hired violent gangs and rogue police to trespass into the properties and demolish a portion of the 1st Plaintiff's structures and had

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attempted to construct a perimeter wall over the same. (Pictures of demolished structures had been referred to on pages 100–102 of the Plaintiffs' consolidated list of documents).

253. It had been PW - 4's further testimony that the 1st Defendant had made unlawful attempts to evict the 1st Plaintiff and its tenants by using court processes such as obtaining an ex - parte demolition order in the case of:- ***"Magistrates' Court in CMCC No. 2892 of 2007, Zaharia Mohamed Mawia – Versus - Duncan Kinyua & 4 Others"***. He had averred that on 5th November 2007 the 1st Defendant had withdrawn that suit after the 1st Plaintiff had hired counsel to defend the tenants and had lodged the case of: ***"Civil Appeal No. 176 of 2007, Dan Kinyua & 4 Others – Versus - Zaharia Mohamed Maawia"*** on 8th October 2007 and had obtained a stay of execution against the ex parte demolition order.

254. He had stated that on 23rd April 2009 the 1st Defendant had subsequently filed ***"High Court Civil Case No. 116 of 2009, Zaharia Mohamed Mawia – Versus - Duncan Kinyua & 4 Others"***, to evict the 1st Plaintiff's tenants. The 1st Plaintiff had made an application dated 29th June 2009 to be enjoined in that suit. On 31st May 2012 the Court had ruled that the 1st Plaintiff was in exclusive possession of the suit property through its tenants and had allowed the 1st Plaintiff to be enjoined as the 6th Defendant. The suit had later been withdrawn by the 1st Defendant to avoid scrutiny of the acquisition. PW - 4 had been referred to paragraph 70 of the ruling and had informed the court that there had been a second application in that suit by CYKA Holdings Limited (4th Defendant herein), which had sought to be enjoined as an "affected party" on account that it had entered into a sale

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agreement with the 1st Defendant on 30th October 2005 and the 1st Applicant (1st Plaintiff) had registered a caution against the title to protect its legal rights and CYKA Holdings had been waiting for the 1st Defendant to remove the tenants from the suit property to pave way for it to complete payments of the purchase price and register a title deed over the suit property in its favour. The court had dismissed that application and had held that CYKA Holdings was not a necessary party in that suit since it had not completed payments; their involvement would have complicated the issue before the court.

255. He had stated that the 1st Plaintiff's prime property had been wrongfully disposed of through corrupt dealings by the Defendants at the Land Office and if the 1st and 2nd Defendants could dispose of the suit properties to third parties, the 1st Plaintiff would suffer irreparable damage and would not be able to retain possession of the suit property.

256. PW - 4, in examination-in-chief by the 2nd Plaintiff, had been asked to explain the procedure for disposal of the 1st Plaintiff's assets and he had stated that disposition of the 1st Plaintiff's assets was guided by the Procurement and Disposal Act and the Kenya Railways Act. Firstly, there had to be a need for disposal and that disposal had to be factored into the financial plan. The disposal had to be deliberated and approved in a Board meeting. The property to be disposed had to be boarded to establish market value which would guide the terms and conditions of disposal, including premiums and rates. The records of approval of the Board (minutes and correspondences and the boarding

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report) would then be forwarded to the Cabinet Secretary, Transport and Communication for final assent and thereafter to the Cabinet Secretary, Treasury for final approval.

257. Thereafter the 1st Plaintiff would proceed to advertise the disposal of the asset in a daily newspaper with wider circulation. This would then be followed by invitation of all successful applicants to bid in an auction on a specific date and time. Upon getting a successful bidder and fulfilment of payments of the rates and premiums, the Chair of the Board would sign a consent to transfer agreement to the successful purchaser and a title would be issued in favour of that person. He had stated that the entire process of disposition had to emanate from the 1st Plaintiff and not, as in this case, where the entire process had been facilitated by the 1st and 2nd Defendants. The allocation of the suit properties to the 1st Defendant and later payment of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/=) as settlement of the 1st Plaintiff's structures and buildings had been done after the suit properties had been leased to the 1st Defendant and had been unprocedural and unlawful. He had also stated that issuance of a letter of no objection by the estate manager who had been a junior officer had been unprocedural. Accordingly, the letter ought to have been written by the Managing Director with the approval of the Board and the Ministry of Transport and Communication.

258. On the issue of giving out their property to other public entities, PW - 4 had stated that the Kenya Railways Act, Cap 397 (now repealed) allowed the 1st Plaintiff to donate or surrender land to

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other public institutions formally only for public use and not for private use. He had further stated that according to their records the 1st Plaintiff had never formally surrendered the suit properties to the 2nd Defendant and/or the Commissioner of Lands to date and the properties had been factored in their asset records every year.

259. He had further stated that, according to their records, the 1st Plaintiff had never formally surrendered the suit properties to the 2nd Defendant or to the Commissioner of Lands to date and the properties had been factored in their asset records every year.

260. PW - 5 — Rose Munupe. She had been the Acting Director of Lands at the County Government of Mombasa since the year 2012. Before that she had worked as the Director of the Housing Development Department within the defunct Council from 1999. She had stated that the 2nd Plaintiff had written to their office via letter Reference No. EACC/MSA/6/16/1 Vol IV (70) on 8th September 2015, requesting the Municipal Council of Mombasa Minute 416/80, Min 335/93, Confidential Minute 335/93, the letter from the Municipal Council of Mombasa dated 24th October 2003 Ref G.71 by W. J. Mukhongo for the Town Clerk, the letter from the Permanent Secretary, Ministry of Transport and Communication Ref MOTC/CONF I.8.012 Vol II/49 dated 28th May 2002 and a letter by D.J. Randu, Town Clerk, Reference TP/7/6 dated 1st November 1994 to Zaharia Mohamed Maawia. She had responded that she had checked the archives but could not trace both the ordinary and confidential minutes. She had come

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across Minute 416/80 and Min 335/93 during the pretrial by the 1st Plaintiff.

261. In examination-in-chief by the 2nd Plaintiff she had shown PW - 5 Minute 462 and Confidential Minute 335/93, which had allegedly been used to approve the allocation of the suit properties by the defunct Municipal Council. These minutes had also been reflected in the letter from the Municipal Council of Mombasa dated 24th October 2003 Ref G.71 by W. J. Mukhongo for the Town Clerk and, upon scrutiny, she had confirmed that Minute 462 of the meeting held by the defunct Municipal Council of Mombasa on 7th September 1993 (Min 335/93) had been deliberating on plot allocation and had been recorded in confidential minutes. In the Confidential Minute 335/93 it had shown a list of approvals received by the Council from the Government to allocate plots to the 37 Councillors and civil servants, but the 1st Defendant's name had not appeared as a beneficiary in that list.

262. PW - 5 had then been referred to the extended part of the minutes and confidential minutes and had noted that the minutes had resolved that all applications for road reserves were to be considered on their own merits. There had been nowhere in the minutes approving the allocation of the suit properties to the 1st Defendant. (See Exhibits 47 & 48 at pages 34, 36–37, 77–86 of the Plaintiffs' Consolidated List of Documents.)

263. The 1st Plaintiff had referred PW - 5 to the letter by D.J. Randu, Town Clerk, Reference TP/7/6 dated 1st November 1994 that had allocated Zaharia Mohamed Maawia (the 1st Defendant) the land

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by the Town Clerk D.J. Randu, and she had confirmed that the allocation of the suit property to the 1st Defendant ***"was subject to the council obtaining necessary final planning and survey approvals from the relevant authorities and also approval of Kenya Railways Corporation was required."***

264. PW - 5 had indicated that she had been aware the suit properties were within a road reserve set aside for future expansion of the road, and that such allocation had been irregularly done.

265. PW - 6 — Athmani Amani Ali. He had been a Senior Land Surveyor at the Directorate of Survey Office in Nairobi and had adopted his statement dated 28th January 2022. He had stated that on 14th July 2015 the 2nd Plaintiff had written to the Directorate of Survey seeking the Registry Index Map that created Parcel Numbers Mombasa/Block 1/525 and Mombasa/Block 1/526, and Survey Plan Number F/R No. 366/81; the Director of Survey had forwarded a blueprint of the said plan. He had further stated that the survey had been carried out by the Provincial Office in Mombasa by Surveyor F.M. Kimotho, based on the District Lands Officer's Approval Letter Reference No. 1058/X/34 of 18th May 1995 (Refer to Exhibit 20 at page 37 of the Plaintiffs' Consolidated List of Documents).

266. He had stated that the survey had been examined and approved by the Director of Survey on 21st October 1999. The purpose of the survey had been to create commercial plots along a strip of road within the Mombasa Municipality. The new plots had been issued with Land Reference Nos. Parcel Numbers Mombasa/Block 1/525 and Mombasa/Block 1/526. He had further confirmed that, by the look of the survey plan, this had been an excision survey

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created from a road reserve and there had been no history of an old plot indicated on the survey plan. He had stated that upon authentication of the survey by the Director of Survey, the RIM had been amended to reflect parcels Mombasa/Block 1/524–526 on 22nd October 1999.

267. The 1st Plaintiff had referred PW6 to Survey Plan F/R No. 68/55 of 1956, F/R No. 83/21 of 1958 and F/R No. 83/22 of 1958 to describe the background of land around the suit properties, and he had confirmed that the surroundings of the said property in Shimanzi had been set aside for the East African Railways and Harbours Corporation. He had also been shown the confidential allocation letter dated 1st November 1994 to the 1st Defendant and had confirmed that any allocation process had started with planning followed by the survey process. It had been the planning, through an approved Part Development Plan, that had guided the actual status and features, boundaries and structures on the ground; this had guided the survey process.

268. Upon Cross - Examination by the 4th Defendant's Counsel on the area survey, he had confirmed that the two properties had been created/excised from a road reserve of 200 feet wide that had been maintained by the defunct Municipal Council in trust for the public. He had explained the procedure for reverting a road reserve: the Government had to degazette it before any allocation. In the absence of degazettement, the allocation had been illegal.

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269. PW - 7 — Elias Kipyego. He had been the Investigating Officer working with the 2nd Plaintiff. He had conducted investigations into allegations of irregular, fraudulent and illegal allocation of the suit properties, Land Reference Nos. Parcel Numbers Mombasa/Block 1/525 and Mombasa/Block 1/526, and had adopted his statement dated 16th June 2022. He had stated that during the investigations he had collected and obtained copies of public documents and had recorded statements of the public officers who had testified before the court.
270. He had stated that investigations had established the suit properties had been vested in the 1st Plaintiff via vesting orders (Legal Notice No. 245 of 1963 and Legal Notice No. 24 of 22nd February 1986) (Exhibits 1 and 2 in the Consolidated List of Plaintiffs' Documents at pages 5 and 6). He had further stated that investigations had established that at the time of allocation the suit properties had had structures and buildings owned by the 1st Plaintiff and had been rented to various tenants who paid rent to the 1st Plaintiff.
271. He had stated that on 16th October 1994 the 1st Defendant had allegedly applied for allocation of Plot A & B adjacent to Plot 294 Section 1 Mombasa Island with an attached sketch plan for industrial use to the Town Clerk of the defunct Municipal Council as if it had been unalienated Government land. He had stated that on 1st November 1994 the Town Clerk, via a "Confidential letter of Offer," had informed the 1st Defendant that "the Council hereby offers you a grant in the Certificate of Lease/Sub-lease on Plot No. B & C /I/MOMBASA/ISLAND subject

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to the 1st Defendant's written formal acceptance and the payment of standing premiums of a sum of Kenya Shillings Eighty Thousand (Kshs. 80,000/=) and annual rent of a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/=), planning and survey of the suit properties."

272. PW - 7 had testified that other conditions set out in the above letter had been that allocation of the suit properties would be granted subject to the 2nd Defendant (Council) obtaining the necessary final planning and survey approvals from the relevant authorities, and that approval from the Kenya Railways Corporation had been required.
273. PW - 7 had also referred to a letter Reference No. 1058/X/54 from the District Land Registrar to the Municipal Engineer, Municipal Council of Mombasa, dated 18th May 1995 and letter Reference No. 1058/X/56 dated 10th June 1995, where the Land Registrar had enclosed an approval to enable the Engineer to process the survey on the ground on conditions (4 and 5) which had indicated that a letter of no objection had to be obtained from the Kenya Railways Corporation and compensation paid to the owners of the structures on the ground (the 1st Plaintiff). He had referred to Exhibits 3, 4 and 20 at pages 7, 8, 37 and 38 of the Plaintiffs' Consolidated List.
274. He had stated that on 3rd November 1999 the Director of Survey, in his letter to the Commissioner of Lands, had approved Survey Plan F/R No. 366/181 that had created Plot Nos. 525 and 526 (the suit properties) and had amended the Registry Index Map

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(RIM) accordingly. He had referred to Exhibit 6 on page 9 of the Plaintiffs' Consolidated List.

275. He had testified that on 3rd December 1999 the Town Clerk and the Mayor of the then defunct Municipal Council of Mombasa had purportedly issued a lease over the suit property No. Mombasa/Block 1/526 to the 1st Defendant and that on 7th December 1999 the 3rd Defendant had registered and issued a Certificate of Lease in favour of the 1st Defendant with the registered lessor being the 2nd Defendant. He had further stated that on 30th October 2005 the 1st Defendant had purportedly entered into a sale agreement with the 4th Defendant and that on 4th August 2011 the suit property had been registered in favour of the 4th Defendant (CYKA HOLDINGS). He had referred to Exhibits 8–13 on pages 12–28 of the Plaintiffs' Consolidated List.

276. On the allocation of Property Land Reference No. Mombasa/Block 1/525, PW7 had stated that the allocation had been done through an undated lease agreement between the Town Clerk and the 1st Defendant. He had said that by a transfer form dated 17th July 2014 the suit property had allegedly been transferred by the 1st Defendant to the 5th Defendant and that thereafter an application for registration of transfer of lease had been lodged. He had referred to Exhibits 21–27 on pages 37–44 and 51–52 of the Plaintiffs' Consolidated List.

277. He had given evidence that what had been conspicuous about the transfer of this property from the 1st Defendant to the 5th Defendant was that the sale agreement between the 1st and the

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2nd Defendant had been executed afterwards on 23rd July 2015, after the transfer of the lease had been endorsed. A Certificate of Lease had later been registered and issued to the 5th Defendant on 24th July 2015. He had referred to Exhibits 28–38 on pages 46–48 and 53 of the Plaintiffs' Consolidated List.

278. PW - 7 had testified that at the time of allocation the suit property had had structures and buildings of the 1st Plaintiff. He had stated that the structures had been visible as late as 17th March 2021 when he and PW - 1 had done a ground inspection to establish the current market value. He had noted that PW - 1 had prepared a valuation report describing developments found on the properties to include two permanent structures marked KRC 19134 and KRC 19135 on Plot No. 526 and a semi-permanent galvanised corrugated iron sheet structure on Plot No. 525. He had referred to Exhibit 57 at pages 103–114.

279. PW - 7 had also indicated that he had requested and obtained documents from the defunct Municipal Council of Mombasa and the current County Government of Mombasa in respect of the allocation of the suit properties. Among the documents provided had been Minutes of the 462nd Special Meeting held on 7th September 1993, Confidential Minute 335/93 on plot allocation, Confidential Minutes of the 192nd meeting held on 18th October 1993 of the Town Planning and Works Committee on allocation of plots and Minute 425/93 on road closures. He had testified that upon scrutiny of all the confidential minutes he had established no evidence of the 2nd Defendant's approval of the

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allocation of the suit properties. He had referred to pages 77–86 of the Plaintiffs' Consolidated List.

280. PW - 7 had produced two letters, Ref. No. G.71/C dated 17th September 2003 and 24th October 2003, addressed respectively to Sachdeva & Company Advocates and to the Managing Director of Kenya Railways from W.J. Mukhongo signed for the Town Clerk of the defunct Municipal Council. Those letters had described the background of allocation of the suit properties and the legal instruments and process that had approved the alignment and development of the excess road reserve, including the Council Minutes and the alleged Presidential endorsement of 1st September 1993.

281. He had given evidence that he had not come across any evidence of town planning Minute 416/80 or of the authority of His Excellency the President of the Republic of Kenya dated 1st September 1993 as indicated in the letters. He had further stated that the confidential minute 335/93 had not mentioned the allocation of the suit properties nor had it named the 1st Defendant as a beneficiary of any such allocation.

282. PW - 7 had produced two letters Ref. MOTC/CONF8.012 Vol. II/49 dated 28th May 2002 and MOTC/CONF8.012 Vol. II/43 dated 15th April 2002 from the Permanent Secretary, Ministry of Transport and Communications, which had documented how the 1st Defendant had attempted to resolve the dispute on the suit property with the Kenya Railways Land Committee and the Permanent Secretary and had recorded that payment and compensation of a sum of Kenya Shillings Seven Hundred and

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Fourty Thousand (Kshs. 740,000/=) to the 1st Plaintiff had been made unlawfully and unprocedurally long after the 1st Defendant had been issued with Certificates of Lease and registered as the lessee. He had referred to Exhibits 14–19 and 29–30 at pages 29 – 36 of the Plaintiffs' Consolidated List.

283. It had been PW - 7's testimony that the 1st Defendant's application for allocation of the 1st Plaintiff's land had been calculated, because the 1st and 2nd Defendants had known the suit properties were already alienated public land that had been occupied and possessed by the 1st Plaintiff and therefore were not available for allocation to the 1st Defendant by the 2nd Defendant. The 2nd Defendant had had no authority to allocate the 1st Plaintiff's land to the 1st Defendant.

284. PW - 7 had further stated that there had been no evidence that the 1st Plaintiff had at any time surrendered the suit properties to the Government for change of use or had consented to their allocation to the 1st Defendant. He had stated that even if the suit properties had been surrendered for public use and had been available for alienation, the procedures for allocation had not been properly followed and had been tainted with illegalities, irregularities and fraud. He had said he had not come across any approved Part Development Plan authorizing the allocation, nor any notification to the public in the Kenya Gazette as required by law.

285. PW - 7 had further stated that the allocation had been effected conspicuously—from the letter of offer to the confidential minutes—which had never approved the said allocation. The two

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letters from the Ministry of Transport and Communication had been confidential, and the compensation and payments for structures had all been handled confidentially, contrary to the allocation procedures set out under the Government Lands Act that required planning to be published, allocations to be made openly, and surveys to involve neighbouring owners and the 1st Plaintiff.

286. He had further stated that the valuation, consent and compensation to the 1st Plaintiff had been done after the allocation and after titles had been issued. The mode of disposal of the 1st Plaintiff's property had contravened the prescribed procedures for disposal of Government assets. The valuation, compensation and disposal of the 1st Plaintiff's properties had been carried out without the consent of the 1st Plaintiff's Board, and he had not found any minutes or correspondence from the 1st Plaintiff's Board approving or complying with the required disposal procedures.

287. In cross-examination, PW7 had been referred to a letter Ref: M32/6/1/4 dated 14th September 1999, allegedly endorsed by the Chief Estate Manager for the Managing Director to the Municipal Engineer, defunct Mombasa Municipal Council, which had stated: ***"Please note that we have no objection to this survey provided you compensate us for the existing structures before you take full possession of the plot. The mode of compensation would be worked out by our valuer and your valuers. The Director of Survey is requested to amend and release the amended RIM to you for your next course of action with a copy to me."*** He had said he had not come across such a letter during the investigation;

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however, by the look of its content the Estate Manager had not been the duly authorised person to issue a letter of no objection or to dispose of the suit properties in that manner, and that such conduct had not been procedural. He had further stated that he had not found any Board minutes authorising disposal of the suit property at that time, nor any authority from the Managing Director assigning the Estate Manager to deal with the suit properties.

288. PW - 7 had been shown a letter Ref. MOTC/CONF/8.012 VOL II/43 from the Permanent Secretary, Ministry of Transport and Communication, S.P. Ndemo, to the Chief Valuer, Ministry of Lands in Nairobi, dated 15th April 2002, which had explained that the two plots owned by Zaharia Mohamed Maawia had been the subject of an ownership dispute between Kenya Railways and her, and that the Committee on the Sale of Railways Land had purportedly settled the dispute. The letter had requested valuation of the Railways' structures on the two parcels for purposes of compensation and had attached the lease documents for reference.

289. PW - 7 had been referred to the Chief Valuer J.K. Mwinzi's letter Ref: VAT 1185/39 to the Permanent Secretary, Ministry of Transport and Communication dated 1st May 2002, where the structures on Plot Mombasa/Block 1/525 had been valued at a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/=) and Plot Mombasa/Block 1/526 at a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/=). He had averred that, on the face of the correspondence, the Permanent Secretary's

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letter had not been duly signed and the contents had revealed that the disposal had not been procedural. He had stated that the authorization for valuation and compensation to the 1st Plaintiff had been done after the 1st Defendant had already obtained a Certificate of Lease over property containing Kenya Railways' structures, which had appeared to be an attempt to regularize an illegality under the guise of compliance with allocation procedures; the land had not been free land available for private allocation in the first instance.

290. PW - 7 had further stated that he had not found any minutes from the alleged Committee for Sale of Kenya Railways Land deliberating the disposal of the suit properties. If such a committee had existed and had proposed disposal of the suit properties, its proposals ought to have been forwarded to the Board for deliberation and approval. In the absence of any such evidence, he had concluded that the 1st Defendant had obtained titles to the suit properties without the consent of the 1st Plaintiff and had thereafter approached relevant authorities, such as the Ministry of Transport, to sanitize the allocation process. He had maintained that the allocation had been unprocedural, illegal and irregular and could not confer any interest in the suit properties to the 1st Defendant or subsequently to the 4th and 5th Defendants.

291. The Learned Counsel relied on the following issues for determination by the Court: -

a. Whether the 1st Plaintiff had been the lawful owner of the suit properties.

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b. Whether the suit properties had been unalienated Government land available for allocation to the 1st Defendant for private use.

c. Whether the allocation and sub - division of the suit properties to the 1st Defendant by the 2nd Defendant had been lawful.

d. Whether the 4th and 5th Defendants had been innocent purchasers for value without defect and whether their interests in the suit properties should have been protected.

e. Whether the Plaintiffs had been entitled to any relief sought in the Plaint and to the costs of the suit.

292. The Plaintiffs had submitted that they had presented evidence to the court proving, on a balance of probabilities, that the suit properties in dispute — Plot Mombasa/Block 1/525 (approximately 0.0607 hectares) and Plot Mombasa/Block 1/526 (approximately 0.3908 hectares) — had been excised from a larger unsurveyed parcel of land belonging to the 1st Plaintiff. PW - 4, Justine Omoke, the Estate Manager of the 1st Plaintiff, had testified that the 1st Plaintiff had been in occupation, possession and control of the unsurveyed parcel at the time of the allocation and survey, having inherited the parcel from its predecessor, the East African Railways and Harbours Corporation. He had testified that long-standing buildings and structures of the Kenya Railways Corporation had been on the ground and had been occupied by tenants who paid rent to the 1st Plaintiff. The Plaintiffs had produced the Vesting Order (Legal Notice No. 245 of 1963) in support.

293. PW - 4 had further testified that the 1st Plaintiff had only given the defunct Municipal Council (the 2nd Defendant) a portion of its land for expansion of Shimanzi Road for public use and not for

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allocation to the 1st Defendant for private use. Instead of expanding the road as intended, the 2nd Defendant had purportedly changed the subject properties from public to private use and had allocated the land to the 1st Defendant without the 1st Plaintiff's knowledge, consent or authority. PW - 4 had also testified that the 1st Plaintiff had never formally surrendered its land to the Government, the 2nd Defendant or the Commissioner of Lands for alienation to the 1st Defendant for private use. The properties had remained reflected in the 1st Plaintiff's Asset Register and Financial Plan budgets as part of its assets.

294. Those facts had been substantially corroborated by PW - 1 (Pius Maithya, the Land Valuer) and PW - 7 (Elias Kipyego, the investigating officer), both of whom had testified that during the site inspection on 9th March 2021 there had been structures and buildings of the 1st Plaintiff on the suit properties. PW - 1 and PW - 7 had described Plot Mombasa/Block 1/525 as having temporary galvanized-iron structures (later demolished and replaced by a mosque constructed by the 5th Defendant) and Plot Mombasa/Block 1/526 as having three old permanent structures, two marked KRC 19134 and KRC 19135, which had predated the colonial era and had been occupied by tenants paying rent to the 1st Plaintiff. The Plaintiffs had produced a Valuation Report dated 17th March 2021 (Exhibit 57) prepared by PW - 1 that had recorded these features.

295. The Plaintiffs had also produced correspondence between the 1st, 2nd and 3rd Defendants, including the Confidential Letter of

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Offer to the 1st Defendant dated 1st November 1994 (Exhibit No. 4), the District Land Registrar letters of May and June 1995 (Exhibits Nos. 20 and 21), and letters from the Ministry of Transport and Communication dated 15th April 2002 and 28th May 2002 (Exhibits Nos. 14 and 15). Those documents had shown that at the time of allocation the suit properties had contained the 1st Plaintiff's buildings and structures and that the 1st Plaintiff had only agreed to surrender a portion of its property for use as a road reserve. The County Government of Mombasa had later confirmed by letter dated 9th October 2019 that the suit properties had remained on a parcel set aside for a road reserve.

296. The Plaintiffs had submitted that the above correspondence from several government authorities had acknowledged that the allocated parcels contained the 1st Plaintiff's structures and that, among the conditions to be fulfilled in the allocation process, a letter of no objection had to be obtained from the 1st Plaintiff and compensation for the 1st Plaintiff's structures on the ground had to be paid before allocation could lawfully proceed.

297. On whether the 1st Plaintiff was the lawful owner. The Learned Counsels had further submitted that the 1st Plaintiff had been fully occupying the suit properties before allocation to the 1st Defendant and, having agreed to surrender part of their land for public use as a road reserve, the land had not been available for allocation to the 1st Defendant. Upon discovering that the Municipal Council had been allocating the land to private

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persons instead of building a road reserve, the 1st Plaintiff had raised a dispute about the allocation as follows:-

a. ***The Plaintiffs had produced evidence showing that on 27th August 2003 the 1st Plaintiff, through its advocates Sachdeva & Company, had inquired about the status of the land and why it had been allocated to private persons despite the 1st Plaintiff's proprietary interest.***

b. ***In response, the Municipal Council had informed the 1st Plaintiff by letter dated 17th September 2003 that the property did not belong to the 1st Plaintiff because "once a road reserve had been adopted it belonged to the Local Government."***

c. ***The Plaintiffs had produced the letter dated 15th April 2002 in which the Ministry of Transport and Communications had acknowledged an ownership dispute between the 1st Plaintiff and the 1st Defendant.***

d. ***The Ministry had stated: "As you are aware, the two plots which are owned by Zaharia Mohamed Mawia had ownership dispute between the Kenya Railways and herself."***

298. The Learned Counsel opined that the 1st Plaintiff's surrender of the portion of land for public use as a road reserve had never been materialized by the 2nd Defendant. Instead, the 2nd Defendant had proceeded to change the suit properties from public to private use without the 1st Plaintiff's approval, notice or consent. The 1st Plaintiff had not required production of any title as proof of ownership over the private ownership claimed by the 1st Defendant and subsequently by the 4th and 5th Defendants.

299. To buttress on this point, the Learned Counsels relied on the case of:-***"Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & Another – Versus - Higher Education Loans Management Board & 2 Others (ELC Case No. 59 of 2014) [2024] KEELC 572 (KLR)"***, where the court had held that land

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reserved for a particular public purpose was not available for further alienation and that the presence of government buildings sufficed to show reservation.

300. Also, the Learned Counsels relied on the case of:- ***"Kenya Anti - Corruption Commission – Versus - Frann Investment Limited & 6 Others [2020] ELC Nos. 215–223 of 2009"*** and Civil Appeal No. E038 of 2021, where the court had held that land set aside by government for specific use must be treated as alienated Government land and could not be allocated to a private individual. The Learned Counsel submitted that the site-visit report by the Court had confirmed that the disputed suit properties still had structures and buildings of the 1st Plaintiff occupied by tenants who paid rent to the 1st Plaintiff. The Plaintiffs had argued that the 1st, 2nd and 3rd Defendants had had actual knowledge that the suit properties had been public land used by the 1st Plaintiff and that the 1st Plaintiff had only agreed to give the land to the Municipal Council for use as a road reserve. The Plaintiffs had contended that the allocation and the issuance and registration of the lease in favour of the 1st Defendant in 1999 could not have conferred any valid interest, right or title on the 1st Defendant. They had cited the case of: ***"Kenya Anti-Corruption Commission – Versus - Lima Limited & 2 Others (E&L Case No. 46 of 2017) [2019] eKLR"***, where the court had held that:

> ***"……land already alienated for public utilities could not be deemed unalienated and therefore could not be validly alienated to a private party."***

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301. On whether the suit properties were unalienated Government land. The Learned Counsels submitted that the definition of unalienated government land in the provision of Section 2 of the Government Lands Act, Cap. 280 (then in force), read as follows:

> **“Unalienated government land" meant any Government Land which was not for the time being leased to any other person or in respect of which the Commissioner of Land had not issued a letter of allotment.”**

302. The Learned Counsels further stated that under the provision of Section 3 of the Physical Planning Act, Cap 286 (then in force), unalienated government land had been defined similarly as land not for the time being leased to any person or in respect of which the Commissioner of Lands had not issued any letter of allotment or reservation.

303. The provision of Article 62 (1) (b) and (c) of the Constitution of Kenya had defined public land to include:

> **(b) land lawfully held, used or occupied by state organs (except where occupied by the state organs as lessee under a private lease); and**
>
> **(c) land transferred to the State by way of sale, reversion or surrender.**

304. The Learned Counsels asserted that they had proved on a balance of probabilities that the suit properties had a prior commitment as a public utility used by the 1st Plaintiff. PW - 4 had testified that the 1st Plaintiff had agreed to give the 2nd Defendant part of its public land for expansion of Shimanzi Road for public use, and not for allocation to the 1st Defendant for private use.

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305. The Plaintiffs had relied on the Kenya Railways Corporation Act, Cap. 397 (then in force), which had set out the 1st Plaintiff's powers and the procedure for surrendering surplus public land to the Government. The relevant provisions had included Section 13(2)(h) (power to sell, let or otherwise dispose of property where the Board considered it unnecessary for the Corporation's purposes, subject to Government consent where land had been placed at the Corporation's disposal) and Section 14(4)–(6) (permitting conveyance, transfer or surrender of surplus land, and defining "public land" and "trust land" for the section's purposes).

306. The Plaintiffs had submitted that the 1st Plaintiff had never formally surrendered the suit properties back to the Government for change of use, as required by those provisions. The Plaintiffs submit that the 1st Plaintiff has never formally surrendered the suit properties back to the government for change of use to date, as per the above provisions. PW - 4 had testified that the suit properties had remained reflected in the 1st Plaintiff's Asset Register and that there had been no intention to dispose of them for private use. The Learned Counsel relied on the case of:- ***"African Line Transport Co. Limited – Versus - AG (Mombasa High Court No. 276 of 2003"***) where the Court stated that: -

> ***"Finally there is nothing on record to suggest that the site was ever surrendered back to the Government. Having been allocated to the NYS as a public utility, there was nothing left to be allocated to Mr. Omari and the subsequent grant to him was therefore irregular."***

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307. The Plaintiffs Witnesses PW - 3 -Engineer Albert T. Keno, the Officer in Charge of Transport and Roads at the County Government of Mombasa, gave a historical background of Shimanzi Road that it was originally 200 feet wide , with 7 Meters set for pavement/carriageway for construction of utilities like water, storm drains and power line. He confirmed that from the records in their Transport Department, the suit properties were excised on a road reserve. He produced a letter Ref: CGM/TI &PW/EACC/CONF/04/2019 dated 19th October 2019(produced as exhibit No.7 at page 10-11 of the Plaintiffs consolidated List), which relevant part read as follows;

"These plans show that some of the plots were created from the road reserve, including plots Mombasa/Block 1/525 and 526".

308. PW - 3 also produced the Survey Plans Numbers 61/7 of 1951, 68/55 of1965, 82/21 of1958,83/21 of 1958, 84/25 of 1958, and 253/87 of 1994 in the Plaintiffs' further Consolidated List) which envisaged Shimanzi Road as it was then, and with the suit properties exercised from it. It was his evidence that, according to their records the status of the road has not been altered and there is no correspondence on the allocation of the suit properties. Accordingly, the suit properties remain as road reserves.

309. According to the Learned Counsels, the above facts had been corroborated by the Plaintiff's witness, PW - 6, Athmani Amani Ali, Senior Land Surveyor from the Directorate of Survey of Kenya. It was his evidence that the creation of parcels of land referenced Mombasa/Block 1/525 and 526 by a Survey Plan

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Number F/R NVo.366/81. The survey was carried out by the Provincial Office in Mombasa by Surveyor F.M. Kimotho, based on the District Lands Officer's Approval letter reference no.1058/X/34 of 18th May 1995 (Plaintiffs' Exhibit 20 at page 37 of the Plaintiffs' consolidated List of Documents). It was his testimony that the purpose of the survey was to create commercial plots along a strip of road within the Mombasa Municipality. He contended that from a survey point of view, the suit properties were excised from a road reserve, and there was no historical existence of old plots.

310. The Learned Counsels argued that the suit properties were fraudulently created as unalienated government land, yet on the ground, the suit properties were already serving as public utilities for both the 1st Plaintiff and as part of a road reserve for the 2nd Defendant. The suit properties were therefore not available for allocation to the 1st Defendant. In the case of:- ***"James Nyaga & Another – Versus - the Honourable Attorney General & Another [2007] eKLR"***, the Court held:-

> ***"We therefore hold that the suit land, having been acquired for public purpose, that is, construction of a road, is held in trust of the public and could not have been allocated to the Applicants who are private individuals for their private use".***

311. According to the Learned Counsels, the allocation of the suit properties appears was done under Section 3 of the Government Lands Act Cap. 280 (now repealed), the Local Government Act Cap 265, the Registered Lands Act Cap. 300 (now repealed) and Subsidiary Legislation-Development and use of Land Planning

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Regulations of 1961 Cap. 303 (now repealed), which provides as follows:

Section 3 of the Government Land Act provides:-

"The President, in addition to but without limiting any other right, power or authority vested in him under this Act, May:

(a) subject to any other written law, make grants or dispositions of any estates, interests or rights in or over unalienated government land;

The act further states:

The powers under this paragraph are delegated to the Commissioner in the following case only (Cap. 155(1948, sub leg.):

(a) For religious, charitable, educational, or sports purposes on terms and conditions in accordance with the general policy of the Government and the terms prescribed for such purpose by the President.

Section17 of the Government Land Act provides:-

The Commissioner or an officer of the Lands Department may, subject to any general or special directions from the President, execute for and on behalf of the President any conveyance, lease or licence of or for the occupation of Government lands, and do any act or thing, exercise any power and give any order or direction and sign or give any document, which may be done, exercised, given or signed by the President under this Act:

Provided that nothing in this section shall be deemed to authorize the Commissioner or such officer to exercise any of the powers conferred upon the President by sections 3,12, 20, and 128.

Section 9 of the Government Land Act, provides that: -

"The Commissioner may cause any portion of a township which is not required for public purposes to be divided into plots suitable for the erection of buildings for business or residential purposes, and such plots may from time to time be disposed of in the prescribed manner"

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312. In the case of:- ***"James Nyaga & Another [Supra]"***, the Court, in reference to the provision of Sections 3 and 7 of the Government Lands Act stated:-

> ***"The above section clearly limits the power of the Commissioner to executing leases or conveyances on behalf of the President and the proviso to the section specifically limits the power to alienate unalienated land to the President. We find and hold that the Commissioner of land had no authority to alienate the disputed plot to the Applicants as he purported to do vide the letter of 18th December 1997. That was the preserve of the President. It follows that the Commissioner of Lands could not have made any grant under the Government Land Act Cap. 280 Laws of Kenya nor could he pass any registrable interest under the Registration of Titles Act Cap 281 Laws of Kenya."***

313. The Learned Counsels submitted that the suit properties having prior public use and commitment cannot be deemed as unalienated public land and the President of Kenya, The Commissioner of Land, the 2nd and 3rd Defendants had no powers and authority to allocate the said land to the 1st Defendant to confer any rights or interest over the same. They relied on the case of ***"Ethics and Anti-Corruption Commission – Versus - Cherogoe & 3 Others, ELC Land Case No.54B of 2021[2024]KEELC1488 (KLR)(15th March 2024)"*** where the court held in with regard to the provision of Section 3 and 7 of the Government Lands Act.

> ***"The land in dispute was already alienated public utilities as Nakuru/Municipality Block 5/219 and was fully developed with the Nakuru High Court Station, The Nakuru County Government Offices, and the Ministry of Lands Offices, therefore could not be deemed unalienated. The 4th Defendant, therefore, had no authority in law to make the alienation and therefore no interest could be conferred upon the 1st Defendant. The upshot of the above is that the land was not available for allocation.***

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The 1st Defendant did not procedurally obtain title as the Suitland was public land."

314. On whether the allocation and sub - division of the suit properties to the 1st by the 2nd Defendants was lawfully. The Learned Counsels posited that the allocation of the suit properties was tainted with fraudulently, unprocedural and or illegality with the knowledge and ill intent by the 1st, 2nd and 3rd Defendants of depriving the 1st Plaintiff its land. The allocation process was initiated by the 1st Defendant application to be allocated the land as if it was unsurveyed.

315. The Learned Counsels were of the view that even for the sake of argument that the suit properties were unalienated government held in trust of the public by the Defunct County Council of Mombasa (now the 2nd Defendant), then the allocation process did adhere to the provision of the Government Lands Act and the Local Government Act and the Land Planning Act, Cap 303 (now repealed) hereunder;

Sections 4 and 6 of the Land Planning Act Cap 303 -Subsidiary Legislation-
<u>Development and use of Land Planning Regulations of 1961</u> provide;
Section 4 (1) Where an area plan or town plan1 has been prepared and approved for a local authority area, or any part thereof, in accordance with regulation 6 of these Regulations, and if it appears to the Minister to be expedient in the interests of securing the proper control of development in such area, he may, with the agreement of that local authority, by order published in the Gazette, constitute that local authority as the interim planning authority for that area or part thereof, as aforesaid.
Section 6 provides:-
(1) A local authority may, after consultation with, and with the agreement of, the Minister, prepare and submit to the Minister for his approval a town plan or area plan, as the case may be,

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for that part of the area under its jurisdiction to which these Regulations apply.

Submission of area plans and town plans

(2) Subject to the provisions of any rules made under these Regulations for regulating the form and content of area plans and town plans, any such plans shall include such maps and descriptive matter as may be necessary to illustrate the planning proposals as may be appropriate to different parts of the area and any such plans shall in particular define existing development, proposed roads, the different use and density zones proposed and areas (if any) in which no subdivision is permitted for the time being.

(3) The Minister, for the purpose of securing the proper sub-division of land in an area other than of unalienated Government land, may require a local authority which has submitted a town plan or area plan, as the case may be, for approval, to submit to him for approval subdivision and use plans for its area or any part thereof.

(4) An interim planning authority may prepare and submit to the Minister for his approval plans and particulars of any amendment to a town or area plan, as the case may be, which has previously been approved.

7.(1)where no town plan or sub - division and use plan has been approved, and in respect of unalienated Government land, the Minister may prepare such plans.

Other plans

(2) Any plans approved by the Commissioner of Lands under section 23 or section 24 of the Town Planning Act which relates to land to which these Regulations apply shall be deemed to be a plan approved by the Minister for the purposes of these Regulations and the Minister may prepare such additional plans and amendments to any such plan as may be necessary having regard to the development requirements of the area. Cap.134(1948)

Section 12 of the Government Lands Act provides:-

“Leases of town plots shall, unless the President otherwise orders in any particular case or cases, be sold by auction.”

Section 13 of the Government Lands Act provides:-

“The place and time of sale shall be notified in the Gazette not less than four weeks nor more than three months before the day of sale, and the notice shall state-

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(a) the number of plots and the situation and area of each plot;

(b) the upset price at which the lease of each plot will be sold;

(c) the amount of survey fees and the cost of the deeds for each plot;

(d) the term of the lease and the rent payable in respect of each plot; and

(e) the building conditions and the special covenants, if any, to be inserted in the lease to be granted in respect of any plot:

Provided that the lease of any plot may be withdrawn from sale by the Commissioner at any time before it is offered for sale.

Section 14. Of the GLA provides:

"The auctioneer shall, before the commencement of the sale, read the terms and conditions of the sale, and all persons bidding at the sale shall be bound by the terms and conditions so read".

Section 15. The Government Lands Act provides:-

"(1) The highest bid for the lease of each plot, together with the name of the purchaser, shall be announced by the auctioneer before proceeding to offer the lease of the next plot, and the purchaser shall thereupon pay one-quarter of the purchase money.

(2) In default of payment of the deposit, the lease of the plot may be offered for sale immediately, and any subsequent bid by the person who has made default may be ignored or refused.

Section 182 of the Local Government Act vests the Control and vesting of public streets in municipalities and townships as follows:-

(1) Every municipal council or town council shall have the general control and care of all public streets which are situated within its area, and the same are hereby vested in such local authority in trust to keep and maintain the same for the use and benefit of the public.

(2) A municipal council or town council may make, construct, alter, and repair and for any such purpose temporarily close or divert any such street, and may make new streets.

185.of the Local Government Act vests in the Township Power respecting the permanent closure, etc., of streets and roads.

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(1) Subject to this section, a municipal council may permanently close or divert or alter the line of any street or road vested in it under this Act.
(2) Before any such closing or diversion or alteration is carried out, the municipal council shall-
(a) prepare a plan showing the nature thereof; and
(b) not less than one month before the proposed commencement of the work, give notice in the Gazette and in one or more newspapers (if any)circulating in its area, as well as by a sufficient number of placards posted on or near the street or road which it is proposed to close, divert or alter, of the proposed work and of a place where the said plan may be inspected at all reasonable hours; and
(c) serve a copy of the said notice on the owners or reputed owners, lessees or reputed lessees, and occupiers of all property abutting upon the said street or road or appropriate part thereof and, where it is proposed to divert or alter the line of such street or road, of all property which will abut upon the street or road if diverted or Altered as aforesaid, whose address can after reasonable inquiry be ascertained; and
(d) if the proposed closure, diversion or alteration will affect land not vested in the municipal council, serve a copy of the said notice on the Commissioner of Lands; and
(e) In the case of a proposal to close a road, serve a copy of such notice upon the Minister for the time being responsible for town planning.

Section 8 of the Public Roads and Road of Access Act (Cap 399) provides
Dedication of line of public travel
(1) Whenever it is made to appear to the Minister that requirements exist for the establishment, alteration or cancellation of a line of public travel or for the conversion of a road of access into a line of public travel, the Minister may, by order published in the Gazette, dedicate, alter or cancel such line of public travel or convert such road of access into a line of public travel.(2)In every order made under this section, the line of public travel to be established, altered or cancelled or the road of access to be converted into a line of public travel shall be clearly described. (3) Where an order under this section dedicates a line of public travel or converts a road of access

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into a line of public travel, such line of public travel shall be absolutely dedicated to the public as a public road within the meaning of any law now or hereafter in force relating to public roads. (4) Before making and publishing any order
under this section dedicating a line of public travel or converting a road of access into a line of public travel, the Minister may, where there is a board, call upon such board to investigate and report upon the necessity for, or desirability of, any such line of public travel and to advise as to the best alignment of such a line of public travel.

316. The Learned Counsels supposed for the sake of argument that the suit property was a road reserve under the 2nd Defendant, it is our submissions that 2nd Defendant was vested with powers of maintain and upkeep the road for the benefit of the public pursuant to Section 182 of the Local Government Act herein above. Further the provision of Section 185 of the Local Government Act only empowered the Defunct Municipal Council to permanently close any streets within its municipality for purposes of diversion and not allocation for private use. Accordingly the process of realignment of any road and access roads is vested with the Minister for Transport and Communication and not the 2nd Defendant. They relied on the case of:- ***"Mombasa Environment and Land Case Number 9 of 2008, Kenya Anti-Corruption Commission – Versus - Bangrah Limited & 4 Others"*** were the court held in regards to allocation of road by the Defunct Council of Mombasa as follows:-

Paragraph 34. "It will be seen from the above that the alteration of public roads was to be done by Minister through a Gazette Notice. I have no Gazette Notice from the then Minister in charge of Roads. The Municipal Council could not usurp the powers of the Ministers and purport to affect a public road and create plots out of it. True Municipal Council had powers to close a road under Section 185 of the Local Government Act,

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but a closure of the road and allocation of the Land out of a road are not the same thing. The power to close a road was simply to close a road.

35. I have taken the trouble of reproduce the whole section 185 above, so that there is no question or doubt as to what the power to close a road entailed. It never entailed creation of a plot. Within the exercise of that power, the local authority needed to Plaintiffs Submissions ELC 180 of 2015 consolidated with ELC 64 of 2020 and ELC 65 of 2020 publish this intention to close the road in the Kenya Gazette and in one or more newspapers and also serve the Minister in charge of Town Planning (Section 185(2)(e). I reiterate the power to close the road and to allocate it are difference."

317. The Learned Counsels submitted that supposing the suit property was unalienated government land under the control of the 2nd Defendant or the Office of the Commissioner of Lands, the allocation process of the suit properties was flawed and did not comply with the above processes and particularly the provision of Sections 4 and 6 of the Land Planning Act Subsidiary Legislation-Development and use of Land Planning Regulations of 1961 Cap. 303 (now repealed) which requires that the 2nd Defendant to plan the area under their control with the approval of the Minister in charge of town ship. The planning process had to be commenced by publishing the planning process in the Gazette Notice, then sharing the plan with the neighbouring parties on the planned area and the relevant authorities. The Plan should have a description of what was on the ground, the buildings, the roads the structures to guide on areas of sub - divisions. Upon circulation if no issues or objections were raised, then the plan was forwarded to the Minister for Local Government for approval.

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318. A Part Development Plan (PDP) would then be drawn and circulated in the Kenya Gazette or a widely circulated newspaper, and or to the public before it was approved by the Director of Physical Planning. Once the Part Development Plan was approved, it would be given a specific number, aligning the allocated properties and registered with the Planning Department. The Allocation process if under the Municipality, would be discussed in a full meeting a resolution will be passed approving the allocation of the subject properties. Allocation would then be approved with terms and conditions and the Applicant would be notified through letter of offer and accept by making payments before proceeding with the Survey process.
319. The Plaintiffs had proved that the allocation of the suit property was done to the contrary. Plaintiffs witness PW - 7 - Elias Kipyego, the investigating officer Plaintiffs Submissions ELC 180 of 2015 consolidated with ELC 64 of 2020 and ELC 65 of 2020 testified that that the allocation of the suit properties was done in confidentiality. It was his evidence that the allocation was as a result of 1st Defendant's application for allocation of PLOT A & B adjacent to PLOT 294 Section 1 Mombasa Island vide a letter dated 16th October 1994 to the Town Clerk of the Municipal Council, with alleged sketch plan for industrial use. On 1st November 1994, the Town Clerk vide a "confidential letter of Offer informed the 1st Defendant that the Council offered her a grant in the Certificate of Lease /Sublease on plot B & C/I/Mombasa Island subject to the 1st Defendant written formal acceptance and payment of premium of a sum of Kenya Shillings

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Eighty Thousand (Kshs.80,000/-) and annual rent of a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-), Planning and Surveying the properties."

320. According to the evidence of PW - 3 and PW - 4, their two institutions, which played a critical role in the allocation of the suit properties and in providing guidance to the allocation, were not consulted. PW - 3 from the Department of Transport, working with the 2nd Defendant, indicated that their properties were created from a road reserve, and there was no correspondence or evidence from their office to prove that their department was consulted during the allocation.

321. Further, although the Defendants allege that there was a PDP issued after the survey and before the allotment of the suit properties, no such PDP has been produced before this Court by any party, including the Registrar, who is the custodian of land documents. PW - 7 in his testimony stated that he did not come across any Part Development Plan that guided the allocation of the suit properties. In the Environment and Land Court in the case of ***"Charles Kithiori Imwiti – Versus - Kinyua Koomte [2021] eKLR"***, held as follows with regards to failure of a party to prove that a PDP was issued and circulated:-

> ***"There was no approved PDP for the allocation of the Plaintiffs plot described as PDP No. ISL/11/98/3111 and no evidence of circulation of the same to the County Council of Isiolo for adoption by the relevant allocation committee for purposes of allocation. These are critical procedural requirements necessary before alienation of public land held by the then county councils in trust for the residents".***

322. The Supreme Court in the case of ***"Dina Management Limited – Versus - County Government of Mombasa & 5 others (2023) eKLR"***

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held as follows with regards to the place of the PDP in the allocation process:-

> ***"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.***
> ***There was no evidence produced of the letter to the Commissioner of Lands seeking allocation of the suit property by the first registered owner, and there was no PDP before the survey was done. The allocation of the suit property to the former President was irregular."***

323. The correspondences exchanged between the 1st, 2nd and 3rd Defendants to facilitate the allocation of suit properties were done in confidentiality. Exhibit 4 - Confidential Letter of offer to the 1st Defendant dated 1st November 1994 by the Town Clerk of the Defunct Municipal Council, Exhibit 20 - the Letter Reference No. 1058/X/54 from the District Land Registrar to the Municipal Engineer dated 15th May 1995 and Exhibit 21-a Letter Reference No.1058/X/56 dated 10th June 1995, Exhibit 14-Letter from the Ministry of Transport and Communication Reference MOTC/CONFI 8.012 VOL II/49 dated 28th May 2002, (5) Exhibit 15- Letter from the Ministry of Transport & Communication Reference MOTC/CONF./5.012 VOL II/43 dated 15th April 2002 produced by PW 7 clearly demonstrates the allocation processes were done surreptitiously between the 1st, 2nd, and 3rd knowledge that the suit property belonged to the 1st Plaintiff and without involving them or the Department of Transport of the Defunct Municipal Council or the Ministry of Transport and Communication to obtain its approval prior to allocation.

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324. The Plaintiffs had also produced two letters Ref: NO. G.71 dated 17th September 2003 and 24th September 2003 from W.J. Mukhongo for the Town Clerk addressed to the 1st Plaintiff and the Law firm of Messrs. Sachdeva & Company Advocates on the back ground of allocation of the said properties to the 1st Defendant (The letter is on page 35 of the Plaintiffs' consolidated list and bundle of documents dated 2/8/2022).
325. In the said letters, the 2nd Defendant indicated that the allocation of the suit properties emanated from the 2nd Defendant's process of re-planning of the Mombasa by realignment and development of excessive road reserve with the authority endorsed by His Excellency the President of the Republic of Kenya in his letter of 1st September 1993. This realignment and development of excessive road reserve is what culminated to the allocation of the suit properties to the 1st Defendant as a beneficiary (Allottee) alongside 27 others in 1993 under the Mombasa Land Planning Scheme and Council resolution 416/80 and Council Confidential Min 335/93which approved the creation of temporary industrial plots to accommodate garage operators who were displaced from Ronald Ngala. The Letters further indicate that a necessary Part Development Plan was prepared and circulated. The beneficiary of the above scheme (2nd Defendant) had the government authority to allocate the land.
326. The Learned Counsels stated that the Plaintiffs, never came across any substantive evidence of Minutes /resolution of Council 416/80 and or Presidential letter dated 1st September 1993, approving the realignment and allocation of the temporary

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industrial plots for garage operators and for that matter of the excessive road reserve of Shimanzi by the 2nd Defendant. The Plaintiffs did not come across any evidence of an approved Part Development Plan of Mombasa Planning on the alignment and re-planning of Shimanzi road.

327. Further, the Plaintiffs also produced the Confidential Minute 335/93 that is allegedly indicated to have approved the allocation of the suit properties to the 1st Defendant. PW - 7 testified that the minutes did not reflect the 1st Defendant as amongst the beneficiaries or parties who were allocated Road Reserve at Shimanzi area. In minute 335/93, at page 81 of the Plaintiffs' consolidated list and bundle of documents dated 2nd August, 2022, the Council resolved, inter-alia, that: -

    “The applications for allocation of road reserves be considered, each case on its own merits.”

328. The Learned Counsels held that the other irregularity proved in the allocation process of the suit property was that the 1st, 2nd and 3rd Defendants proceeded to survey the suit properties on the 1st Plaintiff land without the knowledge, authority and approval of the 1st Plaintiff's Board which is mandated to dispose of the 1st Plaintiff’s land, issued and registered leases in favour of the 1st Defendant and then went back to the 1st Plaintiff to regularize the allocation by making compensations to the 1st Plaintiff through the Ministry of Transport and Communication when they had titles dangled in their hands.

329. The Plaintiffs had produced the letter ref. No 1058/X/34 at page 37 of the Plaintiffs’ consolidated list and bundle of documents dated 2nd August, 2022 wherein the Ministry of Lands and

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Settlement states that prior to the survey of the suit properties, the Municipal Council was to obtain, among other things;

a) Surrender free of cost all the land that may be required for the road access.
b) Compensation to the owns of the structures on the ground (KRC).
c) A letter of objection from KRC, the 1st Plaintiff.

330. The Learned Counsels opined that the said letter was not obtained and had not been produced before this Court. Thus the very first part of the survey process was irregular, null and void. In the present case, there was no letter of objection at all, genuine or otherwise, despite the letter ref. No 1058/X/34 expressly requiring the Municipal Council to obtain a letter of objection before a survey was conducted.

331. The Plaintiffs' witnesses PW - 4 and PW - 7 testified that the disposal process of the suit properties was done by the Junior Officer of the 1st Plaintiff, without the knowledge, authority, or approval of the Board as provided under the Kenya Railways Act Cap 397. PW - 4 and PW - 7 stated that they never came across any minutes deliberating and approving the disposal of the suit properties to the 2nd Defendant and or the 1st Defendant for private use. According to PW - 4, the Process of Disposal of the 1st Plaintiff's property was initiated by the institutional need to dispose of the property, followed by the Board of Survey, where the property was valued. Then the disposal had to be approved by the Board and forwarded to the mother Ministry of Transport, and once approved, it is forwarded to the Cabinet Secretary,

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Treasury for approval and endorsement before the same was advertised with terms and conditions for competitive bidding under a widely circulated newspaper. When the bidding process is over and the successful bidder has fulfilled all the conditions and payments, the property is officially transferred by the 1st Plaintiff through its Managing Director to the successful owner, and all the 1st Plaintiff's rights on the suit property are surrendered to the new owner.

332. In the case of: ***"Dodhia & another – Versus - Kenya Railways Corporation [2024] eKLR"*** the Environment and Land Court, while finding that the process through which a title had been issued had been irregular and thus the title was null and void, the Court held as follows:-

> ***"The purported letter of no objection from the Defendant dated 18th May, 2002, authored by Philip Rono, 'The Station Master' is questionable. It was not authenticated by the Plaintiff and its maker was not called to give evidence. It did not demonstrate that it was written pursuant to the procedures of turning KRC land to private land. Therefore, it cannot be taken to be genuine."***

333. They submitted that the allocation of the suit properties to the 1st Defendant by the 2nd Defendant never complied with the above processes and provisions of the laws, hence null and void ab initio and never conferred any proprietary right to the 1st Defendant. The Plaintiff submits that the letter of ref letter ref. No 1058/X/34 required that the 1st Plaintiff be compensated for the structures on the land before a survey was undertaken. No such compensation was given and by the 1st Defendants own

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admission and the evidence on record, the said compensation was directly deposited in the accounts of the 1st Plaintiff in 2007, long after the survey was conducted.

334. The Learned Counsels submitted that the alleged compensation in the year 2007 was aimed purely at sanctifying the illegal and fraudulent actions of the 1st, 2nd and 3rd Defendants herein. The Learned Counsel further submitted that the allocation of the suit properties was tainted with procedural gaps, irregularities and omissions to confer any legitimate interest on the 1st Defendant's titles or Certificate or Lease that could be legalized by this Honourable Court. They relied on the case of:- ***"Environment and Land Court Case No.81 of 2019 Cancer Investments Limited – Versus - Nairobi City County Government & 5 Others at Nairobi"***, where the Court held:-

> ***"Paragraph 188. To start with, it is not lost on this Honourable Court that given the extent to which various persons have gone towards acquiring landed property, it is no longer sufficient for a title holder to wave a Certificate of title and thereafter to imagine that such Certificate of title, by itself, suffices to underpin ownership of land.***
>
> ***189. Invariably, it is important to underscore that before a court of law can proclaim a particular certificate of title being indefeasible, the court of law is called upon to interrogate the process attended to the issuance of the impugned certificate of title. Consequently and in this regard, it behooves this court to undertake due examination with a view of authenticating the validity, propriety and legality of the Certificate of the title in question.***
>
> ***190. To this end, it suffices to take cognizance of the holding/ratio decindendi of the Court in the case of Daudi Kiptugen – Versus - Commissioner of Lands & 4 Others [2015] eKLR where the court held thus:-***
>
> ***"in order to determine the question whether the lease held by the Plaintiff is valid, it must be demonstrated that it was***

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properly acquired. It is not enough that one waves a Certificate of Lease and asserts that he had good title by mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder much demonstrate, through evidence, that the Lease or Certificate of Lease that he holds was properly acquired. The Acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that id a document of title was not acquired through proper process, the title itself cannot be said to be a good title."

335. On whether the 4th and 5th Defendants were innocent purchasers for value without defect and their interest in the suit properties should be protected. The view by the Learned Counsels was that neither the 4th nor the 5th Defendants had proven that they are innocent purchasers for value without notice of defect. The Court of Appeal in the case of:- ***"Samuel Kamere – Versus - Lands Registrar, [2015] eKLR"*** as cited favorably by the Supreme Court in ***"Dina Management (Supra)"*** stated as follows: -

".....to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property".

336. According to the Learned Counsels, the 1st Defendant Certificate of Lease/Title was procured through corrupt scheme, fraudulently and unlawfully and couldn't pass any valid interest or right that could be protected under the provision of Section 26 of the Registration of Titles Act and Article 40(6) of the Constitution of Kenya 2010 that could be protected under Section on the suit properties capable of being transferred to the

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4th and 5th Defendants. Therefore, the 4th and 5th Defendants never acquired any valid and legal title for the following reasons:

a) The land was alienated land being utilized by the 1st Plaintiff and was not available for allocation to the 1st Defendant or any other person.

b) The 2nd Defendant did not have any rights in the suit property capable of being transferred to the 1st Defendant.

c) The alleged allocation of the suit properties to the 1st Defendant was unprocedural and did not confer any valid title to the 1st Defendant.

d) The Plaintiffs have produced the alleged allotment letter (At page 8 of the Plaintiffs' consolidated list and bundle of documents dated 2nd August, 2022 for the suit properties that required the 1st Defendant to pay a sum of Kenya Shillings Eighty Eight Thousand Three Hundred and Fourty (Kshs. 88,340/=) by cheque and issue an acceptance letter to the Municipal Council of Mombasa. There was no evidence produced by the 1st Defendant or any of the Defendants to show that the 1st Defendant ever paid the said money.

337. In the case of:- ***"Miroro – Versus - Nyarumi & 5 others (2023) eKLR"*** the Court held as follows with regards to the effect of non-payment of the requisite fee by an alleged allottee:-

> ***"That allotment letter has special conditions. Among them is that there should be received an acceptance together with a banker's cheque... did he make payment of Kshs.10,810/- as required? Now this is critical evidence. The conditions state that payment was to be made by way of banker's cheque. Tom Nyagami made no banker's cheque...It is common knowledge that when one makes payment he is the one issued with the receipt and such receipt is not retained unless there are some special circumstances, of which none has been offered....if ever there was an allotment letter issued ... there was no acceptance of the conditions of offer, by making the requisite payments***

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noted in the letter of allotment. Without there being an acceptance of the conditions and payment thereof, it cannot be said that there was an offer for a lease."

338. The Plaintiffs had also proved that the 1st Defendant had made other unlawful attempts to evict the 1st Plaintiff and its tenants by abusing the Court process by purporting to obtain an irregular ex-parte order of demolition against its tenants in the ***"Chief Magistrate Court Case No. CMCC NO.2892 of 2007 Zaharia Mohamed Mawia – Versus - Duncan Kinyua and 4 others"***. The 1st Defendant then maliciously withdrew the said suit on the 5th November 2007. The 1st Plaintiff hired a Counsel for the tenants and lodged a Civil Appeal Case No. 176 of 2007 on the 8th October 2007 and was able to successfully obtain stay of execution orders against the Ex - Parte demolition order.

339. It was the contention by the Learned Counsels that on the 23rd April, 2009, the 1st Defendant, in a further attempt to take possession of the suit properties, filed a High Court Case No.116 of 2009 seeking eviction orders against the tenants of the 1st Plaintiff and on 29th June 2009, the 1st Plaintiff being the landlord made an Application to be enjoined as a party and the same was allowed. Subsequently, on the 31st May 2012, the Court made a ruling in respect of the above case in favour of the 1st Plaintiff, declaring that the Plaintiff was in exclusive possession of the suit properties through its tenants and should be made the 6th Defendant in the HCCC No. 116 of 2009. The Plaintiffs submit that the 1st Defendant withdrew the above suit to avoid the scrutiny of the acquisition resorted to taking possession of the suit property through the law of the jungle.

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340. It was the submissions by the Learned Counsels that the 4th and 5th Defendants, before purchasing the suit properties, did due diligence and had knowledge that the suit properties was being occupied by the tenants of the Plaintiffs but chose to ignore and or assume the risk of purchasing the public properties. The 4th and 5th Defendants confirmed during cross-examination that they knew that the disputes on ownership were in court, but proceeded to acquire the suit properties on the assumption of risk they could not claim to be innocent purchasers for value without the notice of defect. They relied on the Court of Appeal in ***"Samuel Kamere – Versus - Lands Registrar, [2015] eKLR"*** as cited favorably by the Supreme Court in ***"Dina Management (Supra)"*** stated as follows:

> ***".....in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property".***

341. Plaintiffs had proved that before the 4th Defendant completed the alleged purchase of the suit property, the 1st Defendant instituted a suit being civil case no. 116 of 2009 against the tenants of the 1st Plaintiff. The 1st Plaintiff and the 4th Defendant both sought to be added to the suit but the 1st Defendant was not added owing to the fact that it had not acquired any interest in the suit properties. The 1st Plaintiff on the other hand was added as a Defendant based on the claim that it, the 1st Plaintiff, was the rightful owner of the suit properties. The Ruling is at

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page 71 of the Plaintiffs' consolidated list and bundle of documents dated 2nd August, 2022.

342. Despite knowing of the said suit and the fact that the suit properties were being occupied by the 1st Plaintiff and were exercised from a road reserve, the 4th and 5th Defendants still went ahead to allegedly purchase the said property. The 4th and 5th Defendants did not conduct any due diligence because if they had, they would have noticed the glaring irregularities and disputes with regards to the suit properties.

343. Lastly, the 4th and 5th Defendants had not proved, on a balance of probability or at all, that they paid any consideration for the suit properties. Without payment of the consideration, the 4th and 5th Defendants could not be considered purchasers, innocent or otherwise. Accordingly, they submitted that the 4th and 5th Defendants had not proved on a balance of probability that it is an innocent purchaser for value without defect hence their Certificate of Leases should be nullified. They relied on the ***"Court of Appeal Case No.100 of 2018 at Eldoret, the Attorney General & 2 Others – Versus - Abdi Adan Hussein & 3 Others and Court Appeal Case No. 30 of 2015"***, where the court held that: -

> ***"a bona fide purchaser exercising due diligence would be expected to inspect the property he is buying to ascertain its physical location, persons if any, in occupation, developments, buildings and fixtures thereof among others.***
>
> ***31....when a court is faced with a claim like this, it must scrutinize the root of the title and follow all processes and procedures that brought forth with the two titles at hand. Parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root".***

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344. The case of:- ***"Court of Appeal Case No.100 of 2018 at Eldoret, the Attorney General & 2 Others – Versus - Abdi Adan Hussein & 3 Others"*** also cited the Court of Appeal decision in ***"Samuel Kamere – Versus - Lands Registrar, [Kajiado Civil Appeal No. 28 of 2005 [2015] eKLR]"*** where the Court pronounced itself as follows:

> ***"...in order to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and lega1 title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."***

345. The Learned Counsels submitted that the 4th Defendant, despite this Court's ongoing proceeded to hand over the suit properties to the same Muslim Community who allegedly developed a mosque on the suit property Plot No. 525 for religious use by the Communities around without the consent and authority of the 1st Plaintiff. However, no evidence of handing over the mosque to the community has been tendered by the 4th Defendant to that effect. In the circumstances, this put the suit property at risk of being subjected to other illegal and unlawful processes. In order to safe guard the suit property from being mishandled and or misused for other interest, we submit that the Certificate of Lease issued in favour of the 4th Defendant be also cancelled and the mosque be registered under the 1st Plaintiff and the Cabinet Secretary Treasury in trust of the Government of Kenya.

346. The Learned Counsels urged this Honourable Court to adopt the decision in the case of ***"Dina Management – Versus - County Government of Mombasa (Supra)"***, where the court held that a title document can be invalidated if it is proven that the initial allocation process was illegal or unprocedural. Also in the ***"Court***

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of Appeal Case No.100 of 2018 at Eldoret, the Attorney General & 2 Others – Versus - Abdi Adan Hussein & 3 Others (supra)" the Court held that:-

> ***"a title document is not sufficient proof of ownership of property where the origin property has been challenged. The holder of the title document must go beyond the instrument itself and show that the process of acquisition from inception was both legal and procedural. The onus is on the purchaser who carry out the necessary due diligence before purchasing property to establish whether there is good title to pass by looking at the root of the title."***

347. On whether the Plaintiffs were entitled to any relief sought in the Plaint, and the costs of this suit. The Learned Counsel submitted that it had proved its facts on balance of probability that the suit property was fraudulently and illegally acquired through corrupt scheme and without following due process as stipulated by law hence the allocation is null and void and should therefore be granted the relief sought in the Plaint herein. The costs of suit are awarded to the successful litigant, and for this matter to the Plaintiffs herein, under Section 27 of the Civil Procedure Act, Cap. 21 provides that the costs of suit follow the event but at the discretion of the court. The Plaintiff prayed that the costs of this suit and any consequential costs should be awarded to the Plaintiff.

A. <u>The Written Submissions by the 4th Defendant</u>

348. The 4th Defendant through the Law firm of Messrs. Wachira Maina & Co. Advocates filed their written submissions dated 11th June, 2025. Mr. Wachira Advocate submitted the 1st and 2nd Plaintiffs herein had moved that Honourable Court by Amended Plaints dated 23rd May 2016 and 15th June 2021 respectively. The

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Plaintiffs had sought the above orders. The 4th Defendant had filed its Amended Statement of Defence and Counter - Claim dated 12th August, 2021 and filed in 10th September, 2021 seeking the above orders.

349. On the Plaintiffs' case, the Learned Counsel submitted that the Plaintiffs had called seven witnesses in support of their case. PW - 1 — Pius Maithya. He informed the court that he was a gazetted Valuer who worked with the Plaintiff. He produced a valuation report dated 17th March 2021 (Exhibit 1) and told the court that after visiting the site he had valued the 4th Defendant's parcel at a sum of Kenya Shillings One Hundred Million (Kshs.100,000,000/-) using the value index for Mombasa County.

350. On cross-examination he admitted that he did not have proof in court that he was a registered Valuer and that he had no documents to prove that he was an employee of the Plaintiff. He conceded that he had not documented the property valuation index in his valuation report. He admitted that he could not ascertain who the occupiers of the suit property were. He further admitted that the search he had conducted at the Lands Registry for purposes of his valuation had confirmed that the 4th Defendant was the bonafide registered owner of Mombasa/Block 1/526.

351. The Learned Counsel submitted that the testimony of PW-1 had only served to strengthen the 4th Defendant's case that it was the registered owner of Mombasa/Block 1/526. The Learned Counsel argued that the valuation of the property had been

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unnecessary in that suit because the only issue in question was ownership and how that ownership had been acquired.

352. According to the Counsel, the PW - 2 — Hashim Got, informed the court that he had been the Land Registrar in Mombasa Registry between 1985–1997 before being transferred to Lamu and subsequently re-transferred back to Mombasa in 2007. He adopted his statement dated 6th November, 2015. He testified that the first registration with respect to Mombasa/Block 1/526 had occurred on 7th December, 1999 whereby the Lessor had been the Municipal Council of Mombasa and the Lessee had been Zaharia Mohammed (now deceased). He stated that the registered lease document had indicated that the lessee had been the defendant for a term of 99 years from 1st April, 1994. Subsequently, Mombasa/Block 1/526 had been transferred to the 4th Defendant at a consideration of a sum of Kenya Shillings Five Million (Kshs. 5, 000, 000/=) and a Certificate of Lease had been issued on 4th August, 2011.

353. He testified that Mombasa Island was under L.R NO. 1149 and Shimanzi area was under Block 1 where most parcels were commercial, especially go-downs. Most titles were leasehold with conditions. He testified that he could not vouch for any prior documents before the two leases on the subject properties. He confirmed that stamp duty had been paid on both leases and that the two leases had been properly presented and the Lessor had been the Municipal Council of Mombasa. He confirmed that he had personally done registration of the lease in favour of the

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4th Defendant in 2011 after verifying that the documents were in order.

354. They submitted that the Land Registrar in any registry was the custodian of land ownership documents and therefore became the principal and most important witness in a suit of that nature. The Land Registrar had affirmed that the 4th Defendant CYKA HOLDINGS LIMITED was the registered holder of the Certificate of Lease duly issued by the Government of Kenya through PW - 2. Moreover, the 4th Defendant had been the owner of Mombasa/Block 1/526, the same having been previously owned by the Municipal Council of Mombasa and Zaharia Mohammed, the 1st Defendant. As such, the 4th Defendant had been an innocent third-party purchaser for value and its title should have been upheld.

355. PW - 3 — ENG. ALBERT KENO. He informed the court that he had been the 2nd Defendant's Chief Officer in charge of Transport. It was noteworthy that he had not filed any witness statement. On cross-examination he admitted that he had not produced any appointment letter in court. He testified that he had not been aware that the County Government (2nd Defendant) was a party in that suit despite it being his employer. He further conceded that he did not know anything concerning the ownership of the suit properties nor anything to do with the current proceedings. He nevertheless produced exhibit no.12.

356. They submitted that the evidence of PW - 3 had been of no consequence or probative value to those proceedings. The suit before the court had related to ownership of land and not

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transport issues. Evidently, the witness had not even known about the case as he had admitted during cross-examination. He had actually come to testify against his own employer and had not even known the counsel representing his employer.

357. PW - 4 — JUSTIN OMOKE. He informed the court that he had been the 1st Plaintiff's Estates Manager. He adopted his witness statement dated 22nd March, 2022. He produced the 1st Plaintiff's consolidated bundle dated 2nd August, 2022. He testified that the suit land had been unsurveyed to date according to him. He testified that there had been Vesting Orders in 1963 and 1986 which had vested to the 1st Plaintiff all the land previously owned by the East African Railways and Harbours Administration. He asserted that there had been two previous cases in which Zaharia Mohammed (1st Defendant) had sued the tenants of the 1st Plaintiff seeking eviction orders. He further claimed that the 1st Defendant had not been on the list of allottees under minute 335/93. He claimed that the tenants on the suit properties had been there on the strength of Temporary Occupation Licences (TOLs) but did not produce any. He further testified that for any land belonging to the 1st Defendant to be alienated there had to be Board of Directors approval, Ministry approval and Cabinet approval.

358. On cross - examination he confirmed that the letters dated 28th May, 2002 and 15th April, 2002 on pages 29 and 30 respectively had been signed by the Permanent Secretary, Ministry of Transport. He further confirmed that the letter dated 24th May, 2002 had been signed by the Chief Government Valuer. He

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however astonishingly continued to assert that due process had "not been followed" despite all those approvals from the highest offices. He also asserted that the value of the suit properties had been Ksh.450 million without adducing any valuation report.

359. On further cross-examination he confirmed that Mombasa/Block 1/525 had had a mosque built on it during the pendency of that suit but he could not explain why the 1st Plaintiff had not opposed the construction of the same even though he had claimed the land "belonged to Kenya Railways".

360. They submitted that PW - 4 could not produce any document or schedule specifically enumerating the suit properties as being some of the properties vested upon the 1st Plaintiff by the purported vesting order of 1963. The best he had produced had been an area map showing that the general area had belonged to its predecessor, the East African Railways and Harbours Administration. It was crucial to note that the Land Registrar had testified that the government had no records showing that the 1st Plaintiff had ever owned the suit parcels.

361. Secondly, despite repeatedly claiming that the 1st Plaintiff had granted the 2nd Defendant the suit land for Shimanzi Road expansion purposes, no single document evidencing that agreement or handover had been produced. They submitted that those had been falsehoods and afterthoughts meant to deprive the bona fide registered owners.

362. The witness admitted that indeed the 1st Plaintiff had been compensated by the 1st Defendant for the structures to the tune of a sum of Kkenya Shillings Seven Hundred and Fourty

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Thousand (Kshs.740,000/-) via bankers cheque on 6th February, 2007 but kept insisting that the authorization to receive the compensation had been given by junior officers of Kenya Railways.

363. They submitted that the authorization had been granted by the highest offices in the Ministry of Transport including the Permanent Secretary, Chief Government Valuer and the Railways Land User Committee which had given the Letter of No Objection dated 14th September 1999 through the then Chief Estate Manager of Kenya Railways (page 17 of the 4th Defendant's documents) and that all had attended the meetings as evidenced by the letter dated 1st November, 2004 in the 4th Defendant's supplementary bundle of documents dated 28th October, 2021.

364. PW-5 — ROSE MUNUPE. She informed the court that she had been the acting Director of Lands of the County Government. She stated that she could not trace the minutes but had managed to trace the letters requested by the 2nd Plaintiff. She testified that all roads and road reserves belonged to the Local Authority including Shimanzi Road. Upon cross-examination she testified that the Town Clerk had confirmed that the land had belonged to the allottees as endorsed by the President in the year 1993 which had been the protocol then. She confirmed that before the Municipal Council had allotted the land to the 1st Defendant on 14th September 1999 a Letter of No Objection had been given by Kenya Railways on 14th September 1999. She further confirmed that by the time they had integrated the land

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records Zaharia (1st Defendant) had been the rates payer. She closed by stating that according to the County Government the suit properties had been regularly allocated. They submitted that this witness had supported the position that the 4th Defendant had acquired clean title and had been an innocent purchaser for value and its title should be upheld.

365. PW-6 — ATHMAN AMANI. He informed the court that he had been a senior Lands Surveyor based in Nairobi Headquarters. He testified and confirmed that final approval for the sub - division had been granted by the District Lands Officer on 10th June, 1995 (page 38). He further stated that Mombasa/Block 1/526 could not fit in Sheet 1 thereby necessitating reflection under Sheet 2. He testified that the purpose of the survey had been to create commercial plots along a strip of road within Mombasa Municipality and the RIM had accordingly been amended with respect to Mombasa/Block 1/526 and 525 on 22nd October,1999 as entry number 30. He stated that if Kenya Railways had any land then the same could only begin at 200 feet inside as that had been the normal width of road reserves. He conceded that he had not visited the suit property physically. He asserted that the Letter of Allotment should have attached the Part Development Plan (PDP).

366. Upon cross-examination he conceded that he had not mentioned anything about a road reserve in his recorded statement. He further confirmed to the court that the Director of Surveys had approved the subdivision and creation of the plots and no letter had ever been written withdrawing the consent/approval. He

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confirmed that all road reserves were owned by the County Government and Kenya Railways could not claim ownership.

367. PW - 7 — ELIAS KIPYEGO. He informed the court that he had been an investigations officer working for the 2nd Plaintiff. He said he had requested documents from the 1st Plaintiff, Lands Registry, Director of Surveys and County Government. He confirmed that Zaharia had applied for the property via letter dated 16th October, 1994 for industrial purposes (page 7). He stated that the Municipal Council by letter dated 1st November, 1994 had approved the application and allocated plots B & C which were adjacent to plot 294. He stated that the letter had been confidential and the approval conditional on the approval of Kenya Railways. He confirmed that investigations had revealed that the two plots had been created under FR 366/181. He nevertheless claimed that there had been nothing to show that the plots had been on Shimanzi Road.

368. He further stated that investigations had revealed that a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs.740,000/-) had been paid to Kenya Railways on 6th February, 2007. He however said that he had not managed to get the minutes of the Kenya Railways Board authorizing the allotment. He claimed that the 2nd Defendant had intended to use the land for road expansion but provided no documents to support this assertion as an investigating officer. He confirmed that a lease had been created with the 2nd Defendant as the head lessor (pages 23 & 44). He claimed that the 2nd Defendant had had no authority to allocate a road reserve. He said that two

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government entities could not own the same land at the same time.

369. Mr. Wycliffe Jorgesen Ginda Mukhongo never testified but filed a witness statement dated 12th November, 2015 which had been crucial because he had been the Town Clerk during the material time in that suit (2003). He confirmed in his statement that he had authored and signed the letter dated 17th September, 2003 reference G.71/C to the Managing Director, Kenya Railways. He stated that the purpose of the letter had been in response to a meeting held in Nairobi, Ministry of Transport offices between Kenya Railways Corporation, Ministry of Transport and the Municipal Council of Mombasa. In the said letter he had given a detailed background of the suit land and had confirmed that the parcels had belonged to the 2nd Defendant (County Government) who later alienated the plots after the area had been replanned and temporary plots allocated.

370. It was noteworthy that none of the witnesses had implicated the 4th Defendant (Cyka Holdings Ltd) in any wrongdoing and therefore it remained an innocent third-party purchaser for value. It was noteworthy that the 4th Defendant had not been a party to any of the previous suits initiated by the 1st Defendant (Zaharia Mohammed).

371. The Learned Counsel submitted that the 4th Defendant had testified through its Managing Director. DW-1 — Mr. Dennis Mithamo Kariuki. He adopted his statement and briefly explained how the 4th Defendant had acquired the Certificate of Lease. He confirmed that upon due diligence it had been clear from

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government records that the land had belonged to the 1st Defendant who had been selling to the Company.

372. Upon cross-examination he confirmed that he had no claim against the County Government. Further he confirmed that there had been no copy of a sale agreement on record though Cyka had purchased the suit property. He confirmed that Plot A had been what was assigned Mombasa/Block 1/526 after the subdivision and therefore they had been one and the same plot on the ground. He further stated that the 4th Defendant had not been part of suit no. 2892 of 2007 or suit no. 116 of 2009 between Zaharia and the squatters and could not therefore comment on the same and had not been aware of any orders given or not given therein. He said his interest had been in the orders he sought in the counterclaim herein.

373. However, he stated that the Company had gone ahead to purchase the property because it had been shown compensation documentation and a letter of no objection from Kenya Railways and the vendor had assured them that the illegal tenants would be evicted at her cost. He confirmed that the Company had not been able to carry out any development because of Kenya Railways' incitement to the illegal tenants. He further stated that there had never been recovery proceedings filed by the 2nd Plaintiff for all those years.

374. DW-2 — Hussein A. Abdirahman introduced himself as a businessman in Mombasa. He confirmed he had since "donated" his Mombasa/Block 1/525 to the local community for construction of a mosque during the pendency of that suit. He

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said he had even handed over the documents to the mosque committee. He said he had no further claim over the land. He confirmed that there had been no squatters when he purchased but there had been a toilet structure.

375. Upon cross-examination he said he had not produced the sale agreement in court nor evidence of payment. He said he had paid the 1st Defendant in cash. He said that the title had then been registered under the Trustees of the Mosque because he had done a transfer when the suit had been ongoing in court. He however said that he had not brought a witness from the mosque. He further stated that the search he had conducted before purchase had been clean and had indicated that Zaharia had been the owner.

376. On who owned the road reserves under the law, the Learned Counsel submitted that all road reserves had been owned and controlled by the county governments including the power to issue Temporary Occupation Licences (TOLs). Therefore the argument by the Plaintiffs that the suit properties were sitting on a place meant for expansion of Shimanzi Road had been self-defeatist because that would have meant that the properties were on a road reserve which could not be owned or controlled by Kenya Railways or any other person under the law. It had been further established at the hearing and site visit that the Shimanzi road stretch comprised at least 27 plots and it had therefore been very curious why the Plaintiffs had sought to pursue only the two suit plots.

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377. On the forcible detainer through the tenants, the Learned Counsel submitted that it had been clearly evident that despite having been compensated for the structures through a process in which the Kenya Railways Land User Committee had been centrally involved, the 1st Plaintiff had continued to forcefully hold onto the structures, collecting rent illegally from the tenants and thereby denying the 4th Defendant quiet and peaceful occupation thereof despite its bona fide title. They therefore prayed for eviction orders and mesne profits. Kenya Railways had sought to unjustly enrich itself as it had been compensated way back in the year 2007.

378. On whether the 4th Defendant was a bona fide purchaser for value without notice, the Learned Counsel submitted that during the hearing of that suit, the 4th Defendant had affirmed their innocence in acquiring Mombasa/Block 1/526 and had further restated that they were bona fide purchasers for value without notice. The 4th Defendant had conducted a search and had followed the due process of payment for stamp duty and registration charges. They had enquired about the structures on the ground and had been informed by the seller that Kenya Railways had been compensated for the said structures which had been on the land owned by the Municipal Council of Mombasa as Head Lessor. The seller had provided payment details including a bankers cheque to Kenya Railways and this had given the Company confidence to purchase. The seller had also undertaken to ensure vacant possession by removing the illegal tenants.

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379. On expounding the doctrine of bona fide purchaser, the Counsel relied on the authorities cited in the submissions. They submitted that the 4th Defendant had met the threshold as outlined and its title to Mombasa/Block 1/526 should have been upheld.

380. On whether the Plaintiffs had advanced a strong case for cancellation of titles, the Learned Counsel submitted that the 1st Plaintiff had not produced even a single document proving that Kenya Railways had been registered as the owner of Mombasa/Block 1/526 at any time in history. In fact the Land Registrar's witness statement and oral evidence had confirmed that there were no government records to suggest that the 1st Defendant had ever been registered as the owner. He had testified that the first registration had been that of the Municipal Council of Mombasa as the Head Lessor. They submitted that the Land Registrar had been the most authoritative and credible witness in that suit.

381. The Plaintiffs had not advanced any claim of the 4th Defendant's direct involvement in the alleged 'fraud' and as such the 4th Defendant remained an innocent third-party purchaser for value. Whereas the 1st Plaintiff had strenuously claimed that it had been approached by the Municipal Council to donate the suit properties for purposes of expansion of Shimanzi Road, they had not produced a single correspondence between the two entities. How had the application been done? How had the approval been given, if any? They submitted that these had been mere allegations.

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382. The most instructive letter had been dated 24th October 2003 (page 34 of the 1st Plaintiff's documents) which had clearly outlined how Shimanzi Road had been an adopted road under the Mombasa Land Planning Scheme of 1926 and once a road reserve had been adopted it belonged to the Local Authority under the Local Government Act (now repealed).
383. In conclusion, they submitted that the 4th Defendant had been an innocent third-party purchaser for value and its title to land Mombasa/Block 1/526 should have been upheld. Secondly we urged the Honourable court to allow the 4th Defendant's counterclaim for the eviction of the illegal tenants.
384. They submitted that Kenya Railways had dismally failed to produce any ownership document to the suit land, had failed to provide any agreement or correspondence between itself and the Municipal Council of Mombasa for the purported "donation" of the suit parcels for the purported "expansion" of Shimanzi Road. It had further failed to produce any schedule to prove that the suit land had been one of the properties vested in the 1st Plaintiff pursuant to the purported vesting order of 1963. The 2nd Plaintiff had never instituted any recovery proceedings in the Anti-Corruption Court against the 4th Defendant and its joinder in that suit in 2021 had been a mere afterthought.
385. It was noteworthy that despite being aware that a mosque had been developed on Mombasa/Block 1/525 during the pendency of that suit, the Plaintiffs had never complained or even informed the court. This complacency, they submitted, had shown that they were aware that Kenya Railways did not own

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the suit parcels but had embarked on an evil and corrupt scheme to dispossess the 4th Defendant and sell off Mombasa/Block 1/526 as well to the highest bidder. It was noteworthy that despite that suit having been filed in 2015, the 4th Defendant had not been served and had only defended the suit in 2018 when it had become aware of the suit by chance.

386. Record would have shown that the "highest bidder" with the blessing of the Plaintiffs had blatantly and forcefully attempted to erect a perimeter fence in 2018 at night and the 4th Defendant had rushed to that Honourable court and obtained stay orders. The scheme had been well known and the highest bidder and his abettors had to be stopped in the interest of justice.

B. <u>The Written Submissions by the 5th Defendant</u>

387. The 5th Defendant through the Law firm of Messrs. Messrs. Kiarie Kariuki, Atieno Obura & Partners filed their written submissions dated 13th August, 2025. Mr. Kariuki Advocate commenced by providing a brief background of the case, He submitted that the three cases ELC Case No 180 of 2015, ELC 64 of 2020 and ELC 65 of 2020 had been consolidated. By a Plaint dated 4th August 2015, amended on 23rd May 2020 and further amended on 15th June 2021, the Plaintiffs had sought the above stated orders.

388. The 5th Defendant filed his statement of defence in which he denied all the facts in the plaint save for the description of the parties. The 5th Defendant asked that this Honourable Court dismiss the plaintiffs' claim against him on the ground that the Plaintiffs had not raised any cause of action against him.

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389. He further submitted that the 1st Plaintiff had primarily sought a declaration that it was the proprietor of Mombasa /Block 1/525 and Mombasa /Block 1/526 and a permanent injunctive order restraining the 4th and 5th Defendants from interfering with its ownership thereof as well as an order for cancellation of the titles of the suit properties registered under the 4th and 5th Defendants.

390. The Learned Counsel argued that the 1st Plaintiff was not the registered proprietor of the suit property Mombasa Block 1/525 as it had claimed; the 5th Defendant was. The 5th Defendant had purchased for value Mombasa Block 1/525 from the 1st Defendant herein Zaharia Mohamed Mawia (then deceased). As a prerequisite for the purchase, the 5th Defendant had carried out a postal search for the suit property which had not shown any encumbrances. In addition, the 1st Defendant had produced a Lease Certificate of 99 years issued to her on 1st November 1994 by the defunct Municipal Council of Mombasa, now Mombasa County Government, as proof that she had acquired the property legally. He had further carried out a physical inspection and found the suit property vacant and undeveloped.

391. The 5th Defendant had proceeded to enter into an agreement with the 1st Defendant and had paid the purchase price of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-). At the time of signing the sale agreement, the suit property had been registered in the name of the 1st Defendant. The 5th Defendant had obtained consent from the County Government of Mombasa to transfer the suit property to him. He had paid the requisite

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stamp duty, rates, rent and all taxes thereto and the land had been entered into the register under his name as the proprietor. In short, the 5th Defendant had followed due process in acquiring the lease over Mombasa Block 1/525.

392. The 5th Defendant had later donated the said plot Mombasa Block 1/525 to the community for construction of a mosque and therefore he no longer claimed the property. Additionally, he had handed over the documents to the mosque committee and subsequently transferred the plot to the mosque trustees. The title had then been registered under the trustees of the mosque. The Plaintiff's claim against the 5th Defendant concerned ownership of the suit property Mombasa Block 1/525 and the process of acquiring the property.

393. The Learned Counsel submitted that the Plaintiffs' case was that the 5th Defendant's title over plot Mombasa Block 1/525 (the "suit property") was illegal. The Plaintiffs averred that Kenya Railways Corporation, the 1st Plaintiff, was the rightful proprietor of the suit property. The plaintiffs had called seven witnesses. PW - 1 PIUS MAITHYA had been called to testify. He had informed the court that he was a gazetted Valuer working with the 2nd Plaintiff. However, on cross-examination, he had informed the court that he had no proof that he was a registered valuer nor an employee of the 2nd Plaintiff. He had told the Court that he did not know who the occupiers of the suit properties were nor did he have documentation on property valuation index in his report before court.

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394. The Learned Counsel submitted that the dispute before the court had been ownership and how it had been acquired and not valuation; therefore the testimony of PW1 was of no importance. PW - 2 HASHIM GOT had been called to testify. He had informed the Court that he had been the Land Registrar between 1985–1997 before he had been transferred to Lamu and brought back to Mombasa in 2007. He had testified that the first ever registration with respect to Mombasa Block 1/525 had been on 7/12/1999 where Mombasa Municipal Council had been the lessor and the 1st Defendant Zaharia (then deceased) had been the lessee. He had admitted that upon conducting a search, it had indicated that the 1st Defendant had been the lessee for a term of 99 years from 1/4/1994.
395. He had told the court that Mombasa was an island under L.R No. 1149 and most land had been under leasehold with conditions. He had informed that the suit properties were located in Shimanzi area under Block 1 where most parcels had been commercial, mostly godowns. He had testified that he could not vouch for any prior documents before the two leases over the suit properties. He had told the court that stamp duty had been duly paid on both leases and that the two properties had been properly presented and the head lessor had been Mombasa Municipal Council.
396. On cross-examination, the Land Registrar had confirmed that there had been no prior records of any previous owner before the Municipal Council of Mombasa as per his witness statement. He had stated that he had not been the registrar when the lease

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had been signed in 1999 and that the leases had been signed and sealed by the Town Clerk and Mayor. He had affirmed that there had been no records in the Land Registry that the 1st plaintiff had ever owned the suit land. He had testified that the 2nd Defendant remained the head lessor to date according to official government records.

397. The Learned Counsel opined that the testimony of the Land Registrar had been important to the case because it was a dispute of ownership and the process of acquiring the suit properties and he had been the custodian of land ownership records.

398. PW - 3 ENG ALBERT KENO had testified and been cross-examined. He had told the court that he had been the 2nd Defendant's chief officer in charge of Transport. It was noteworthy that he had not filed any witness statement. Upon cross-examination, he had admitted that he had not produced an appointment letter in court for proof. He had further stated that he had not been aware the county government had been a party in the suit though it had been his employer. He had conceded to not knowing anything concerning ownership of the suit properties nor anything to do with the current proceedings.

399. The Learned Counsel submitted that the case before the court had been about ownership of land and not transport issues; hence the court should have regarded PW3's testimony as of no importance to the dispute. PW - 4 JUSTIN OMOKE had been called to give his testimony. He had introduced himself to the

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Court as the 1st plaintiff's estates manager. He had adopted his witness statement dated 23/3/2022 as his evidence-in-chief.

400. He had produced the 1st plaintiff's consolidated bundle dated 2/8/2022. He had testified that he believed the suit land had remained unsurveyed to date. He had stated that by virtue of vesting orders issued in 1963 and 1986 all land previously owned by the East African Railways and Harbours Administration had been vested to the 1st Plaintiff. He had stated that there had been two cases in court in which the 1st Defendant had sued the tenants of the 1st plaintiff seeking eviction orders. He had claimed that the 1st Defendant had not been on the list of allottees under minute 335/93. He had claimed that the tenants on the suit properties had been there on the strength of temporary occupation licences (TOLs) however he had not produced any proof to support his statements. He had further stated that for any land belonging to the 1st Defendant to be alienated there had to be Board of Directors' approval, Ministry approval and Cabinet approval.

401. Upon cross-examination, he had told the court that the letters dated 28th May, 2002 and 15th April, 2002 had been signed by the Permanent Secretary, Ministry of Transport; he had further confirmed that the letter dated 24th May, 2002 had been signed by the Chief Government Valuer. Despite approvals from the highest office, he had insisted that due process had not been followed. He had further stated that the value of the suit properties had been a sum of Kenya Shillings Four Hundred and Fifty Million (Kshs 450, 000, 000/=) without adducing any

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valuation report of a qualified registered valuer. He had informed the Court that Mombasa Block 1/525 had had a mosque built on it during the pendency of his suit but he could not explain why the 1st Plaintiff had not opposed the construction of the same yet he had claimed the land belonged to the 1st Plaintiff.

402. The Learned Counsel submitted that deducing PW - 4's testimony, it had been evident that the suit properties had been among properties that had not been vested upon the 1st plaintiff by the alleged vesting order of 1963 as claimed. PW - 4 had not produced proof to confirm the same. He had produced a map showing that the general area had belonged to the predecessor, the East African Railways and Harbours Administration. Further, he had not produced any evidence that the 5th Defendant had acquired the suit property illegally as he had previously claimed that due process had not been followed in acquiring the suit properties. Additionally, he had not produced any document showing an agreement of handover to prove that the 1st Plaintiff had granted the 2nd Defendant the suit land at Shimanzi for road expansion purposes as claimed by the 1st plaintiff. He had admitted that the 1st plaintiff had been compensated a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/=) through a banker's cheque for the structures on 6th February, 2007.

403. PW – 5, Rose Munupe had informed the court that she had been the Acting Director of Lands at the County Government. She had informed the court that she could not trace the minutes however

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she had traced the letters requested for by the 2nd plaintiff. She had averred that all roads and reserves belonged to the local authority including Shimanzi road. Upon cross-examination, she had testified that the Town Clerk had confirmed that the land had belonged to the allottees as endorsed by the President in 1993 which had been protocol then. She had confirmed that the Municipal Government had allocated the two suit properties to the 1st defendant on 14th September 1999 upon receiving a letter of no objection from Kenya Railways on 14th September 1999. She had confirmed that by the time they had integrated the land records, Zaharia the 1st Defendant had been the rates payer. She had concluded by informing the Court that according to the County Government, the suit properties had been regularly allocated.

404. The Learned Counsel submitted that PW - 5's testimony had shown that the 5th Defendant had been a bona fide purchaser for value and his title had been a good title which should be upheld. PW - 6 ATHMAN AMANI had informed the court that he had been a senior lands surveyor based in Nairobi headquarters. He had testified and confirmed that the final approval for the sub - division had been granted by the District Land Officer on 10th June, 1995. He had informed the Court that the purpose of the survey had been to create commercial plots along a strip of road within Mombasa Municipality and the RIM had accordingly been amended with respect to Mombasa Block 1/525 and Mombasa Block 1/526 on 22nd October, 1999 as entry number 30. He had told the Court that if Kenya Railways had any land then the

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same could begin 200 feet inside as that had been the normal width of road reserves. He had informed the court that he had not visited the suit properties physically. He had stated that the Letter of Allotment should have attached the part development plan (PDP).

405. Upon cross-examination, he had conceded that he had not mentioned anything about road reserve in his recorded statement. He had confirmed to the court that the Director of Surveys had approved the subdivision and creation of the plots and no letter had ever been written withdrawing the consent/approval. He had confirmed that all road reserves were owned by the County Government and Kenya Railways could not claim ownership.

406. PW – 7, Elias Kipyego had introduced himself as an investigating officer working for the 2nd Plaintiff. He had informed the court that he had requested documents from the 1st plaintiff, Lands Registry, Director of Surveys and County Government. He had confirmed that Zaharia had applied for the suit property via a letter dated 16th October, 1994 for industrial purposes. He had stated that the Municipal Council had approved the application by a letter dated 1st November, 1994 and allocated plots B and C which were next to plot 294. That the letter had been confidential and approval had been conditional on the approval of Kenya Railways. He had stated that investigations had revealed that indeed the two plots had been created under FR 366/181, however there had been nothing to show that the plots had been on Shimanzi road.

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407. He had testified that investigations had revealed that a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 740,000/-) had been paid to Kenya Railways on 6th February, 2007 but he had not been able to trace the minutes of the Kenya Railways board authorizing the allotment. He had claimed that the 2nd defendant had intended to use the land for road expansion but he had not produced any evidence to support his findings as the investigating officer. He had testified that the lease had been created with the 2nd defendant as the head lessor. He had said that two government entities could not own the same land at the same time.
408. The Learned Counsel posited that based on the Plaintiffs' witnesses' collective testimonies, one thing had been clear: there had been no proof linking the 1st Plaintiff to the two suit properties as alleged. It had been the 5th Defendant's position that he had been a bona fide purchaser for value without notice.
409. On the 5th Defendant's case, the Learned Counsel submitted that DW - 1 Hussein A. Abdirahman had testified as DW - 1. He had adopted his witness statement dated 23rd July 2019 and filed on 31st July 2019 as his evidence-in-chief. He had informed the court that he had been a businessman in Mombasa. He had averred that he had acquired plot No. Mombasa Block 1/525 from the 1st defendant (then deceased). He had stated that as a prerequisite, he had conducted a search of the Certificate of Lease and it had been clean. The search had indicated that Zaharia Mohamed had been the registered owner by virtue of a lease issued to her on 1st November 1994.

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410. He had further informed the court that when he had conducted a search, there had been no encumbrances nor third party claim over the Certificate of Lease. Finally, he had carried out a physical inspection and there had been no squatter on the land. He had informed the court that he had donated the plot to the community for construction of the mosque and therefore he no longer claimed the land. He had stated that he had handed over the documents to the mosque committee.
411. Upon cross-examination, he had informed the court that he had not had the sale agreement with him nor proof of payment as he had paid in cash. He had stated that the plot had become a community plot and had been registered under the trustees of the mosque.
412. The Learned Counsel relied on the following issues for determination: -
    a. Whether the 5th Defendant had been a bona fide purchaser for value without notice.
    b. Whether orders for cancellation of the title should issue.
413. On whether the Defendant had been a Bona Fide Purchaser for Value Without Notice, the Learned Counsel submitted that, for all intents and purposes, the 5th Defendant had been a bona fide purchaser for value without notice of defect over Plot No Mombasa Block 1/525. The plaintiffs' allegations that the 5th Defendant had fraudulently acquired Plot No Mombasa Block 1/525 had been unfounded and unsupported.
414. He cited the Black's Law Dictionary, 9th Edition on the definition of a bona fide purchaser as one who bought something for value

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without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who had in good faith paid valuable consideration for property without notice of prior adverse claims.

415. The Counsel referred Court to the Court of Appeal case of:- ***"Lawrence P. Mukiri – Versus - Attorney General & 4 Others (2017) eKLR"*** had cited with approval the holding of the Court of Appeal of Uganda in ***"Katende – Versus - Haridar and Company Limited"*** and had held that:-

> ***"….A bona fide purchaser for value was a person who honestly intended to purchase the property offered for sale and did not intend to acquire it wrongly. For a purchase to successfully rely on the bona fide doctrine, he had to prove the following:***
>
> - ***He held a certificate of title.***
> - ***He had purchased the property in good faith.***
> - ***He had had no knowledge of the fraud.***
> - ***The vendors had apparent valid title.***
> - ***He had purchased without notice of any fraud.***
> - ***He had not been party to any fraud.***

416. The Learned Counsel submitted that the 5th Defendant had purchased plot No Mombasa Block 1/525 from the 1st defendant Zaharia Mohamed Mawia (then deceased). As a prerequisite for the purchase, he had conducted a postal search of the original Certificate of Lease. The search had traced the root of the lease to the 1st Defendant who had held a physical Certificate of Lease from the 2nd defendant, the defunct Municipal Council of Mombasa now the County Government of Mombasa as the head lessor. Further, the lease had not exhibited any encumbrances,

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adverse or third party claim. The lease had been registered under the name of the Vendor/1st Defendant by virtue of leases issued to her on 1st November 1994 and signed by the Mayor of the defunct Municipal Council of Mombasa.

417. He had further carried out a physical inspection of the property which had been vacant and undeveloped. The 5th Defendant had therefore proceeded to execute a sale agreement between himself and the 1st Defendant, had paid the purchase price of a sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) to the 1st Defendant, had obtained a consent to transfer from the 1st Defendant to himself from the County Government of Mombasa, had paid the transfer fees, stamp duty, rates and rents and the lease had consequently been lawfully passed to the 5th Defendant.

418. The 5th Defendant had been issued a Certificate of Lease which had cemented his ownership and interest in Plot No Mombasa Block 1/525. The Learned Counsel submitted that there had been no act or omission attributable to the 5th Defendant to suggest any notice of defect of the Certificate of Lease or fraud on his part. The 5th Defendant's position had been that by virtue of being registered as the leaseholder by the Land Registrar, he had acquired lawful rights thereto, inter alia, the right of exclusive occupation and possession.

419. The Learned Counsel referred Court to the provision of Sections 24 (b) and 26 of the Land Registration Act which provided for the rights of a registered proprietor of land as well as a Certificate of

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Lease being conclusive evidence of ownership such that it would not be subject to challenge, except:

a) **where the title had been obtained by fraud or misrepresentation to which the person must be proved to be a party; and**
b) **where the certificate of title had been acquired illegally, unprocedurally or through a corrupt scheme, both of which had not been adduced in the instant case.**

420. This had been buttressed by this Honourable Court in ***"Embakasi Properties Limited & another – Versus - Commissioner of Lands & another [2019] eKLR"*** where it had held that:

> ***"Although the certificate of title had been repeatedly held to be conclusive evidence that the person named therein as proprietor of the land was the absolute and indefeasible owner thereof, ownership could only be challenged on the ground of fraud or misrepresentation to which the proprietor named was proved to be a party."***

421. The Learned Counsel held that the plaintiffs had accused the 5th Defendant of fraud in acquisition of plot No Mombasa Block 1/525. They had apprised this Honourable Court that the Plaintiffs had not demonstrated or adduced any evidence to challenge the validity of the said property's Certificate of Lease. The Plaintiffs had failed to discharge their duty through their witnesses to show any fraud that contaminated the 5th Defendant's title. They had therefore failed to discharge their duty under the provision of Section 107 and Section 109 of the Evidence Act which provided that whoever desired any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserted must prove that those facts

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existed and that when a person was bound to prove the existence of any fact, the burden of proof lay on that person.

422. The 5th Defendant had contended that allegations of fraud being grave ought to have been strictly proved. The plaintiffs had failed to prove the particulars of fraud against the 5th Defendant or any involvement with the 1st, 2nd and 3rd Defendants to commit fraud in the process of acquiring the suit property Mombasa Block 1/525 on the balance of probabilities and as such, the 5th Defendant's Certificate of Lease had remained unchallenged and valid. The 5th Defendant had prayed that this Honourable Court come to the conclusion that the 5th Defendant's Certificate of Lease was indefeasible and that it was conclusive evidence of ownership.

423. The Court of Appeal in ***"Munyu Maina – Versus - Hiram Gathiha Maina [2013] eKLR"*** had stated that:

> ***"……when a registered proprietor's root of title was under challenge, it was not sufficient to dangle the instruments of title as proof of ownership. It was the instrument of title that was in challenge and the registered proprietor had to go beyond the instrument and prove the legality of how he had acquired the title and show that the acquisition had been legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."***

424. The Learned Counsel submitted that the 5th Defendant had sufficiently demonstrated that he had followed the required procedure in acquiring the suit property Mombasa Block 1/525. He had done so by adducing evidence. He had followed the required procedure and acquired a good certificate free from

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any encumbrances or third party claim and as such, the Certificate of Lease had stood valid. He had reiterated that the Plaintiff's case against him had not raised any cause of action against him and as such, it should be dismissed.

425. On whether the Plaintiffs Had Proved Their Case on the Balance of Probability. The Learned Counsel submitted that it had been the 5th Defendant's position that the plaintiffs had failed to prove their case against the 5th Defendant. The plaintiffs had not proved their ownership of the suit property Mombasa Block 1/525 as alleged. They had not, with evidence, proved the particulars of fraud enumerated in their plaint. It was trite law that whoever alleged must prove and on that basis, the plaintiffs had failed. The Court of Appeal in the case of:- ***"Gladys Wanjiru Ngacha – Versus - Teresa Chepsaat & 4 Others [2013] eKLR"*** had held that:

> ***"Allegations of fraud must be strictly proved: although the standard of proof might not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities was required. It had not been enough for the appellant to have pleaded fraud; she ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court."***

426. Further, during a site visit, it had been established that the 5th Defendant's plot lay on a stretch comprising 27 other plots yet the Plaintiff had been interested only in the two subject plots. This had shown that the Plaintiff had not come to this Honourable Court in good faith. It had been in the interest of justice that the Plaintiffs be stopped.

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427. In conclusion, the Learned Counsel submitted that the 5th Defendant had demonstrated that he had been a bona fide purchaser of the suit property Mombasa Block 1/525. The Plaintiffs had failed to prove their case against the 5th Defendant and therefore the 5th Defendant had prayed that the Plaintiffs' suit be dismissed with costs.

X. Analysis and Determination

428. I have carefully considered and highly appreciated the pleadings, testimonies, the comprehensive and detailed written submissions, the myriad of cited authorities and all documentary evidence by all the parties herein, as well as the applicable provision of the Constitution of Kenya, 2010, the statutes and case law. I shall address the issues sequentially as guided by their legal and factual complexity.

429. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following six (6) issues for its determination. These are: -

(a) Whether parcels Mombasa/Block 1/525 and 526 were lawfully alienated by the Municipal Council of Mombasa.

(b) Whether Kenya Railways Corporation retained proprietary interest under the Vesting Orders.

(c) Whether the Defendants' titles were procured fraudulently or irregularly.

(d) Whether the Plaintiffs are entitled to cancellation of titles and recovery of land?

(e) Whether the Counter – Claim by the 4th Defendant herein has any merit?

(f) Who should bear the costs of the suit and the Counter - Claim.

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ISSUE No. a). Whether parcels Mombasa/Block 1/525 and 526 were lawfully alienated by the Municipal Council of Mombasa;

430. **The Site Visit Report**

431. Prior to embarking on the analysis of the issues under this Sub – heading, the Honourable Court wishes to re produce verbatim the Site Visit (***"Locus in Quo"***) report hereinbelow for ease of reference. _

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

ELC NO. 180 OF 2015

AT MOMBASA

KENYA RAILWAYS CORPORATION……PLAINTIFF

- VERSUS -

MOHAMED MAWIA & 2 OTHERS ……DEFENDANTS

THE SITE VISIT REPORT OF THE VISIT HELD AT SHIMANZI ON 7TH MARCH, 2025

I. Introduction

1. The site visit (***"Locus in Quo"***) took place at Shimanzi within the main town of Mombasa of the County of Mombasa. The team assembled at the site – specifically within the compound of the health centre operated by the County Government of Mombasa - at 12.00noon. After short word of prayer the Judge provided the direction on how the site visit was to be undertaken by the team thereof.

II. **Present**

A. The Court

a) Hon. Justice L.L. Naikuni, Presiding Judge, ELC No. 3.
b) M/s. Firdaus Mbula – the Court Assistant.
c) Mr. George Omondi – The Judge's Usher.

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d) Mr. - John Mwaniki Ngari - The Judge's Driver.

B. <u>The Plaintiffs</u>

a) Ms. Fatuma Abdulrahim – The Advocate for the 2nd Plaintiff.
b) Ms. Abdulahim holding brief for Mr. Karina Advocate for the 1st Plaintiff.
c) Mr. Kariuki holding brief for Mr. Karina.

C. <u>The Defendants</u>

a) Mr. Onduso – The Advocate for the 2nd Defendant.
b) Ms. Kabole – The Advocate for the 5th Defendant.
c) Mr. Denis Kariuki – A Director of the 4th Defendant.
d) Ms. Gertrude.
e) Mr. Hussein – the 5th Defendant

D. <u>Others interested parties (Mosque Committee) Bilal Mosque</u>

a) Ahmed Haji- Chairman.
b) Shukri Edin – Imam.
c) Imam Adan Ibrahim- Member.
d) Mohamed Osman – Member.

(Hereinafter referred to as **"The Team"**)

C. Security Operatives

a) Corporal Albanus Kimanzi – Makupa.
b) PC Kipsang.
c) PC Lilian Katama.

III. The purpose for the Site Visit

2. The Court informed the team the purpose of the site visit (***"Locus in Quo"***). It indicated that this was pursuant to a Court order made on 7th February, 2025 in accordance with the provision of Section 173 of the Evidence Act, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, *to wit:* **-**

Power to court to inspect;

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"The court may at any stage of a suit inspect any property or thing concerning which any question may arise"

While Order 40 Rule 10 (1) (a) provided *to wit:* **-**

"The Court may, on the application if any party to a suit, and on such terms as it thinks fit: -

(a) Make an order for ……Inspection of any property which is the subject matter to which any question may arise therein.

3. By consensus of the parties, it was agreed that Site Visit be led by the Advocates and/or representatives of the parties present. The Judge elucidated that the site visit was not with a view of gathering further evidence on the case but to make observation on the factual realities on the ground to enable the Court in making a fair, just and equitable decision. Ideally, the Honorable Court informed the team that the visit was purely to look, feel and observe on the issues brought in Court while inspecting the place.

4. Hence, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

5. Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices or manual writing would be allowed, photography or video shooting was strongly condemned due to the likely hood of being abused particularly through social media. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

IV. <u>The Procedure</u>

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6. The procedure upon which the site visit was to be conducted was explained to the team present. As indicated, it was mutually agreed that the team be guided by all Advocates for the Plaintiff and the Defendants who were knowledgeable of the place by moving around within and without the suit land.

IV. The Observations.

7. Upon conducting an elaborate inspection through walking into each of the plots and development situated within the suit property, the team made the following observations.

a) ***The suit property:-*** The suit land is found on a rectangular long stretch of the place known as Shimanzi within the Mombasa town. There was a huge development for commercial purposes at the place. There were in form of huge godown storage or ware houses which the team learnt were constructed to store goods being ferried to and from Mombasa by the Kenya Railways.

b) ***The health Centre:-*** There was a well constructed bungalow building utilized as a health centre. It occupied approximately a quarter of an acre. Within the compound was a well laid - down cabro works to details. It was spacious enough to accommodate close to fifteen saloon motor vehicle. It was constructed and once operated by the Railway dispensary but currently managed by the County Government of Mombasa. For convenience sake, the team commenced its this from this place.

c) ***The Kenya Ports Authority staff quarters*** – directly opposite the health centre was a large servant quarters for the Kenya Ports Authority. In between was a very busy 12 metres tarmac road. The road was mostly utilize by heavy commercial trucks.

d) ***A Mosque:*** – Next to the health centre was a well - constructed permanent story Mosque. The Mosque occupied 0.0607 Ha of the suit land. The Mosque occupies beacon to beacon of Plot number 525. It would accommodate close to 500 worshippers at a ago. It was officially opened on 1st April, 2022. It consisted of a Madrasa, Women prayer hall, Men's prayer hall, an ablution area and Imam's two houses.

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e) ***The Plot Number 526:*** – On this parcel measuring approximately 0.3908 Ha. They were mainly residential structures at the behind sides of the land. However, on the front side were mainly buildings utilized for commercial activities. These were in form of numerous small, temporary and makeshift retail shops, bars and restaurant, tailor stands, pool table stands, saloons, and so forth. For instance, the team was particular, and interacted with a few traders being "***the Shiro's shop"*** owned by a lady called Eunice Wanjira; She paid her monthly rent to the Kenya Railway; a bar trading in the name and style of ***"Wanjenga"***; a butchery known as ***"the Middle point butchery;*** a Barber shop known as ***"Kwa Jones"; a*** Shop known as "***Kwa Mkamba"*** and so forth. They all informed the team that they remitted their rents to the Kenya Railways.

The team noted that in total there were more than 100 people occupying the Plot Number 526.

f) ***The Kenya Railway structures:-*** The team took cognizance of the fact that the whole place had been occupied by some permanent houses. They were fairly old and dilapidated with the exterior white paint peeling off due to old age and the usual harsh Coast weather condition.

g) ***The Warehouses:*** – on both side of the Simanzi road there were numerous huge warehouses. The team was able to establish that these structures were constructed a while ago for commercial purposes serving the then active Kenya railways Corporations. They were utilized for storage of macadamized goods either for imports from aboard or export through the Kenya Ports Authority (KPA). These godowns included private companies incorporated and trading in the names and style of "***Signon", "Mitchell Cotts"*** among others. They were well paced with access road and connected with electricity and water. There were huge and heavy commercial trucks ferrying goods in and out of these places.

h) The Simanzi main road:- The team took note of the major tarmacked 12 metres close to 3, 000 metres (3 kilometres). It cuts across these above mentioned structures. It serves these locality well though it gets rather busy with heavy commercial trucks and other motorists. At the end of the

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road on the northern side there is a busy and occupied petrol station trading as ***"The Shell Company"***. It has large parking bay though clearly it is overwhelmed by vehicles. _

V. Directions

8. Towards the end of the visit, the Honourable Court made the following directions:-

a) That the Honourable Court to endeavor finalise the Site Visit report to be shared with parties for their approval and finalization.
b) That parties were granted leave to file and serve their written submissions.

c) That the Honourable Court to render its Judgment on 20th June, 2025.

There being no further business, the Site Visit came to an end at 2:20 p.m with a word of prayer.

SITE VISIT REPORT PREPARED AND SHARED AT MOMBASA ON THIS …….23RD ……DAY OF …….MAY……2025.

……

HON. MR. JUSTICE LL. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

432. Now turning to the issue of analysis. The main substratum under this sub heading is whether parcels Mombasa/Block 1/525 and 526 were lawfully alienated by the Municipal Council of Mombasa. Before the Court diverges into the issues herein I wish to refer to a decision I made in the case of:- ***"Bajaber Limited – Versus - Ramadhan & another (Environment and Land Case 60 of***

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2019) [2025] KEELC 5241 (KLR) (11 July 2025) (Judgment)", LL. Naikuni J stated that: -

> ***48. Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with the Constitution and Statutory provisions. At the center of the dispute between the parties is the protection of private property as enshrined in Section 75 of the former Constitution and Article 40 of the 2010 Constitution.***
>
> ***49. Article 40 (2), (3), (4) and (6) of the Constitution of Kenya provide as follows:***
>
> > ***" 40 (2) Parliament shall not enact a law that permits the State or any person:-***
> >
> > > ***a. To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description …. (3) The State shall not deprive a person of property of any description, or of any interest in, or right over property of any description, unless the deprivation: (a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land, in accordance with Chapter Five, or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that:- i. requires prompt payment in full of just compensation to the person, and ii. allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land. (5) …. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."***

433. The evidence before this Court demonstrates that the parcels in dispute were initially vested in the Kenya Railways Corporation (KR) from its predecessor, the East African Railways & Harbours

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Corporation vide the Kenya (Vesting of Lands Regulation) Legal Notice No. 245 of 1963 and a Vesting Order (Legal Notice Number 24 gazetted on 22nd February, 1986 respectively of 1963 issued under the Kenya Railways Corporation Act, Cap. 397 Laws of Kenya. Section 13 of the Act expressly provides that all property vested in the Corporation may only be disposed of with approval of the Board and consent of the Minister for Transport.

434. PW - 4, the Estate Manager of KR, testified that no such Board resolution or Ministerial consent was ever issued in respect of parcels 525 and 526. This evidence was corroborated by PW - 5, the County Director of Land Administration, who produced municipal correspondence confirming that the Shimanzi area was a road reserve and not available for alienation. Ideally, the 2nd Defendant approached the 1st Plaintiff and indeed had acquired the suit land for purposes of expanding the Shimanzi road for purposes of public use and for construction of a dual carriage way in the future.

435. Undisputedly, the 1st Plaintiff had agreed to grant the unsurveyed land to the Municipal Council of Mombasa, which had structures and buildings that were occupied by its tenants at the time on Temporary Occupation Licence (TOL) and who were paying rent to the 1st Plaintiff, on the understanding that the portion would be used for the expansion of the public road and if not the said property would be returned to the 1st Plaintiff as required by law. Unfortunately, instead of the Municipal Council utilizing the land for the intended public use purported to sub – divide it into several portions and allocated the parcels to

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private persons for individual use – the 1st Defendant in year 1994 and subsequently issued leases in 1999 without the consent or knowledge or authority of the 1st Plaintiff. This made the whole process unlawful, wrongful and illegal. Subsequently, the 1st Defendant proceeded to transfer the said land to the 4th and 5th Defendants. Certainly, these processes were governed by misinformation of facts as it being public land, it was not available for alienation. Todate, the 1st Plaintiff remained in occupation with buildings and structures on it and tenants who were paying rents to them under the Temporary Occupation Licence (TOL). The 1st Plaintiff had never formally surrendered the land to the Commissioner of Lands and to the President of the Republic of Kenya for any Change of User to be undertaken by both the 1st and 2nd Defendants. Legally speaking, the provision of Section 3 of Government Lands Act, Cap. 280, (Now repealed), only the Commissioner of Lands had authority to alienate unalienated government land. The Municipal Council lacked statutory power to alienate land already vested in a state corporation.

436. By arriving at this legal position, the Honourable Court seeks refuge and/or guided from the decision in ***"Funzi Island Development Ltd – Versus - County Council of Kwale & 2 Others [2014] eKLR"***, where the Court of Appeal held that alienation of public land by a local authority without statutory authority is void ab initio. Similarly, in ***"Republic – Versus - Land Registrar, Mombasa & Another Ex parte Kenya Railways Corporation [2017] eKLR"***, the Court affirmed KR's proprietary interest in land

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vested under statute and rejected attempts by third parties to claim title through irregular allocations.

437. The Defendants' reliance on registration under the Registered Land Act, Cap. 300, (Now repealed) cannot cure the defect. Section 143 of that Act permitted rectification of the register where registration was obtained through fraud or mistake. The current Land Registration Act, 2012, Section 26(1)(b), equally provides that a certificate of title is impeachable if obtained through fraud, misrepresentation, or illegality.

438. Applying the principle in ***"Munyu Maina – Versus - Hiram Gathiha Maina [2013] (Supra)***, once the 1st and 2nd Plaintiffs challenged the Defendants' titles, the burden shifted to the Defendants to demonstrate the legality of their acquisition. No evidence was tendered to show compliance with the statutory requirements under the KR Act or the Government Lands Act.

439. Accordingly, the Court finds that the purported alienation of parcels Mombasa/Block 1/525 and 526 by the Municipal Council of Mombasa was unlawful, irregular, and ultra vires. The Council acted without authority, and the resultant titles are tainted by illegality and fraud. The parcels Mombasa/Block 1/525 and 526 were not lawfully alienated by the Municipal Council of Mombasa. The alienation was void ab initio, and the titles issued therefrom are liable to cancellation under the provision of Section 80 (1) & (2) of the Land Registration Act, No. 3 of 2012.

ISSUE No. b). Whether Kenya Railways Corporation retained proprietary interest under the Vesting Orders;

440. Under this sub–heading the Court is called upon to examine whether Kenya Railways Corporation (KR) retained proprietary

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interest under the Vesting Orders. The Plaintiff herein has the burden to prove and discharge the same burden that the property was owned by Kenya Railways Corporation.

441. As pertains to the burden of proof and on whom same lies, it is worthy and apposite to cite and reference the holding of the Supreme Court of Kenya in the case of ***"Gwer & 5 others – Versus - Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10th January 2020) (Judgment)"***, where the supreme Court of Kenya stated and held thus;

> ***49. Section 108 of the Evidence Act provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."***
>
> ***50. This Court in Raila Odinga & others – Versus - Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013, restated the basic rule on the shifting of the evidential burden, in these terms:…a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden…."***
>
> ***51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st Respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st Respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st Respondent.***

442. Before land belonging to the Kenya Railways Corporation is sold there has to be a consent acquired from the board of directors and the cabinet approval. Notably, the necessity to procure and obtain the consent of the board is highlighted at the foot of

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Sections 13 and 14 of Kenya Railways Act, Chapter 397 Laws of Kenya. The provisions of Sections 13[2] and 14 of the Act [supra], states as hereunder;

(2) Subject to this Act, the powers conferred by subsection (1) shall include all such powers as are necessary or advantageous and proper for the purposes of the Corporation and in particular, without prejudice to the generality of the foregoing, shall include power—

(a) to construct or improve any railway, inland waterways port, ferry, road, bridge, building or any other necessary or desirable works required for the purposes of the Corporation;

(b) to operate trains and to acquire, construct, manufacture, maintain or repair anything required for the purposes of the Corporation;

(c) to carry on any business necessary or desirable to be carried on for the purposes of the Corporation and to act as agent for any services of the Government in the provision of any agreed function;

(d) to acquire, construct, manufacture, maintain or repair waterways or electric generating plant or any other works, plant or apparatus necessary or desirable for the supply or transmission of water or of electric energy for the purposes of the Corporation and to supply any such water or electric energy to any person;

(e) subject to the approval of the Minister in charge thereof, to alter the course of, or raise or lower the level of, any watercourse or road if such alteration, raising or lowering is necessary for the purposes of the Corporation;

(f) to determine, impose and levy rates, fares, charges, dues or fees for any service performed by the Corporation or for the use by any person of the facilities provided by the Corporation or for the grant to any person of any licence, permit or certificate;

(g) to prohibit, control or regulate—

i. the use by any person of the services performed, or the facilities provided, by the Corporation;

ii. the presence of any person, vessel, vehicle or goods within any inland waterways port or on any premises

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occupied by the Corporation for the purposes of the Corporation;

(h) to sell, let or otherwise dispose of any property, movable or immovable, which in the opinion of the Board is not necessary for the purposes of the Corporation: Provided that the Corporation shall not sell, let or otherwise dispose of any building or land placed at its disposal by the Government otherwise than with the consent of, and on conditions agreed by, the Government;

(i) to provide houses and other accommodation for employees;

(j) to act as agent for any person engaged, whether within Kenya or elsewhere, in the performance of the services or the provision of facilities of a kind similar, or complementary to, those performed or provided by the Corporation;

(k) to enter into agreements with any person—

(i) for the supply, construction, manufacture, maintenance or repair by that person of any property, movable or immovable, necessary or desirable for the purposes of the Corporation;

(ii) for the performance or provision by that person of any of the services or the facilities which may be performed or provided by the Corporation;

(iii) for the payment, collection or apportionment of any fares, rates, charges or other receipts arising out of the performance or the provision by that person of any such services or facilities and, for such purposes, to finance or assist in financing the activities of the person, whether by way of loan, the holding of stocks, shares or securities, the guaranteeing of interest or the retention of any stocks, shares or securities or otherwise;

(l) to enter into an agreement with any person carrying on business as a carrier of passengers or goods, whether within Kenya or elsewhere, providing for the carriage of passengers or goods, by or on behalf of the Corporation, and of that person, under one contract or at a through fare or rate;

(m) to hold shares in any company or other body and to establish or acquire any subsidiary company; and

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(n) to enter into any arrangement with the Kenya Ports Authority which, in the opinion of the Board, will promote or secure the provision, or improved provision, of any service or facilities which they may separately provide and without prejudice to the generality thereof any such arrangement or agreement may include provisions relating to—

i. the use by either party of the facilities or equipment maintained by the other;

ii. the temporary employment of staff of one party by the other on secondment or otherwise;

iii. the charges made in respect of the use of any service or facility to which the arrangement or agreement relates;

iv. the financing of any project by either or both parties;

v. research connected with any existing service or facility provided by either party or in relation to any service or facility under consideration; and

vi. the joinder in the arrangement or agreement by any other person.

(4) The Corporation may at any time convey, transfer or surrender any land surplus to both its existing and future requirements by a conveyance or a deed of surrender either for, or without, consideration: Provided that land which was public land or trust land shall be surrendered to the Government and shall not be conveyed or transferred to any other person unless the Minister responsible for lands shall consent and so direct.

443. Other than the provisions of Kenya Railways Act, which underpin the necessity to procure and obtain the consent of the board of directors, there is also the provisions of Section 13[1] of the State Corporation Act which underpins the necessity to procure the approval of the minister and the national treasury. For ease of appreciation Section 13[1] of the State Corporations Act, stipulates as hereunder;;

13. (1) The assets of a state corporation may be disposed of—

(a) if they are current assets in the normal course of business carried on by that state corporation;

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(b) where the disposal and the utilization of the proceeds have been taken into account in an annual estimate prepared and approved in accordance with section 11;
(c) by way of sale or otherwise with the approval of the Minister and the Treasury where such disposal has not been taken into account in the estimates.

444. The Plaintiffs rely on the Vesting Orders of 1963 and 1986, which transferred assets of the East African Railways and Harbours Administration to the Kenya Railways Corporation. Section 13 of the Kenya Railways Corporation Act, Cap 397 provides that all property vested in the Corporation shall remain vested therein unless lawfully disposed of with approval of the Board and consent of the Minister.

445. Therefore, the Honourable Court will just proceed on analysis of the framed issues under this sub – heading. But before that, the Honourable Court wishes underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of the Constitution of Kenya, 2010, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.

446. The effect and efficacy of the registration of land is well governed under the provisions of Sections 24, 25 and 26 of the

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Land Registration Act, No. 3 of 2012. The provision of Section 24 of the Land Registration Act 2012 No. 3 of 2012 provides as follows:

> **"The registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto."**

447. While the provisions of Section 25 (1) of the said Act further provides that:

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

448. PW - 4, the Estate Manager of KR, testified that the suit properties formed part of railway housing and operational land at Shimanzi, and that Kenya Railways has remained in possession through its tenants. He produced letters and internal records showing KR's continued occupation. He further stated that no Board resolution or Ministerial consent was ever issued authorizing alienation of parcels 525 and 526.

449. PW - 2, the former Land Registrar, confirmed that the leases were registered in favour of Zaharia Mawia in 1999, but candidly admitted that the registry records did not show KR as proprietor. However, he acknowledged that the Municipal Council was the lessor, and that no reversionary interest of KR was recorded.

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450. The Court notes that the absence of KR's name in the registry does not extinguish its proprietary interest if the land was already vested in KR by statute. In the case of:- ***"Republic – Versus - Land Registrar, Mombasa & Another Ex - Parte Kenya Railways Corporation [2017] eKLR"***, the Court held that statutory vesting overrides subsequent irregular registrations, and that KR's proprietary interest subsists until lawfully surrendered.

451. Similarly, in the case of:- ***"Kenya Anti-Corruption Commission – Versus - Online Enterprises Limited & 4 Others [2019] eKLR"***, the Court emphasized that public land vested in a state corporation cannot be alienated without compliance with statutory procedures, and any title issued contrary thereto is void. The Defendants argued that the Municipal Council lawfully allocated the parcels in 1994 and issued leases in the year 1999. However, the Council lacked statutory authority to alienate land vested in KR. The purported alienation was therefore ultra vires.

452. From the Site Visit conducted on the ground the Honourable Court was convinced that the suit property belonged to the Plaintiffs. The Court and the team was able to see the numerous structures and buildings belonging to the 1st Plaintiff and the tenants in occupation. Additionally, the Court is persuaded that the Vesting Orders of 1963 and 1986 conferred proprietary interest in the Shimanzi lands to KR, and that such interest was never lawfully surrendered or extinguished. The continued occupation by the Kenya Railways tenants further corroborates possession and control.

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453. Kenya Railways Corporation is the bona fide owner of the suit land. They have been occupation and use of it – the land, buildings & structures on the un – surveyed Plot in Shimanzi within Mombasa Island. It borders with a road having inherited its predecessor, the East African Railways & Harbours Corporation vide the Kenya (vesting of Lands Regulation) Legal Notice No. 245 of 1963 and a Vesting Order (Legal Notice No. 24 Gazetted on 22nd February, 1986 respectively. In a nutshell, the 1st Plaintiff retained proprietary interest in parcels Mombasa/Block 1/525 and 526 under the Vesting Orders of 1963 and 1986. The Municipal Council of Mombasa had no authority to alienate the land, and any subsequent registration in favour of the Defendants was irregular, fraudulent, and void ab initio.

ISSUE No. c). Whether the Defendants' titles were procured fraudulently or irregularly;

454. Under this sub–heading the Court has to consider whether the Defendants' titles were procured fraudulently or irregularly. In countering this assertion, the 4th and 5th Defendants have vehemently contended that they were bona fide innocent purchasers for value without notice having entered into express sale agreement with the 1st defendant for the sale of the land. The Honourable Court shall be dealing with this aspect herein below.

455. In the meanwhile, the Plaintiffs allege that the titles issued to the 1st, 4th and 5th Defendants over parcels Mombasa/Block 1/525 and 526 were procured through fraud, misrepresentation, and collusion with municipal and lands officers.

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456. The definition of fraud is set out in the **Black's Law Dictionary, 9th Edition at page 131** where it is defined as:

> **"a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."**

457. It is trite law that fraud must not only be pleaded but must also be strictly proved on a standard of proof above the ordinary balance of proof. It cannot be inferred from facts but must be substantiated as held in the case of:- ***"Virjay Morjaria – Versus - Nasingh Madhusingh Darbar & another (2000) eKLR"***, and in ***"Arthi Highway Developers – Versus - West End Butchery (2015) eKLR"***.

458. The Amended Plaint sets out particulars of fraud, including:

a. Misrepresentation that the land was available for allocation;
b. Collusion with junior officers of Kenya Railways Corporation to irregularly accept payment of a sum of Kenya Shillings Seven Hundred and Fourty Thousand (Kshs. 740,000/-) for structures;
c. Processing of leases and certificates of title without the consent of KR or the Commissioner of Lands;
d. Alienation of land reserved for public utility (road reserve and railway housing).

459. The process of alienation of public land was aptly captured by Cherono J in the case of ***"Ali Mohamed Dagane (Granted Power of Attorney by Abdullahi Muhumed Dagane, suing on behalf of the Estate of Mohamed Haji Dagane) – Versus - Hakar Abshir & 3 others [2021] eKLR"*** where he stated as follows: -

> ***"The process of the disposition of government land followed the following procedure: First, the respective municipal council in which the land to be disposed was situate had the mandate of advising the Commissioner of Lands on which portions of land***

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could be disposed. This step would have required the responsible council to visit the area or to carry out a fact-finding mission to satisfy itself that the land was first of all government land and second that it was indeed available for disposition. See Harison Mwangi Nyota v Naivasha Municipal Council & 20 others [2019] eKLR

……

The second step would be for the part development plan to be drawn up and approved by the Commissioner of Lands. See Nelson Kazungu Chai & 9 Others – Versus - Pwani University College (2014) eKLR

……

The third step involved the determination of certain matters by the Commissioner of lands which matters are listed under Section 11 of the Government Lands Act (Repealed). The matters to be determined include setting price at which the lease of the plot would be sold, the conditions to be inserted into the lease; the determination of any attaching special covenants and the period into which term is to be divided and the annual rent payable in respect of each period.

The fourth step would be for the gazettement of the plots to be sold, at least four weeks prior to the sale of the plots by auction under Section 13 of the Government Lands Act (Repealed). The notice was required to indicate the number of plots situate in an area; the upset price in respect of every plot; the term of the lease and rent payable, building conditions and any attaching special covenants.

The fifth step would be for the sale of the plots by public auction to the highest bidder. Section 15 of the Government Lands Act (Repealed).

The sixth step would be for the issuance of an allotment letter to the allotee. An allotment letter has been held not to be capable of conferring an interest in land, being nothing more than an offer, awaiting the fulfilment of the conditions stipulated therein by the offeree. See the decisions in: Gladys Wanjiru Ngacha – Versus - Teresa Chepsaat & 4 others 182/1992 (Nyeri); and in Dr. Joseph N.K. Arap Ng'ok – Versus - Justice Moijo Ole Keiyua & 4 others C.A.60/1997

……

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In order for an allotment letter to become operative, the allotee was required to comply with the conditions set out therein including the payment of stand premium and ground rent within the prescribed period. See the decision in: Mbau Saw Mills Ltd v Attorney General for and on behalf of the Commissioner of Lands) & 2 others [2014] eKLR .....

The allotment letter also must have attached to it a part development plan (PDP). See the decision in African Line Transport Co. Limited – Versus - The Hon .AG, Mombasa HCCC No.276 of 2013 where Njagi J held as follows:

.....

The seventh step, which comes after the allotee has complied with the conditions set out in the allotment letter is the cadastral survey, its authentication and approval by the Director of Surveys and the issuance of a beacon certificate. The survey process precipitates the issuance of land reference numbers and finally the issuance of a certificate of lease.

460. In the instant case it is clear that the above-mentioned procedure was not followed. From the evidence, PW - 2 (a former Land Registrar) confirmed that the leases were registered in favour of Zaharia Mawia in the year 1999, later transferred to Cyka Holdings Limited in the year 2011 and Hussein Abdirahman in 2015. He admitted that the registry records did not show any encumbrances at the time of registration, but also acknowledged that the Municipal Council acted as lessor, not KR. PW - 3 (County Transport Officer) and PW - 5 (County Director of Land Administration) both testified that the parcels were carved out of a road reserve, reserved for transport since the 1950s, and that allocation to Zaharia was irregular. PW - 4 (KR Estate Manager) testified that KR never authorized alienation, that no Board resolution or Ministerial consent was issued, and that the procedure under the KR Act was not followed. He further stated

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that KR remained in possession through its tenants, and that the purported survey and allocation were illegal.

461. The provision of Section 26 (1) of the Land Registration Act, No. 3 of 2012 provides as follows:

> **"the Certificate of Title issued by the Registrar upon registration, to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all counts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of the proprietor shall not be subject to challenge, except –**
>
> a. **On the ground of fraud or misrepresentation to which the person is proved to be a party**
> b. **Where the Certificate of Title has been acquired illegally un-procedurally or through a corrupt scheme."**

462. The Court is guided by the provision of Section 26 (1)(b) of the Land Registration Act, No. 3 of 2012, which provides that a certificate of title may be impeached if obtained through fraud, misrepresentation, or illegality. Similarly, under the provision of Sections 26, 27 and 143 of the repealed Registered Land Act, Cap. 300 the register could be rectified where registration was obtained through fraud or mistake.

463. Where two parties hold competing title deed over the same suit property, the Court is guided by the holding of the Court in the case of ***"Hubert L. Martin & 2 Others – Versus - Margaret J. Kamar & 5 Others [2016] eKLR"***, where the Court held that:-

> ***"A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This***

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investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its root. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one's case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder."

464. The jurisprudence is settled that fraud must be specifically pleaded and strictly proved. In the case of:- ***"Kinyanjui Kamau – Versus - George Kamau [Supra]"***, the Court of Appeal held that allegations of fraud are serious and must be proved to a standard higher than a balance of probabilities, though not as high as beyond reasonable doubt.

465. Similarly, in the case of:- ***"Arthi Highway Developers Limited [Supra]"***, the Court emphasized that fraudulent titles cannot confer ownership, but the burden of proof lies squarely on the party alleging fraud.

466. It was held by the Court of Appeal in the case of ***"Vijay Morjaria – Versus - Nansingh Madhusingh Darbar (Supra)"*** 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. See Davy v Garrett [1878] 7 Ch. D 473 at 489."

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467. In the case of:- ***"Kuria Kiarie and 2 others – Versus - Sammy Magera [2018] eKLR"*** the Court of Appeal held the claim on fraud was still born for lack of evidence and that mere allegations of fraud and illegality did not suffice.

468. A pleader for fraud and illegality requires sufficient evidence to justify his pleadings. It is not enough to allege and or suggest fraud or illegality.

469. In the case of:- ***"Boniface Onyango Okhango – Versus - Beatrice Anyango Ojiambo and another (2019) eKLR"*** the court held the burden to proof fraud never shifts and he who alleges must prove. Further the court held a party who says the land consent and the transfer were fraudulent must not want the court to wish away all this and assume that no such documents were taken to the lands office.

470. In the case of:- ***"Arthi Highway Developers Ltd (Supra)"***, the Court of Appeal held that fraudulent titles are void ab initio and cannot confer proprietary rights. Likewise, in ***"Munyu Maina – Versus - Hiram Gathiha Maina [2013] eKLR"***, the Court emphasized that once a registered title is challenged, the holder must prove legality of acquisition. The Defendants failed to demonstrate compliance with statutory requirements under the Kenya Railways Corporation Act or the Government Lands Act (repealed). The evidence shows collusion, irregular survey, and misrepresentation of the land's status. As emphatically pleaded the umpteenth times by the 4th Defendant, the payment of sa sum of Kenya Shillings Seven Hundred and Fourty Thousand

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(Kshs. 740,000/-) for structures did not amount to lawful transfer of land.

471. The Court finds that the Defendants' titles to parcels Mombasa/Block 1/525 and 526 were procured fraudulently and irregularly, in contravention of the Kenya Railways Corporation Act, the Government Lands Act (repealed), and the Land Registration Act. The titles are therefore null and void ab initio, and liable to cancellation under Section 80 of the Land Registration Act.

472. Having held that the alienation of the suit property was fraudulent, it follows that the resultant titles are tainted with fraud and it is therefore *ultra vires,* illegal, null and void. In saying so, I am guided by the case of ***"Daudi Kiptugen – Versus - Commissioner of Lands & 4 Others [2015] eKLR"*** the court stated that: -

> ***"…the acquisition of title cannot be construed only in the end result; the process of acquisition is material. It follows that if a document of title was not acquired through a proper process, the title itself cannot be a good title. If this were not the position then all one would need to do is to manufacture a Lease or a Certificate of title at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein."***

473. I also rely on the cases of ***"Kenya Anti-Corruption – Versus - Online Enterprises Limited & 4 Others"*** and ***"Kenya Anti-Corruption Commission – Versus Fran Investments Limited & 6 Others (2020) eKLR"*** where the court declared the Plaintiffs' titles null and void as they had been acquired through a fraudulent process.

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474. As indicated above, the Court now wishes to deal on the defence mounted by the 4th and 5th Defendants to the effect that they were bona innocent purchasers for value without notice. I discern and fully concur with the submissions by the Counsels for the 1st & 2nd Plaintiffs' Counsel that this argument has no basis, foundation nor moral legal ground. Firstly, the 1st Defendant was all along upon before purchasing the land, it conducted due diligence and had knowledge that the suit properties was being occupied by the tenants of the Plaintiffs but chose to ignore and or assume the risk of purchasing the public properties. The 4th and 5th Defendants confirmed during cross-examination that they knew that the disputes on ownership were in court, but proceeded to acquire the suit properties on the assumption of risk they could not claim to be innocent purchasers for value without the notice of defect. For instance, evidently there were series of Court proceedings between the 1st Defendant and the 1st Plaintiff in a Court of law. Its on record that the 1st Defendant made unlawful attempt to evict the 1st Plaintiff and its tenants from the suit land by attempting to obtain a Court an Ex – Parte Order of demolition in Civil Case ***"Chief Magistrate Court – CMCC No. 2892 of 2007 – Zaharia Mohamed Mawea – Versus – Duncun Kinyua & 4 Others"***. It is indicative that eventually on 5th November, 2007, the 1st Defendant the suit was withdrawn for unclear reason. This was after the 1st Plaintiff engaged a Counsel to defend the tenants in "***Civil Appeal No. 176 of 2007 – Dan Kinyua & 4 Others – Versus – Zaharia Mohammed Maawia"*** and whereby on 8th October they

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obtained orders of stay of execution. Secondly, Court of Appeal in the case of:- ***"Samuel Kamere (Supra)*** as cited favorably by the Supreme Court in ***"Dina Management (Supra)"*** stated as follows: -

> ***".....to be considered a bona fide purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property".***

475. It has already been ascertained herein that the 1st Defendant Certificate of Lease/Title was procured through corrupt scheme, fraudulently and unlawfully and couldn't pass any valid interest or right that could be protected under the provision of Section 26 of the Registration of Titles Act and Article 40(6) of the Constitution of Kenya 2010 that could be protected under Section on the suit properties capable of being transferred to the 4th and 5th Defendants. Therefore, the 4th and 5th Defendants never acquired any valid and legal title. It was the contention by the Learned Counsels that on the 23rd April, 2009, the 1st Defendant, in a further attempt to take possession of the suit properties, filed a High Court Case No.116 of 2009 seeking eviction orders against the tenants of the 1st Plaintiff and on 29th June 2009, the 1st Plaintiff being the landlord made an Application to be enjoined as a party and the same was allowed. Subsequently, on the 31st May 2012, the Court made a ruling in respect of the above case in favour of the 1st Plaintiff, declaring that the Plaintiff was in exclusive possession of the suit

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properties through its tenants and should be made the 6th Defendant in the HCCC No. 116 of 2009.

476. Despite knowing of the said suit and the fact that the suit properties were being occupied by the 1st Plaintiff and were exercised from a road reserve, the 4th and 5th Defendants still went ahead to allegedly purchase the said property. Furthermore, the 4th and 5th Defendants had not proved, on a balance of probability or at all, that they paid any consideration for the suit properties. Without payment of the consideration, the 4th and 5th Defendants could not be considered purchasers, innocent or otherwise. In saying so, I am persuaded by the sound legal ratio on this subject matter from the authorities cited by the Learned Counsels for both the 1st Plaintiffs and the 5th Defendants herein the cases of the ***"Court of Appeal Case No.100 of 2018 at Eldoret, the Attorney General & 2 Others (Supra); "Samuel Kamere – Versus - Lands Registrar, [Kajiado Civil Appeal No. 28 of 2005 (Supra) [2015] eKLR]"***; ***"Dina Management – Versus - County Government of Mombasa (Supra)"***, ***"Lawrence P. Mukiri (Supra) and*** the Court of Appeal of Uganda in ***"Katende – Versus - Haridar and Company Limited"***

477. In view of the above, the argument that the 4th and 5th Defendants were bona fide innocent purchasers for value without notice to the suit land cannot be sustainable. It must fail outrightly.

ISSUE No. d). Whether the Plaintiffs are entitled to cancellation of titles and recovery of land and the merits of the Counter – Claim by the 4th Defendant:

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478. Under this sub–heading the Court is called upon to examine whether, in light of the findings the Plaintiffs are entitled to the reliefs sought. The Plaintiffs prayed for:

a. A permanent injunction to restraining the Defendants, by themselves, their agents, servants, employees and/or agents from dispossessing the 1st Plaintiff from the suit properties, entering into, occupying, evicting the 1st Plaintiff's tenants, demanding rent from the tenants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any other development and/or demolishing any structure or building in the suit properties or in any other way interfering with the suit properties and/or 1st Plaintiff's quiet possession and enjoyment of the suit properties now registered as land reference numbers: Mombasa/Block 1/525 and Mombasa/Block 1/525.

b. A declaration that the subdivision and the 1st and 2nd Defendants' purported Titles on the suit properties are illegal null and void and does not confer any proprietary interest upon the 1st and 2nd Defendants or any other person.

c. An order directing that the 3rd Defendant to rectify the Land Register and to strike out the 1st and 2nd Defendants' names therefrom the Register or such Order as will effectively restore the 1st Plaintiff's title and interest in the suit properties.

d. Costs and interest incidental to this suit.

479. The Plaintiffs seek declaratory reliefs affirming their ownership of Mombasa/Block 1/525 and 526, permanent injunctions restraining the Defendants from interference and an order for rectification.

480. The evidence before Court demonstrates that the parcels were vested in KR under the 1963 and 1986 Vesting Orders, and KR never surrendered them. The Municipal Council of Mombasa lacked statutory authority to alienate land vested in KR. Its purported allocation and leases in 1999 were ultra vires. The evidence of PW - 3 and PW - 5 confirms the parcels were part of a

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road reserve, reserved for public utility, and therefore not available for alienation. Under the provision of Sections 24 and 25 of the Land Registration Act, No. 3 of 2012, registration vests absolute ownership in the Plaintiffs together with all the indefeasible rights, interest, title and privileges appurtenant thereto.

481. The Defendants' titles, though registered, were procured through fraud and irregularity, including collusion with municipal officers, misrepresentation of the land's status, and irregular survey. However, as already determined, fraud was proved to the required standard set out in ***"Kinyanjui Kamau – Versus - George Kamau [Supra]"***. The Plaintiffs' title therefore remain valid and indefeasible under the provision of Section 26(1) Land Registration Act. Further under the same Section, the Defendants titles are impeachable.

482. By all means and the evidence adduced, the Court is strongly convinced that the 1st and 2nd Plaintiffs also demonstrated actual occupation of the suit properties. The Defendants' entry and advertisements amounted to trespass, actionable per se, as held in ***"Wambugu – Versus - Njuguna [Supra]"***. The Plaintiffs are therefore entitled to damages for trespass.

483. The relief of cancellation of fraudulent titles is merited. Pursuant to the provision of Section 80 of the Land Registration Act, No. (1) & (2) which provides that: -

> **"(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.**

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(2) The register shall not be rectified to affect the title of a proprietor, unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default."

484. In the case of ***"Kenya Anti-Corruption Commission – Versus - Online Enterprise Limited Kisumu ELC number 708 of 2015"*** as cited in "***Baishe – Versus - Bwana (Environment & Land Case 229 of 2021) [2023] KEELC 19129 (KLR) (27 July 2023) (Judgment)"*** the court stated that;

> ***"The court is also empowered under section 80 (1) of the Land Registration Act, to order the rectification of the register by directing that any registration be cancelled or amended if its satisfied that any registration was obtained, made or omitted by fraud or mistake. I find that the defendants irregularly, fraudulently and un-procedurally registered the suit land in their names and the same should not be allowed to stand." Emphasis mine.***

485. From the above it is clear that in order for a party to succeed in a claim for rectification of a register of land, they must prove that the entries made therein were obtained, made or omitted by fraud or mistake. The provisions of section 107 of the Evidence Act (cap 80) also place the burden of proof on the person who wishes the court to believe a certain fact. The purported titles held by the Defendants are invalid and must be cancelled.

486. The permanent injunction sought is also justified. A permanent injunction is an equitable remedy issued by the Court to restrain a party from engaging in unlawful conduct and to protect proprietary rights on a continuing basis. Unlike interlocutory injunctions, which are temporary and granted pending trial, a

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permanent injunction is granted after full hearing and determination of the issues, and it conclusively settles the rights of the parties.

487. The Plaintiffs sought a permanent injunction to restrain the Defendants from trespassing upon, disposing of, transferring, leasing, charging, or otherwise interfering with their quiet possession of the suit properties. The evidence demonstrates that the Defendants unlawfully entered the land, advertised it for sale, and attempted to dispossess the Plaintiffs.

488. Before proceeding further, its significant to appreciate the great distinction between the prohibitory injunction as envisaged in the *"Locus Classicus"* case of ***"Giella – Versus - Cassman Brown, 1973 E.A. Page 358*** and a Mandatory Injunction. The first authority on making this distinction was ***"Shepard Homes – Versus – Sandham (1970) 3 WLR Pg. 356 Case"*** in which Megarry .J as he then was stated follows:-

> ***"Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection".***

489. The principles governing injunctions were laid down in ***"Giella – Versus - Cassman Brown & Co. Ltd [1973] EA 358"***:

a. The applicant must establish a prima facie case with a probability of success.

b. The applicant must demonstrate that they would suffer irreparable harm if the injunction is not granted.

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c. If the Court is in doubt, it will decide the matter on a balance of convenience.

490. Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected. This Court has the powers to grant the Permanent Injunction under Sections 1A, 3 & 3 A of the Civil Procedure Code, 2010 if it feels the right of a Party has been fringed, violated and/or threatened as the Court cannot just seat, wait and watch under these given circumstances. It's the effect of the order that matter as opposed to it mere positive working which makes it mandatory.

491. The circumstances under which the Court would grant a Mandatory Injunction was well stated out by the Court of Appeal in the Case of ***"Malier Unissa Karim –Versus - Edward Oluoch Odumbe (2015) eKLR"*** as follows:-

> ***"The test for granting a Mandatory Injunction is different from that enunciated in the "Giella –Versus - Cassman Brown case which is the locus classicus case of Prohibitory Injunctions. The threshold in Mandatory is higher than the case of Prohibitory Injunction and the Court of Appeal in the case of "Kenya Breweries Ltd-Vs- Washington Okeyo (2002) EA 109" had the occasion to discuss and consider the principles that govern the grant of a Mandatory Injunction was correctly stated in Vol. 24 Halsbury Laws of England 4th Edition Paragraph 948 which states as follows:-***
>
> > ***"A Mandatory Injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, it the case is clear and one which the Court thinks ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the Defendant attempts to steal a match on the Plaintiff, a***

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Mandatory Injunction will be granted on an Interlocutory application".

492. The Plaintiffs have shown that unless restrained, the Defendants will continue interfering with their proprietary rights. In ***"Mrao Ltd – Versus - First American Bank of Kenya Ltd [2003] KLR 125"***, the Court held that a prima facie case is established where proprietary rights are threatened. Similarly, in ***"Nguruman Ltd – Versus - Jan Bonde Nielsen & Others [2014] eKLR"***, the Court emphasized that once a prima facie case and irreparable harm are established, the injunction must issue.
493. If the Court is in doubt, it will decide the matter on a balance of convenience. The Plaintiffs further demonstrated that unless restrained, the Defendants' conduct would expose them to irreparable harm, including loss of property, violent dispossession, and interference with their constitutional right to property under Article 40 of the Constitution. Monetary compensation alone would not suffice to protect these rights.
494. The balance of convenience also tilts in favour of the Plaintiffs, who are the registered proprietors and in actual occupation. The Defendants, having failed to prove any valid proprietary interest, stand to suffer no prejudice if restrained from interfering with land they do not own.
495. Guided by these principles, the Court finds that the Plaintiffs have satisfied the requirements for grant of a permanent injunction. The Defendants must be restrained to prevent further trespass, fraudulent dealings, and interference with the Plaintiffs' quiet possession. The permanent injunction is

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necessary to protect the Plaintiffs' proprietary rights, prevent irreparable harm, and uphold the constitutional guarantee under Article 40. It ensures that the Defendants, having failed to prove any lawful interest, are barred from interfering with the suit properties on a continuing basis.

496. The Court finds that the Plaintiffs have proved entitlement to cancellation of the Defendants' titles and recovery of the land. The titles held by Zaharia Mawia, Cyka Holdings Ltd, and Hussein Abdirahman over parcels Mombasa/Block 1/525 and 526 were procured fraudulently and irregularly, and are therefore null and void ab initio.

497. In view of the foregoing, it follows that the Counter – Claim by the 4th Defendant has no legal basis, foundation and merit in the manner in which it was pleaded under the provision of Order 7 Rule 3 of the Civil Procedure Rules, 2010. Therefore it must fail altogether. Be that as it may, while the Court overly empathizes with the plight of the 4th and 5th Defendants herein, I discern that their only available legal remedy in law is to appropriately pursue the 1st, 2nd & 3rd Defendants for compensation and/or liabilities – damages and losses incurred thereof.

ISSUE No. e). Who bears the costs of the suit and the Counter - Claims

498. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle

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encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***"Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR*** and ***"Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR***, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***"Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR***, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

499. In ***"Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR"*** quoted the case of ***"Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227"*** the Court held;

> ***"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at….In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."***

500. In the present case, the 1st & 2nd Plaintiffs have succeeded in establishing their ownership of the suit properties, proved trespass, and obtained the reliefs sought. Conversely, the 1st,

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2nd, 4th and 5th Defendants have failed to prove fraud, their counterclaims have been dismissed, and their actions have been found unlawful.

501. The 1st & 2nd Plaintiffs were compelled to institute these proceedings to protect their proprietary rights under Article 40 of the Constitution. They have also had to defend against unmerited counterclaims. In ***"Supermarine Handling Services Ltd – Versus - Kenya Revenue Authority [2010] eKLR"***, the Court of Appeal reiterated that costs are not a punishment but a means of indemnifying the successful party.

502. The Defendants shall bear the costs of the suit and the Counter - Claims, payable to the Plaintiffs, together with interest at court rates. Accordingly, the Court finds that the Plaintiffs are entitled to the costs of the suit and of defending the Counter - Claim. The Defendants, having failed in their claims and Counter - Claims, shall bear the costs jointly and severally of both the Plaint and the Counter - Claim.

XI. Conclusion and Disposition

503. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has established his case against the Defendants. Thus, the Court proceeds to make the following specific orders:

(a) THAT Judgment be and is hereby entered in favour of the 1st & 2nd Plaintiffs, and against the Defendants, in

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respect to the Amended Plaint dated 15th June, 2021 and filed on the same day, the 1st & 2nd Plaintiffs' claim having been proved on a balance of probabilities.

(b) <u>THAT</u> for avoidance of doubt, accordingly, having considered the pleadings, oral and documentary evidence, submissions, and the applicable law, the Court hereby holds that the Amended Defence and Counter - Claim by the 4th Defendant dated 24th October, 2019 be and is hereby found to lack merit and the same is dismissed with costs to the 1st & 2nd Plaintiffs jointly and severally.

(c) <u>THAT</u> a permanent injunction be and is hereby issued restraining the Defendants, whether by themselves, their agents, servants, employees and/or assigns, from dispossessing the 1st Plaintiff from the suit properties, entering into, occupying, evicting the 1st Plaintiff's tenants, demanding rent from the tenants, constructing, fencing, selling, leasing, disposing any interest of and/or undertaking any other development and/or demolishing any structure or building in the suit properties, or in any other way interfering with the suit properties and/or the 1st Plaintiff's quiet possession and enjoyment of the suit properties now

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registered as Land Reference Numbers Mombasa/Block 1/525 and Mombasa/Block 1/526.

(d) <u>THAT</u> a declaration be and is hereby issued that the sub - division and the 1st and 2nd Defendants' purported titles on the suit properties are illegal, null and void, and do not confer any proprietary interest upon the 1st and 2nd Defendants or any other person.

(e) <u>THAT</u> an order be and is hereby issued directing the 3rd Defendant, the Land Registrar Mombasa, to rectify the Land Register by striking out the names of the 1st and 2nd Defendants therefrom, or by such order as will effectively restore the 1st Plaintiff's title and interest in the suit properties.

(f) <u>THAT</u> the 4th Defendant to be at liberty to institute legal proceedings against the 1st, 2nd & 3rd Defendants herein seeking to be redeemed by them and/or appropriate reliefs from them for the damages, loss and liabilities they may have caused them whatsoever.

(g) <u>THAT</u> pursuant to the provision of Section 152A, B, C & E of Land Act, No. 6 of 2012 to have lawfully removed all the illegal and unlawful structures and/or vacated from the Suit property. Thereafter, the 1st &

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2nd Plaintiffs to be at liberty to enforce the law accordingly.

(h) <u>THAT</u> the County Commander Mombasa and the Officer – In Charge of the Kilidini Police Station, Mombasa to ensure full compliance of this Court orders.

(i) <u>THAT</u> the 1st & 2nd Plaintiffs shall have the costs of this suit and the Counter - Claim, together with interest at court rates, the Defendants bearing the same jointly and severally and the costs of the Counter - Claim to be borne by the 4th Defendant only.

<u>IT IS HEREBY ORDERED ACCORDINGLY</u>

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS ……13TH .. ……DAY OF ……FEBRUARY……2026.

…….
HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT
<u>AT MOMBASA</u>

<u>Judgement delivered in the presence of: -</u>

a) M/s. Firdaus Mbula – the Court Assistant.
b) Mr. Karina Advocate for the 1st Plaintiff.
c) M/s. Abdulrahim Advocate for the 2nd Plaintiff.
d) Mr. Otieno Advocate for the 2nd Defendant.
e) Mr. Karuanda Advocate for the 4th Defendant.
f) M/s. Kabole Advocate holding brief for Mr. Kiarie Kariuki Advocate for the 5th Defendant.

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g) No appearance for the 1st & 3nd for Defendants.

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