

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MILIMANI
ELC PETITION NO. 824 OF 2012
AS CONSOLIDATED WITH ELC NO 102 OF 2008 (O.S)

BETWEEN

**ST. BENJAMIN MEMORIAL
CLINIC SUPPLIES LIMITED**
PETITIONER

VERSUS

HON ATTORNEY GENERAL 1ST
RESPONDENT
**THE PERMANENT SECRETARY MINISTRY OF LANDS
HOUSING AND URBAN DEVELOPMENT..... 2ND**
RESPONDENT
REGISTRAR OF TITLES3RD
RESPONDENT
CITY COUNCIL OF NAIROBI 4TH
RESPONDENT
**ABDUL WAHEED SHEIKH
ABDUL HAMMED SHEIKH
Trustees of the SHEIKH FAZAL ILACHI NOORDIN
CHARITABLE TRUST 5TH**
RESPONDENT
**PRINCIPAL SECRETARY
MINISTRY OF FINANCE 6TH**
RESPONDENT

**NATIONAL LAND COMMISSION 7TH
RESPONDENT**

AND

**DAVID KIHARA CHEGE
JAMES NGUGI IRWA GATHECA(Deceased)
MICHAEL GITHINJI KIMANI
JOSHUA KAHURIA KINGECHE
ANNE WAIRIMU KAKUI
RICHARD KAMAU
JAMES MWAURA
(Suing on their own behalf and on behalf of
Umoja City Self Help Group Kwa
Njoroge Village Residents)
PLAINTIFFS**

VERSUS

**COMMISSIONER OF LANDS 1ST
DEFENDANT
MINISTER OF LANDS HOUSING
AND SETTLEMENT 2ND
DEFENDANT
THE ATTORNEY GENERAL 3RD
DEFENDANT
COUNTY COUNCIL OF NAIROBI 4TH
DEFENDANT
THE PERMANENT SECRETARY TO
THE TREASURY OF KENYA 5TH
DEFENDANT**

AND

**ABDUL WAHEED SHEIKH AND ABDUL
HAMEED SHEIKH AS TRUSTEES OF
THE SHEIKH FAZAL ILACHI NOORDIN
CHARITABLE TRUST INTERESTED
PARTY**

JUDGMENT

Background

1. This Judgement is with respect to two suits being ELC 102 of 2008 and ELC Petition 824 of 2012.

ELC 102 of 2008

2. Vide an Amended Originating Summons dated 6th August, 2015, the Plaintiffs seeks the following reliefs:

- i. If the Plaintiffs/Applicants have been in adverse possession of the Land Reference Number 209/193 as colonial squatters, thus do claim the land in issue has been their only home since colonial days and it's where they have lived and live peacefully, openly and as a matter of right from the time their fathers and grandfathers were employed by F.B Mayer in 1902. All of them were born and grew up here, their elders have seen the country proceed from colonial times to freedom while there. Several generations of their family lines have been born and lived there*

preceding presentation of this originating summons in court.

ii. If there can be an order recognizing the Plaintiff/Applicants herein as colonial squatters who have had their livelihood depend on the parcel of land in issue thus the Plaintiffs/Applicants be registered as the proprietors/lessees of the Land Reference Number 209/193.

iii. If the court can start with a site visit to be able to see the said village which has existed since the colonial times and the villagers always got their livelihood by farming the adjacent land.

iv. If the costs of this suit would be awarded to the Plaintiff/Applicants.

- 3.** In support of the Summons was the affidavit of David Kahara Chege of an even date. He deponed that he is one of the Plaintiffs/Applicants and the Chairman of Umoja City Self Help Group (Kwa Njoroge Village Residents), competent and duly authorized to swear the affidavit on his own behalf and on behalf of 252 members thereof.
- 4.** He averred that the group was registered by the Department of Social Services under the Ministry of Gender, Sports, Culture and Social Services in Westlands Division on 20th

March 2003, comprising settlers and squatters residing on L.R. No. 209/193 (*suit property*)

5. He explained that that L.R. No. 209/193 had originally been leased to Mr. and Mrs. F.B. Mayer in 1902 for a term of 99 years commencing on 1st January 1902; that the property measures approximately 44.13 acres within Muthaiga and City Park areas of Nairobi and that Mayers employed several African workers who resided on the land, notably Kinyanjui Kaima, Chege wa Kamau, Thuo wa Njedu and Kiratu wa Kamau.
6. According to Mr Chege, Mr Mayer died and left his wife on the property and she later surrendered the lease in 1906 to one Mr G.C Bowker and Mrs. Hellen Elizabeth Bowker who retained the workers on the said parcel of land; that there were subsequent transfers of lease ranging from white settlers to the Singh family and later to the Sheikh Fazal Ilahi Noordin Charitable Trust and that the settlers and their families continued occupying and utilizing portions of the land as their home.
7. Mr. Chege, the 1st Plaintiff in ELC 102 of 2008 stated in the Summons that around 1976, some of the long-standing occupants approached the then Minister for Lands seeking recognition of their occupation, and were allegedly advised to await expiry and renewal of the lease and that over the years, they have continued cultivating the land, maintaining homesteads and seeking regularization of their status

through correspondence with the Ministry of Lands, though without success. He added that in or about 2005, the Commissioner for Lands requested a list of squatters for purposes of allotment letters, which they forwarded, but no tangible outcome followed.

- 8.** The deponent explained that the Plaintiffs instituted the suit in 2008 after their attempts to secure renewal or formal recognition of their interests yielded no response; that he later discovered the existence of **Nairobi HCC Misc. No. 1531 of 2005**, in which Trustees of Sheikh Fazal Ilahi Noordin Charitable Trust had obtained orders relating to extension of the lease, and which the Plaintiffs unsuccessfully sought to set aside.
- 9.** The 1st Plaintiff also referred to **ELC No. 824 of 2012**, whose parties had an interest in the same parcel, prompting efforts to consolidate the matters so that all competing claims could be determined together.
- 10.** He maintained that the Plaintiffs and their families have lived on the land openly since colonial times and consider it their ancestral home. According to him, the parcel is presently registered in favour of the Permanent Secretary to the Treasury, although the circumstances leading to that registration are unclear.
- 11.** The 4th Defendant, the County Government of Nairobi vide a response to both the Amended Summons and Petition relied

on an affidavit sworn by David Oseko, the Director Legal Services on 23rd September, 2019. He deponed that the issues in the Amended Summons and Petition are *res judicata* on account of the decisions in **Nairobi High Court Misc 1531 of 2005(OS)-Abdul Waheed Sheikh & Anor vs Commissioner of Lands** delivered on 18th May, 2012 and in **Abdul Waheed Sheikh & Anor vs National Land Commission [2017] eKLR** delivered on 28th February, 2017 all affirming that the 5th Respondent is the legitimate owner of the suit property.

12. He stated that the Plaintiff's attempts to be enjoined in the proceedings of **Nairobi High Court Misc 1531 of 2005(OS)-Abdul Waheed Sheikh & Anor vs Commissioner of Lands** were unsuccessful their Motion in this respect being dismissed vide a Ruling of 6th July, 2013.
13. In response, the 5th Respondent, through Mr Abdul Waheed Sheikh, swore a replying affidavit on 16th May, 2016. He deponed that the Summons are frivolous, misconceived and an abuse of the court process. He averred that the Plaintiffs had initially pursued a claim for adverse possession against the government contrary to **Section 41** of the **Limitations of Actions Act**.
14. He deponed that the Amended Originating Summons is an attempt to invite this court to reverse the judgment in **Nairobi HCC Misc. No. 1531 of 2005**, issued on the 18th May, 2012 which judgment, conclusively determined

ownership of the suit property and that attempts by the Plaintiffs to be joined as interested parties in the aforesaid suit was dismissed. It was contended that any challenge to the said judgment lies within the appeal court.

15. Further, it is the 5th Respondent's case that the Plaintiffs lack *locus standi* to institute or prosecute the Amended Originating Summons in light of the uncontroverted evidence arising from earlier litigation. Equally, that the Plaintiffs failed to make full and frank disclosure of material facts, including the existence of earlier orders and proceedings affecting the suit land.
16. It was contended that the Plaintiffs conduct amounts to an abuse of the court process through deliberate concealment and misrepresentation of material facts; that the Plaintiffs allegedly misled the court by stating that the present Summons were filed after discovering inaction by government offices, while omitting the existence and outcome of **Nairobi HCC Misc. No. 1531 of 2005** and that the Plaintiffs repeatedly made false statements on oath despite earlier judicial findings by Lenaola J (as he then was) and deceptively downplayed an unsuccessful attempt to set aside that judgment.
17. According to Mr Waheed, the Plaintiffs are attempting to rely on alleged historical occupation while concealing the fact that the land had been the subject of various transactions and court orders, including reconstruction of land records

following destruction of files. He maintained that the property in issue is L.R. No. 209/193 (now Nairobi Block 37/63) and that historical dealings concerning the land, including Gazette Notices and administrative actions, had already been scrutinized in previous litigation.

- 18.** According to the deponent, the property has been held in the name of the successive Trustees of the Trust for an uninterrupted period since 1943 notwithstanding changes in the identity of the successive Trustees, and that the provision of **Sec. 98(7) Land Registration Act 2012** is quite explicit and clear that no easement and no right in the nature of an easement shall be capable of being acquired by any presumption of a Grant from long and un-interrupted use.
- 19.** The 5th Respondent asserted that Umoja City Self Help Group was initially registered on 20th March 2003 under the Ministry of Gender, Sports, Culture and Social Services (Nairobi Province, Highridge Ward, Westlands Division) as a Harambee self-help entity supervised by the Provincial Director of Social Services, with authority limited to social development activities.
- 20.** He asserted that the group's authorised objectives do not extend to acquisition of private land through adverse possession, which he termed *ultra vires* its registration mandate. He further deponed that David Kihara Chege had not produced any approval or consent from the Provincial Director of Social Services authorising the filing of the

present summons against the Government, a claim said to offend **Section 41** of the **Limitation of Actions Act**.

- 21.** Additionally, he contended that the proceedings are incurably defective for lack of locus standi, as the Plaintiffs failed to comply with **Order 1 Rule 8 (2)** of the **Civil Procedure Rules** governing representative suits.
- 22.** He averred that the purported squatters had never acquired any easement, leasehold or proprietary interest capable of sustaining the claims advanced in the Amended Originating Summons, emphasizing that any colonial lease previously existing had expired and that subsequent dealings with the property were governed by lawful administrative and judicial processes.
- 23.** The 5th Respondent explained that attempts by certain individuals, including David Kahara Chege, to assert rights over the land are unsupported by lawful title and were accompanied by actions intended to mislead public authorities. He stated that administrative officers and security agencies have been compelled to intervene following reports of unlawful entry, construction of temporary structures and disturbance of the property.
- 24.** He maintained that the Plaintiffs and associated groups have failed to provide credible evidence to demonstrate continuous, exclusive or lawful occupation necessary to sustain claims of adverse possession, and that the alleged

occupation consisted of sporadic encroachments rather than settled possession and that in Criminal case number 3286 of 2010-Kibera Law Courts vs Simon Njoroge, Mr Chege admitted to not being in possession of any party of the suit property.

- 25.** He further averred that the Plaintiffs' pleadings were inconsistent and contradictory, particularly in seeking both constitutional reliefs and orders grounded in adverse possession, thereby demonstrating lack of a coherent cause of action.
- 26.** The 5th Respondent through Mr. William Rasowo swore a supplementary affidavit on the 18th June, 2018. He deponed that since about the year 2004, he has been employed by the Trustees of Sheikh Fazal Ilachi Noordin Charitable Trust (SFINCT) as a caretaker and security manager over L.R. No. 209/193 Pangani, Nairobi (formerly L.R. No. 37/63), a property situated adjacent to City Park.
- 27.** He stated that his duties include safeguarding the land against intruders and managing overall security operations. In the course of performing these duties, he registered a business name known as Rasamco Security Services under which he provides professional guarding services on the property twenty-four hours a day throughout the week, including recruiting, training and supervising guards.

- 28.** He deposed that normally, at least two guards are deployed during the day and two at night, although the number would be increased to seven or eight depending on prevailing security alerts or national events. He averred that he undertook his work under the supervision of the Trustees, Abdul Waheed Sheikh and Abdul Hameed Sheikh, who were readily accessible to receive updates or to adjust the level of security whenever necessary.
- 29.** According to Mr Rasowo, upon assuming his duties in 2004, he found approximately sixty to seventy persons living on the farm as tenants, all of whom were known to him through long interaction exceeding fourteen years and that on the property stood an old timber-concrete mabati farmhouse comprising six rooms belonging to the Trust, which he used between 2004 and 2012 as an office where he kept security equipment such as batons, boots, raincoats and uniforms.
- 30.** He stated that from reliable information provided by former employees, the farmhouse has existed since the 1940s and was already on the land when the Trust acquired it. He also recalled incidents of vandalism during construction of a perimeter fence intended to secure the property with barbed wire.
- 31.** Mr. Rasowo deponed that around 2010 he was approached by a tenant's son, Patrick Njoroge, together with his mother Wanjiku Njoroge, alleging that an intruder known as David

Kahara Chege had come from Mathare Village and accused Patrick of stealing iron sheets from a mabati house.

- 32.** He stated that he confronted the said David Kahara Chege, introduced himself as the caretaker, and warned him that no strangers were permitted onto the Trust's property or to assert ownership rights through dubious means. Notwithstanding the warning, David Kahara Chege allegedly lodged a criminal complaint against Patrick Njoroge at Kibera Criminal Law Courts.
- 33.** Mr. Rasowo deponed that the complaint was later withdrawn after investigations and after Abdul Hameed Sheikh recorded a witness statement, with the court being informed that the allegations were false and misleading. Following the withdrawal, their advocate, Mr. Gatheru Gathemia, was instructed by the Trustees to inquire further into what they described as deceptive schemes by the intruder.
- 34.** He further stated that in 2013 he observed David Kahara Chege bringing iron sheets onto the property and attempting to seal open spaces in the farmhouse while claiming ancestral ownership. Acting on instructions from the Trustees, he reported the matter to Parklands Police Station and the Parklands District Officer's office and obtained written warning letters from their advocate requiring David Kahara Chege to desist from illegal activities. According to Mr. Rasowo, the intruder was summoned on several

occasions by the OCS and District Officer and warned against trespassing or interfering with the farmhouse.

- 35.** He deponed that on 6th September 2013, David Kahara Chege allegedly returned accompanied by a group of about sixteen-to-twenty-armed youths who forcibly destroyed padlocks installed on the farmhouse and chased him away, prompting him to hide in nearby bushes for safety while the group ransacked the premises. Immediately thereafter, he reported the incident to Trustee Abdul Hameed Sheikh, and together with their advocate they visited the scene where mattresses and blankets had been placed in one of the rooms by the alleged intruder.
- 36.** The matter was subsequently reported to the DCIO's office in Gigiri, where statements were recorded and police officers dispatched to verify the facts. Following investigations, the DCIO advised that authority be sought from the Director of Public Prosecutions to charge David Kahara Chege, leading to his arrest and arraignment in **Criminal Case No. 1681 of 2015** at the City Court, Nairobi, which Mr. Rasowo stated was still ongoing.
- 37.** Mr. Rasowo further averred that David Kahara Chege had circulated to authorities a purported list of 251 persons whom he claimed to represent as occupants of the land. He maintained that inquiries conducted in the presence of Trustee Abdul Hameed Sheikh revealed that many of the alleged tenants denied executing any such document. He

added that he had never encountered the said persons, including those purportedly associated with “Umoja City Self Help Group (Kwa Njoroge Village Residents),” and insisted that none of those individuals had ever occupied the suit property.

- 38.** In his view, the list is fictitious and intended to create the false impression that the intruder represented a large group of claimants, whereas in truth David Kahara Chege is the sole trespasser who forcefully entered the farmhouse in 2013.
- 39.** He further deponed that investigators had discovered that David Kahara Chege and his family resided in Mathare Village and that he had been collecting money from unsuspecting third parties under false pretenses by promising to settle them on the land as internally displaced persons or landless persons.
- 40.** Mr. David Kahara Chege swore a further affidavit on 12th September, 2018. He reiterated that the suit property is a colonial-era parcel whose main lease remained vested in the Colonial Master and was only sub-let to Asian occupants, with the land intended to revert to the Government upon expiry of the lease.
- 41.** He stated that the said occupants had sold their interest to Mohammed Abdulle Ahmed for Kshs. 20,000,000 on 20th November 1998, contending that the purchaser could only

have acquired a sub-lease and that during the pendency of the suit, the purchaser allegedly gazetted the reconstruction of a lost or destroyed land register through Gazette Notice No. 7154 dated 31st May 2013, which he asserted demonstrated that the prior holders had no remaining interest in the land.

- 42.** He further deponed that despite disposing of their interest in 1998, the former holders instituted ex parte proceedings in 2005 without involving squatters on the ground or disclosing the earlier sale, thereby obtaining a judgment that could not be executed due to existing suits against the same defendants.
- 43.** He added that after consolidation of the matters, they approached the National Land Commission with the ex parte judgment without disclosing the consolidation or ongoing proceedings, and allegedly induced the Commission to attempt issuance of a lease, an effort that ultimately failed, as evidenced by the Commission's letter dated 19th June 2017.
- 44.** He further deponed that the formation and registration of the Self-Help Group known as "Kwa Njoroge Village" and later "Umoja Self Help Group" was lawful and encouraged by the government policy of promoting community registration. He stated that members formed the Self-Help Group voluntarily and that he became its chairman with the consent of the members.

- 45.** He explained that the suit was filed on behalf of village dwellers through the Self-Help Group and not through the Provincial Director of Social Services because the claim related to squatters residing on land whose colonial lease had expired. He asserted that families living in Kwa Njoroge Village had occupied and depended on the land from time immemorial and that their wellbeing was tied to continued residence thereon.
- 46.** Mr. Chege also averred that earlier High Court proceedings, particularly **Nairobi HCC Misc. No. 1531 of 2005**, were conducted without involvement of the squatters despite their occupation of the land. He maintained that colonial squatters and their descendants had continuously resided on the land through dwelling and farming, and that the 5th Respondent had not physically occupied or utilized the land.
- 47.** He further claimed that any purported sale of interests in 1998 to Mohammed Abdulle Ahmed and subsequent attempts at reconstruction of records through Gazette Notice No. 7154 of 31st May 2013 demonstrated that the earlier claimants acted fraudulently and attempted to obtain ex parte orders without involving persons actually on the ground.
- 48.** In response to allegations made against him personally, Mr. Chege denied the same terming the accusations as untrue and defamatory, asserting that they were intended to

intimidate him as chairman of the squatters. He stated that advocates acting for interested parties had written to government security agencies seeking his arrest despite lack of a valid cause of action, and that administrative officer's familiar with the area recognized him as a village elder, a fact supported by letters dated 5th December, 2013 and 23rd March, 2015.

- 49.** He maintained that criminal proceedings brought against him were instigated through improper means and were ongoing in the lower courts, emphasizing that he remained innocent until proven guilty. He further argued that trespass allegations could only arise from a registered owner with valid title and that any ex parte judgment relied upon by the complainants had been obtained without full disclosure of facts.
- 50.** He further averred that public feasibility reports, including an Athi Water Services Board study identifying Kwa Njoroge Village as an informal settlement, demonstrated the longstanding presence of residents. He also referred to letters from local administration officers indicating that disputes on the ground contradicted Mr. Rasowo's narrative, and asserted that criminal proceedings cited against him could be verified from court records which showed that accusations had been withdrawn or lacked merit.
- 51.** Mr. Duncan Andenga, swore an affidavit dated 15th December, 2022. He averred that he was instructed by

Umoja City Self Help Group (Kwa Njoroge Village Residents), to obtain, analyse and produce high-resolution satellite imagery of the suit property, L.R. No. 209/193 (now Nairobi Block 37/63), from the earliest available records.

- 52.** He deposed that he realized that he could only obtain the same from Google Earth Maps program on Google Earth Pro, a mapping program that generates a three-dimensional representation of the earth using satellite images, aerial photography and GIS data.
- 53.** According to him, the available satellite imagery covered the period from 2003 to 2022. He explained that his analysis of the images revealed consistent and organized farming and cultivation of the land throughout the period under review, 2003-2022 evidenced by demarcated farming plots, seasonal clearing and regrowth of vegetation.
- 54.** He observed that between 2003 and 2017, there are views of pre-existing building structures for the two squatter villages; that the existing structures appear to be old given the faded top roofs as viewed by google maps program and that there appears to be no new structures within two villages for the period 2003 to 2017.
- 55.** According to Mr. Duncan Andenga, in 2012, approximately 25 to 30 circular structures appeared on the lower side of the property, which he identified as an Administration Police base camp, and that between 2012 and 2017 only minor

extensions and replacement roofing on existing structures were visible.

- 56.** He also deponed that satellite imagery showed a road construction beginning around 2017 and appearing to stall by 2020, alongside a reduction of cultivation on the upper section of the property. He stated that from 2019 to 2022, two new structures appeared outside the two main squatter villages, primarily through densification within the existing squatter villages rather than expansion into new areas, with only two isolated structures emerging within farming zones.
- 57.** He stated that his conclusion from the foregoing analysis of the images in respect of the suit property L.R. No. 209/193, now Nairobi Block 37/63, is that from the year 2003 to 2022, there has been consistent farming and cultivation of the suit property yearly in an orderly demarcated plot. In terms of structures development on the suit property, he stated that from 2003 to 2017, the squatters have not developed any new structures, and that the only new houses are from 2012 being the A.P Base Pangani Camp built by the government.
- 58.** He deposed that squatters residing on L.R. No. 209/193 between 2003 and 2022, as discerned from the Google imagery, appear to have established an organised settlement pattern, with no evidence of haphazard or uncontrolled expansion beyond their original dwelling zones and that the observable increase in structural density between 2019 and 2022 is confined to a relatively small cluster, approximately

50 metres in radius, situated near the central-eastern portion of the suit property.

- 59.** It is his case that the remainder of the suit property has been in active farming and cultivation by the squatters and that the squatters have also maintained indigenous trees around their residential structures and in the rest of farm land.
- 60.** In response to Mr. Andenga above, Mr. Abdul Waheed Sheikh vide the affidavit of 11th January, 2023 deponed that according to him, save for the image for the year 2003, the remaining images were substantially similar to those earlier produced by Kennedy Muendo on behalf of the Interested Parties.
- 61.** He averred that a comparison of the satellite imagery corroborated the Interested Parties' position, demonstrating gradual and haphazard development of tin structures over time, particularly from 2018 to 2022, concentrated within a limited area along the eastern boundary of the suit property abutting the Nairobi-Thika Highway. He maintained that the imagery shows steady encroachment over the years but also evidences continuous cultivation of the land, which he asserted was consistent with the lessees' covenant to maintain the property in cultivation.
- 62.** He further deponed that there was no contradiction between the satellite evidence produced by the respective parties, emphasizing that the structures identified in earlier images

represented original farmhouses, staff quarters, stores and related amenities dating back to historical developments approved in 1922, 1939 and 1944. In his view, these were wrongly described as “squatters’ structures,” as they were used to accommodate farm workers and security personnel engaged in maintaining the property in accordance with the lease.

- 63.** He added that between 2012 and 2017 no significant new permanent developments arose, save for temporary Administration Police tin huts erected on the eastern side of the property. He disputed portions of Duncan Andenga’s affidavit, asserting that the images showed gradual densification of tin structures only from around 2012 onwards and that encroachment between 2019 and 2022 remained confined to a small zone of the land, with the remainder of the approximately 44-acre property remaining largely free of new dwelling structures.
- 64.** Finally, he stated that satellite imagery alone could not substantiate claims of longstanding “colonial squatters,” maintaining that visible encroachment only emerged in recent years.

ELC Petition 824 of 2012

- 65.** Vide an Amended Petition dated 30th August, 2012, the Petitioner seeks the following reliefs:

- i. A declaration that the allotment of the parcel of land to the Petitioner, accepting, approving, and receiving the stand premium and land rent amounting to Kshs 2.8 million and refusing to grant the applicant the land was done in contravention of Article 40(3) of the Constitution.**
- ii. A declaration that the acquisition of the land by the Ministry of Finance and not the Ministry of Lands and later transferred to the Ministry of Housing without following the laid down procedures continued occupation, retention and detention of the suit land by the Government through the Ministry of Housing is not procedural and is in contravention of Article 40(3) of the Constitution.**
- iii. A declaration that the actions of the Permanent Secretary, Ministry of Lands in transferring the land to the Permanent Secretary Ministry of Finance was done in contravention of Article 40(3) and 57 of the Constitution and the title issued as Nairobi Block 37/63 be revoked.**
- iv. A declaration that the extension of lease to Sheikh Fazal Ilachi Noordin Charitable Trust is in contravention to the statutory requirement of registering an instrument of extension executed**

by lessor and lessee before the expiry of the term of the lease thus the lease to the trust ceased by operation of law.

- v. *A declaration that the Petitioner is entitled to the suit land and that the 3rd Respondents registers the grant issued on the 17th February, 2002 in respect of L.R 209/193 converted to Nairobi Block 37/63 be executed on behalf of the Petitioner.*
- vi. *That possession of the suit land be granted to the Petitioner and the title be executed on behalf of the Petitioner and in the alternative an order for the payment of Kshs 2, 050,000/= being approximated as the current value if the said 16/9HA with interest at prevailing commercial bank rates.*
- vii. *A declaration that the Respondents do pay mesne profits from the date of occupation until restoration.*
- viii. *A declaration that the detention of the Petitioners Director at Kilimani Police Station from 3rd July, 2003 is a violation of his fundamental right and freedom particularly Article 49(1)(g) and thus entitled to damages.*

- ix. ***A declaration that the respondents are liable to pay costs of this Petition and costs of the valuation of Kshs 6, 845, 300.00/=.***
- x. ***Any other reliefs that this court deems fit to grant***

66. The Petitioner, St Benjamin Memorial Clinic Supplies Limited, instituted the present Amended Petition alleging violation of its constitutional right to property in respect of L.R. No. 209/193, Nairobi.

67. According to the Petitioner, in 1997, it applied for allocation of L.R. No. 209/193, measuring approximately 16.59 hectares, through the Ministry of Lands and Settlement; that the Ministry processed and approved the application vide the letter of 16th April, 1997 and subsequently issued a letter of allotment dated 1st December, 1998 requiring payment of stand premium and annual rent.

68. The Petitioner avers that it complied fully with the allotment conditions, paying Kshs 2,301,217 on 14th February, 2003 and a further Kshs 488,155 on 1st April 2003; that a lease was thereafter prepared in the Petitioner's name and that before execution, its Director, Mr. Joseph Bungei, was arrested, detained for five days at Kilimani Police Station and later charged with forgery-related offences allegedly connected to the land file.

- 69.** In particular, it was deposed, Mr. Bongeji was accused of forging file number 244761 at the Ministry of Lands reference no 209/193; forging the grant for reference number 209/193 purporting to be a genuine grant for the suit property and attempting to obtain registration by false pretenses thereof in the names of St Benjamin Memorial Clinic Supplies Limited and that the detention violated his fundamental rights under **Article 49(1)** of the **Constitution**.
- 70.** According to the Petitioner, its Director was ultimately acquitted under **Section 215** of the **Criminal Procedure Code**, the court recognizing that he could not have prepared the whole land file and given it to the Ministry of Lands as alleged and that payment of approximately Kshs 2.8 million by the Petitioner was not disputed.
- 71.** Despite pending criminal proceedings and subsisting court orders barring dealings with the land, it was deposed by the Petitioner's Director that the Government, through the Ministry of Finance, allegedly proceeded to register the property in its own name. The Petitioner questions how registration occurred when the original file remained in CID custody pursuant to criminal court directions.
- 72.** It is further contended that the subsequent transfer of ownership between government departments without adherence to statutory procedures violated the Petitioner's constitutional right to property under **Article 40**.

- 73.** According to the Petitioner, Gazette Notice Vol. CIX No. 64 dated 28th September 2007 invited persons to object to part development plan PDP No. 42/15/2007/01 for a proposed civil servants housing scheme affecting the suit property. The Petitioner asserts that it learned that the property had had been acquired despite being the subject of ongoing litigation and despite the Ministry of Finance holding the original title.
- 74.** He deposed that as a consequence, the Petitioner repeatedly wrote to the Permanent Secretary, Ministry of Housing on 18th October 2007, 23rd October 2007 and 7th September 2009 objecting to the project and seeking approved plans and that the Ministry acknowledged receipt but declined to release the plans on grounds that they had not been approved. The Petitioner alleges continued occupation of the land by government agencies and administration police officers who allegedly barred access, actions said to violate its property rights.
- 75.** According to the Petitioner, the City Council of Nairobi issued demand notes for rates, the latest being Kshs 278,796,332 reduced after waiver to Kshs 35,380,858, and warned of possible auction should payment not be made. The Petitioner contends that this contradicts the Government's assertion that the land had been repossessed due to non-payment of rates by prior owners and that valuation done places the property at Kshs 50 million per acre, translating to an approximate total value of Kshs 2.05 billion.

76. The Petitioner maintains that it properly applied for allotment after the lapse of a previous lease to Sheikh Fazal Ilachi Noordin Charitable Trust, and further states that at the time of filing the Petition, it was unaware of the orders issued in Nairobi **HCC Misc. No. 1531 of 2005**.
77. The Petitioner also recounts that the High Court had ordered registration of the 5th Respondent as proprietor of the leasehold interest for 99 years from 16th July 2002 and that by that time, it already possessed its own allotment letter dated 1st December 1999 and had paid the requisite stand premium, facts allegedly not disclosed during the earlier proceedings, leading to orders it believes to be unenforceable.
78. The Petitioner further claims that the lease to the charitable trust had expired by effluxion of time; that the government's purported acquisition for civil servants' housing did not meet the definition of "public purpose," and that adverse possession claims by squatters in **Nairobi ELC 102 of 2008** are unsustainable. The Petitioner also alleges breach of trust conditions by failure to develop the land, which justified allocation to the Petitioner.
79. The Petitioner also relied on an affidavit sworn on 17th January 2006 by the then Commissioner of Lands Sammy, Silas Komora Mwita confirming execution of a grant in its favour. It asserts that the Government's continued

occupation and failure to consider it while holding its funds constitutes a violation of **Article 40** of the **Constitution**.

- 80.** The 4th Respondent opposed the Amended Petition vide grounds of opposition dated 31st August, 2012. It was deposed that the Petitioner was incorporated on 17th June 1998 and that the alleged approval of allotment vide the Permanent Secretary's letter dated 16th April, 1997 in respect of L.R. No. 209/193 was illegal and unlawful since the Petitioner was at that time a non-existent entity, a company being deemed to come into existence only upon incorporation, and therefore lacked capacity to apply for or own the suit property.
- 81.** It was further stated that the allotment letter expressly required payment of the requisite amount within thirty days, yet the Petitioner allegedly made payment on 30th May 2003, four years after the allotment and long after its expiry, meaning the only remedy available to the Petitioner would be a refund from the Commissioner of Lands and not a claim to the land itself.
- 82.** The 4th Respondent further averred that the alleged acquittal of the Petitioner's Director in **Criminal Case No. 1681 of 2003** is not proof that the land had been lawfully allocated to it, noting that criminal proceedings operate under a different standard of proof from civil matters and that the acquittal was therefore irrelevant to the determination of ownership.

- 83.** It was also contended that an allotment letter does not confer proprietary rights in land; that the contract purporting to transfer the suit land to the Petitioner was unsigned, and that the Petitioner admitted that the grant itself had not been signed.
- 84.** The County Government of Nairobi, the 4th Respondent further relied on the Government Lands Act then in force, asserting that all transactions concerning Government land required registration in the Government Lands Registry offices in Nairobi, and that the Petitioner had produced no evidence that any such transaction had been registered. It was further averred that title to land comprised in a grant is evidenced by issuance of a certificate of title and that no such certificate had been produced by the Petitioner.
- 85.** The 4th Respondent also challenged the authenticity of the title annexed as Exhibit B7, noting discrepancies including the acreage indicated as 19.03 hectares instead of 16.59 hectares and the fact that the title was signed on 17th February 2002 whereas the alleged stand premium payments were made in 2003, discrepancies said to confirm that the alleged title had been fraudulently obtained.
- 86.** It was further stated that the then Commissioner of Lands, Sammy Silas Komen Mwita, lacked lawful authority to execute any grant in respect of the suit property because at that time the Petitioner had neither accepted the allotment

nor made payment of the stand premium, which payments were only made around 30th January 2003.

- 87.** The 4th Respondent also averred that the Petitioner had failed to notify the 4th Respondent of any alleged change of ownership or transfer so as to enable adjustment of its records, and that no proof of any transfer had been provided.
- 88.** Further, it was contended that the Petitioner sought to mislead the court by alleging that administration police officers had been permanently stationed on the property to deny it access, leaving both the court and the 4th Respondent to speculate as to how the valuation relied upon by the Petitioner had been undertaken.
- 89.** The 4th Respondent further deponed that the affidavit sworn by Sammy Silas Komen Mwitwa was intended to mislead the court, particularly because it alleged that he signed the grant on 17th February, 2002 before payment had been made. It was further asserted that the Petitioner was not entitled to the claim of Kshs 2,050,000,000 or any return of L.R. No. 209/193 and that the Petitioner could not use the court to legitimize an otherwise illegal and irregular transaction aimed at depriving the public of prime public land. It was urged that the Petition is for dismissal.
- 90.** The 5th Respondent, through Mr. Abdul Hameed Sheikh, deponed that the consolidation of ELC No. 824 of 2012 with ELC No. 102 of 2008 was improperly obtained and had caused prejudice to the 5th Respondent by confusing and

conflating distinct causes of action and parties, thereby undermining proper adjudication of the issues in dispute.

- 91.** He referred to the ruling of Lenaola J (as he then was) in **Nairobi HCC Misc. No. 1531 of 2005** and maintained that the issues concerning ownership of the suit property were conclusively determined therein, rendering subsequent proceedings an abuse of the court process. He deponed that the Petitioner had improperly attempted to introduce additional parties, including the 5th and 6th Respondents, without leave of court.
- 92.** Mr. Sheikh further averred that the proceedings before this court were irregularly filed because the Petitioner had already filed a constitutional petition before the Constitutional and Human Rights Division, Petition No. 342 of 2012, and ought not to have instituted parallel proceedings. He contended that documents relied upon by the Petitioner in support of a purported letter of allotment are tainted by illegality, misrepresentation, deceit and fraud, and could not confer any lawful interest in the suit property.
- 93.** According to him, the land was not unalienated government land available for allotment as at 1st December 1998, and any suggestion to the contrary arose from erroneous information allegedly procured by the Petitioner in collusion with certain land officers.

- 94.** He deponed that the Trust was at all material times the lawful registered proprietor of L.R. No. 209/193, having acquired the interest originally through an assignment in 1943 and subsequently through renewal of a 99-year lease granted by the Commissioner of Lands.
- 95.** He stated that the Trust had remained in uninterrupted possession and occupation of the suit property from 1943 through successive trustees, save for recent acts of trespass and unlawful encroachment. He explained that by a letter dated 19th October 1998, the Commissioner of Lands approved renewal of the lease for a further 99-year term and that a letter of allotment dated 21st March 2003 was issued in favour of the Trustees by way of renewal of the lease, which offer he duly acknowledged and accepted.
- 96.** He maintained that the Trust had continued to exercise ownership, possession and control of the suit property, and questioned how the Petitioner's alleged allotment could have been implemented years after its purported lapse, noting that acceptance of the stand premium allegedly made on 14th February 2003 came long after the stipulated acceptance period.
- 97.** Mr. Sheikh also challenged the authenticity of the purported grant relied upon by the Petitioner, pointing out discrepancies in the grantee's name between "St. Benjamin Memorial Clinic Supplies" and "St. Benjamin Memorial Clinic Supplies Ltd," as well as irregularities relating to stamping,

registration dates and deed plan particulars, which in his view rendered the documents unreliable.

- 98.** He further asserted that the Petitioner had failed to distinguish between two separate legal entities bearing similar names, namely a business name registered in May 1998 and a limited liability company incorporated in June 1998, and that the confusion of identities undermined the credibility of the Petitioner's claim.
- 99.** He deponed that correspondence from the Senior Deputy Solicitor General in April 2012 confirmed the existence of a judgment delivered by Lenaola J. on 18th May 2012 directing that the suit property be registered in the name of the Trustees of Sheikh Fazal Ilachi Noordin Charitable Trust, and that the Petitioner had subsequently sought negotiations aimed at an amicable settlement, including a request for refund of the alleged stand premium. He further stated that the 2nd, 3rd and 6th Respondents had never been in possession of the suit property due to existing conservatory orders.
- 100.** Mr. Sheikh also addressed affidavits sworn by public officers, including the Registrar of Titles and survey officials, which he contended supported the Trust's lawful ownership and exposed inconsistencies in the Petitioner's documents. He maintained that attempts by David Kahara Chege and others to assert rights over the land were unfounded, and that any purported occupation by squatters arose from unlawful encroachment rather than legitimate entitlement.

Hearing and Evidence

- 101.** The matter proceeded for hearing on 6th June, 2022. PW1 was David Kihara Chege. He relied on his supporting affidavit and witness statement which accompanied the Originating summons as his evidence in chief and adduced the documents in the bundle as PEXHB1 which I have already summarised above.
- 102.** It was his evidence on cross-examination that he is not aware of any title given to Abdul Waheed Sheikh; that although they have sued Nairobi City Council, he has no problem with them and that he was aware of the judgment of Lenaola J which they did not appeal against. He denied having entered the property in 2013 or having been arrested for trespassing. He stated that he does not remember when Umoja City Self Help Group was registered.
- 103.** It was his further evidence on cross-examination that he has never filed a case with the National Land Commission; that he has no evidence to show that he was born on the land; that he does not know on which land his father was buried and that they have never been evicted from the land by the government.
- 104.** PW2 was Joshua Markinnie, an elected Councilor. He adopted his supplementary affidavit dated 12th September 2018 as his evidence-in-chief. In that affidavit, he testified that he moved to Westlands in 1976 and resided at Deep Sea

Village within the Highridge area and that he initially worked as a casual electrician until 1984 when he secured permanent employment as an electrician at MP Shah Hospital, where he served until his retirement in 2010.

- 105.** During his tenure at MP Shah Hospital, he became actively involved in politics and was elected the KANU Youth Leader in 1984, at a time when City Park Kwa Njoroje already existed; that he was subsequently re-elected in 1988 to the same position, serving until 1992; that in 1992, he was elected the Area Councillor for Westlands Constituency, which then comprised eight villages, and that together with Mr. Chege, they initiated the establishment of the open-air city market.
- 106.** PW2 stated in cross-examination that he does not know the registered owner of the land and the land did not fall within his area and that he does not know about Umoja Self Help Group or if David Kihara is a member of the group.
- 107.** In re-examination, he clarified that he led the entire group in his capacity as the Chairman of Youth Kenya in Westlands Sub-County, and that Kwa Njoroje Village fell within his area of mandate and responsibility as a KANU official.
- 108.** PW3 was Nobert Odowry, a former Councillor for Highridge Karura Ward, who adopted his supplementary affidavit sworn on 12th August 2018 as his evidence-in-chief. He testified that he began residing in Parklands in 1982 while working at

Parklands Sports Club. Following a by-election in Westlands Constituency in 1994, he became involved in local politics and familiarized himself with the villages within the Highridge area, namely Deep Sea, City Park Kwa Njoroge, Mji wa Huruma, Githongoro and Kwa Maasai.

109. He further stated that in 1998 he contested for the councilor position in the area but was unsuccessful, having been defeated by Mr. Njoroge. Between 2003 and 2007, although he did not hold a leadership position, he remained active on the ground and closely followed developments within the community and that during that period, David Chege continued to serve as the chairman of Kwa Njoroge and the chairman of the City Park Market.

110. It was his evidence that in the 2007 elections, PW3 was successfully elected, with Mr. Chege serving as his chief campaigner; that upon assuming office, Mr. Chege assisted him in identifying the area's needs, including the proposal to enhance security through the establishment of an Administration Police Camp, which remains in existence to date and has improved safety for both residents and road users. He denied the assertions contained in the affidavit of William Rasowo and maintained that David Chege was a well-known figure within the village.

111. It was his evidence in cross-examination that he was a resident of Kwa Njoroge but lived and worked at Parklands Sports Club. He stated that he did not know William and

testified that the land had previously belonged to a European settler.

112. He admitted that he did not know when David began residing in Kwa Njoroge, had never seen the title to the land, and was unaware of the registered proprietors. He also stated that he had no knowledge of the other suit involving the sheikhs.

113. During re-examination, he clarified that it was not possible for him to know every individual living in the village. He maintained that he had never heard of the Sheikhs and noted that they likewise did not know him despite his leadership role in the area. He added that he left Parklands Sports Club in 1999 and was testifying in his capacity as the area Councillor. He further stated that Self-Help Groups emerged more recently with the formation of co-operatives, and that the villages had come together primarily for development purposes.

114. PW4 was Duncan Andenga. He adopted the affidavit dated 15th December, 2022 as his evidence in chief. It was his evidence vide the affidavit that Information and Communication Technology is his area of expertise as a sales Consultant. He averred that he had carried out a high-resolution satellite imagery of the suit property, from the earliest available records on the Google Earth Maps programme up to the year 2022.

- 115.** It was his evidence that his analysis revealed that from the year 2003 to 2022, there has been consistent yearly farming and cultivation of the suit property in an orderly demarcated plot; that from 2003 to 2017, the squatters have not developed any new structures, but have always used pre-existing building structures and that the only new houses build are from 2012 being the A.P Base Pangani Camp built by the government.
- 116.** It was his evidence that other than the area stated above of 50 meters radius in occupation by the Squatters from 2003 to 2022 and 15 meters radius area in occupation by the A.P Base Pangani Camp from 2012, the remainder of the suit property has been in active farming and cultivation by the squatters, and that the squatters have also maintained indigenous trees around their residential structures and in the rest of farm land.
- 117.** It was his evidence in cross-examination that he was engaged by Umoja Self Help Group to provide pictorial representations of the disputed property covering the period between 2003 and 2022, pursuant to verbal instructions allegedly issued by the group's Chairman. He conceded, however, that no documentation had been produced to demonstrate his professional qualifications, and further acknowledged that the photographs relied upon were sourced from Google Maps.

118. PW5 was Joseph Bungei, a director of the Petitioner, who relied on the Petition dated 30th August 2013 as his evidence-in-chief and produced the annexures attached to the initial Petition as Petitioners Exhibit 1. He testified that the annexures initially referenced L.R. No. 209/193, which is now known as Block 37/63. His evidence has already been summarised above.

119. According to him, the Petitioner seeks the issuance of a title deed following allocation of the land and payment of the requisite premiums, which he stated were settled on two separate occasions. He further testified that he was arrested by officers from the Directorate of Criminal Investigations (DCI) and subsequently charged, after which he moved to court to assert his claim to both the land and the title deed.

120. He explained that the Trust is similarly laying claim to the same property and that, although he testified as a state witness in the related criminal proceedings, he has consistently maintained his own proprietary interest in the land. He stated that his grant constituted a fresh allocation issued upon the expiry of a previous lease, which the Trust had sought to renew. According to him, he lodged applications for the land twice, in 2010 and 2012, although his initial application had been made on 16th April 1997.

121. He testified that the application was approved by the Permanent Secretary, culminating in the issuance of a letter of allotment. He further stated that he effected payments

through a banker's cheque, following which the lease was prepared, and that he was ultimately acquitted in the criminal proceedings.

122. During cross-examination, PW5 stated that the land has not been allocated to him and that he did not hold a title deed; that he later learnt that the lease over the property had expired, although he was unsure when it had originally been issued.

123. He testified that when he applied for the land, there existed a very old house on the property, which remains to date; that he spoke to one of the occupants of that house, who informed him that he was an employee of the Asian owner of the land and that Mr. Onyango from the Ministry advised him that processing of his title would not proceed until the mother title was obtained, and confirmed that he was never issued with a grant.

124. PW5 conceded that he had no documentary proof to demonstrate his directorship of the Petitioner. He testified that the JBL document reflected an acreage of 19.03 acres, which differed from the acreage stated in the letter of allotment. He denied authoring any letter seeking compensation.

125. In re-examination, PW5 explained that the land had been advertised on the Nairobi City Council public notice board, from which he selected it in 1997. He testified that he was

subsequently issued with a letter of allotment and paid Kshs 2.3 million, an amount higher than Kshs 2.1 million due to accrued penalties.

126. He added that the original title remained with the Abduk Waheed Trust and clarified that he was not making any claim against the Trust but was pursuing his claim against the Government for allocation of the land. He emphasised that his interest was in obtaining the land rather than monetary compensation. He confirmed that he was not a party to the case before Lenaola J although he became aware of it in 2012 and had instructed his advocates to pursue steps towards setting it aside.

127. DW1 was Abdul Waheed Sheikh, an Advocate of the High Court admitted to the Bar in 1960. He adopted his replying affidavit sworn on 16th May 2015 as his evidence-in-chief. He testified that he is a trustee of the Sheikh Fazal Trust and is familiar with the Plaintiff in ELC No. 102 of 2008.

128. DW1 referred the court to the Judgment of Lenaola J dated 8th May 2012, together with the order directing the Registrar of Titles to register the lease, which he stated had been duly complied with. According to him, the Trust holds the grant for the renewed lease.

129. He further referred to the ruling delivered on 6th June, 2012 **Nairobi HCC Misc. No. 1531 of 2005** in which the present Plaintiff had sought to be enjoined in the proceedings. The

court, he stated, found no basis for such joinder, and he maintained that the Judgment of Lenaola J. has never been set aside.

130. During cross-examination, DW1 conceded that the Trust Deed had not been produced before the court and that he had no documentary proof evidencing his trusteeship. He testified that the land was converted into Nairobi Block 37/63 in September 2005, and that the Judgment was issued on 18th May 2012.

131. He explained that the property had previously been registered under the Government Lands Act and that Block 37/63 represents the new registration. He stated that the Trust has always maintained physical possession through security personnel and that although they do not reside on the land, they remain its owners. He further alleged that the indenture relied upon by the opposing party was forged and had never been signed by Ahmed. He added that there exists a grant in favour of the Trust and that he holds the certificate of lease.

132. DW1 testified that the land was not allocated to the Trust but was originally purchased by his father. The lease, he stated, was due to expire in 2002, and the Trust applied for its extension prior to its expiry. He conceded, however, that the initial letter seeking extension of the lease was not included in the bundle of documents before court, and maintained that

the relevant proceedings and correspondence are contained within the judicial review record.

- 133.** He further stated that they were aware of St Benjamin, who also claimed to have been allocated the land. According to him, **Nairobi HCC Misc. No. 1531 of 2005** was instituted after a title was issued in the name of the Ministry of Lands while the Trust awaited extension of its lease. He maintained that the Judgment of Lenaola J (as he then was) was executed, resulting in the issuance of a certificate of lease, although he added that the certificate of lease had not been adduced.
- 134.** DW2 was Kennedy Muondo, an employee of the Trust practicing computer science. He adopted his affidavit dated 29th September, 2022 as his evidence in chief. It was his evidence that he was instructed by the said 5th Respondent to research, secure, analyse and produce high-resolution satellite images covering the period between the years 2004 and 2022 relating to property L.R. No. 209/193.
- 135.** In compliance with those instructions, he produced a bundle of images collectively marked “KM1,” comprising satellite imagery for the years 2004, 2006, 2007, 2009, 2011, 2012, 2013, 2015, 2017, 2019, 2020, 2021 and 2022.
- 136.** DW2 explained that the images were obtained from Google Earth, which partners with Maxar Technologies, a United States-based satellite imaging company that maintains

topographical surveys of the earth, and that the images carried a spatial resolution of approximately 50-60 metres. From his analysis of the imagery spanning 2004 to 2022, he observed gradual development of building structures on the suit property over time when comparing earlier images with more recent ones.

137. He noted that in 2007, only a few structures were visible compared to the image for the year 2009. By the year 2012, approximately twenty-five to thirty building structures, some appearing circular in shape, had emerged on the eastern side of the property.

138. DW2 further testified that between 2012 and 2015, there were minimal development changes as reflected in the imagery for that period, but from 2015 to 2018 several new tin-roofed shanty structures appeared, particularly within the middle section of the land.

139. According to DW2, between 2018 and 2020, there was further densification with numerous additional tin shanties constructed in already built-up sections, and that roughly, ten more such structures appeared between 2020 and 2022 on the eastern side of the property. He emphasized that save for two main farmhouses and staff quarters, there was no single building structure visible on the property as at the year 2007, a fact he stated was evident from the satellite imagery for that year.

140.Based on his analysis, he concluded that prior to 2007, development on the property was minimal, consisting mainly of two farmhouses and adjacent staff quarters together with stores and amenities. Thereafter, between 2009 and 2012, numerous new haphazard and rampant shanty structures were erected, including about twenty-five to thirty identical circular huts resembling PWD-type rondavels on the eastern side as seen in the 2012 imagery.

141.He further stated that many new shanty structures of varying types, shapes and sizes appeared to have been constructed between 2018 and 2022, demonstrating progressive encroachment onto Block 37/63 and the adjoining Block 37/62; that these structures were concentrated within an approximate radius of 100 metres along the eastern boundary of the property abutting the Nairobi-Thika Highway and that he has referenced google maps which start in 2004 because of clarity.

142.DW3 was Edwin Munoko Wafula, a principal land registrar, Chuka. He adduced into evidence his affidavit sworn on 12th September, 2019 as his evidence in chief. It was his evidence that the Plaintiffs' claim premised on the status of "colonial squatters" had no legal basis.

143.According to him, official records indicated that L.R. No. 209/193 had been leased to the Trustees of Sheikh Fazal Ilahi Noordin Charitable Trust for a term of ninety-nine years from 1st January 1902 for agricultural purposes, and that the

lease expired on 31st December 2001. He further stated that although an application for extension of the lease had been processed in 1989, no new grant was ever issued or registered in favour of the trustees.

144. DW3 also testified that the property, measuring approximately 44.13 acres and situated in Pangani along Mathare River, had for a long period remained undeveloped to the satisfaction of the Commissioner of Lands; despite the issue of development of the suit property having been approved by the town planning committee of the City Council as early as 26th May, 1953.

145. DW3 stated that up to date, no meaningful development proposal has been given; that this has allowed squatters to settle there and establish what became known as Kwa Njoroge village; that upon expiry and forfeiture of the lease for breach of special conditions, the land reverted to the Government, and that the Commissioner of Lands was under no obligation to renew the lease.

146. He further stated that the trustees had previously pursued litigation culminating in a judgment delivered on 18th May 2012 directing registration of the trustees as proprietors, and that subsequent attempts by the Plaintiffs to challenge those orders were dismissed. It was his evidence that in **Nairobi Constitutional Petition no 396 of 2016-Abdul Waheed Sheikh vs National Land Commission**, the court

held that the judgment and decree dated 18th May, 2012 determined the rights of the Petitioners over L.R 209/193.

147. DW3 maintained that, in light of those existing decisions and the material before the court, there was no legal basis for the reliefs sought in the Amended Originating Summons, as the present court cannot sit on appeal over judgments issued by courts of concurrent jurisdiction

148. In cross-examination, he testified that the lease was not available in their records and that he had not come across any records relating to Mr. and Mrs. F.B. Mayer. He further stated that he had not seen any requests for allocation of the land in question, noting that applications for renewal of leases are ordinarily made by way of a standard letter.

149. DW3 conceded that he did not investigate why any such requests may not have been complied with, neither did he know why the Ministry failed to review the lease following the Judgment. He confirmed that he had never visited the land and was therefore unaware of which party was in possession. According to him, the lease lapsed on 31st December 2001, although he did not know when the Trust applied for its renewal.

150. During re-examination, he clarified that lease renewals are presently undertaken by the National Land Commission, whereas at the material time, it is the Commissioner of Lands who was responsible for extending leases. He stated that he

had never worked in the Office of the Commissioner of Lands and had never encountered a lease in favour of Meyer.

Submissions

- 151.** The Plaintiff filed written submissions dated 2nd May 2025. Counsel submitted that the Plaintiffs have led credible evidence to show that their forefathers had occupied the land since colonial times, and that the original colonial lease was for 99 years from 1902, lapsing in 2001.
- 152.** Counsel argued that the Plaintiffs have established homes on the land, raised families there, and their occupation in what is commonly referred to as “Kwa Njoroge” village was confirmed by two long-serving area councilors whose testimony, was uncontroverted.
- 153.** According to Counsel, upon expiry of the colonial lease, the land reverted to the Government and became public land, and that as explained in **Sehmi & another vs Tarabana Company Limited & 5 others (Petition E033 of 2023) [2025] KESC 21 (KLR) (11 April 2025)**, the Plaintiffs’ long, open and notorious occupation entitles them to the right to accessible and adequate housing under **Article 43(1)(b) of the Constitution**. Reliance was placed on **Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae) (Petition 3 of 2018) [2021] KESC 34 (KLR)**.

154. As to whether the 5th Respondent was entitled to the suit property, Counsel argued in the negative, asserting that **Nairobi HCC Misc. No. 1531 of 2005** was prosecuted *ex parte* despite the Trust knowing of the Plaintiffs' continuous occupation. They relied on *Okiya Omtatah Okoiti vs Joseph Kinyua & 2 others [2018] eKLR* and *R vs Kensington Income Tax Commissioners ex parte [1917] 1 KB 486* for the principle that an *ex parte* applicant must make full and frank disclosure, failing which any advantage obtained may be set aside.

155. Secondly, Counsel argued that the judgment in **Nairobi HCC Misc. No. 1531 of 2005** related to L.R. No. 209/193 which, by 9th September 2005, had ceased to exist upon conversion to Nairobi/Block 37/63, with registration in favour of the Permanent Secretary to the Treasury, and therefore the judgment was incapable of execution. He further challenged the process of allocation of Government land, relying on *Dina Management Limited vs County Government of Mombasa & 5 others (Petition No. 8 (E010) of 2021) [2023] KESC 30 (KLR)* on the requirements of PDPs, letters of allotment and compliance before issuance of title.

156. Counsel also questioned the locus and authority of Abdul Hameed Sheikh to act on behalf of the Trust, contending that he produced no documents showing he was a trustee or otherwise authorized. In the alternative, it was urged that the Trust had relinquished its interest through sale, citing an

indenture dated 20th November 1998 and Gazette Notice No. 7154, and relying again on **Sehmi & another vs Tarabana Company Limited & 5 others** (*supra*) for the principle that a leaseholder remains a lessee until disposal of the estate.

157. Counsel further invoked the doctrine of *lis pendens*, arguing that a certificate of title procured during the pendency of the suit was irregular and offended the principle. He relied on several authorities including **Shivji Naran Virji v Oglia Jemeli Barngetuny [2021] eKLR, Ruth Kinyua vs Patrick Thuita Gachure & another [2015] eKLR, and Bellamy v Sabine [1857] 1 De J 566,** as well as **Bernadette Wangare Muriu v NSSF Board of Trustees & 2 others [2012] eKLR.**

158. On reliefs, Counsel urged the court to grant the orders in favour of the Plaintiffs under **Section 38** of the **Limitation of Actions Act** registering them as proprietors, or in the alternative order allocation of the land or compensation, arguing that they are the only longstanding occupants and have utilized the land for their livelihoods.

159. In its submissions, the Petitioner's counsel contends that the Petitioner acquired a legally enforceable interest in L.R No. 209/193 (now Nairobi Block 37/63) following allocation through a letter of allotment dated 1st December 1998, which it accepted and complied with by paying approximately Kshs 2.8 million in stand premium and related charges.

- 160.** Counsel argued that the allocation process had reached an advanced stage, with registration being the only outstanding step, and maintained that fulfillment of the allotment conditions crystallised the Petitioner's proprietary rights.
- 161.** It was further contended that without notice to the Petitioner, and while the allotment remained subsisting, the Commissioner of Lands and the Minister for Lands, Housing and Settlement irregularly purported to allocate the same property to the Permanent Secretary to the Treasury.
- 162.** Counsel argued that the land was no longer available for reallocation once the Petitioner had complied with the terms of allotment. Reliance was placed on ***Republic vs City Council of Nairobi & 3 Others [2014] eKLR***, where Odunga J (as he was then) observed that once land is allotted and conditions met, it is no longer available for fresh allocation unless the first allotment is lawfully cancelled.
- 163.** Counsel also cited ***Mbau Saw Mills Ltd vs Attorney General (for and on behalf of the Commissioner of Lands) & 2 Others [2014] eKLR*** for the proposition that an allotment letter may confer enforceable rights where acceptance and payment of the stand premium are demonstrated.
- 164.** Counsel submitted that the Trust's allotment lapsed due to non-compliance with the stipulated conditions, particularly the failure to pay the required stand premium within thirty

days. Counsel maintained that the Petitioner's allotment preceded that of the Trust and therefore enjoyed priority. Relying on **Section 23** of the **Registration of Titles Act (repealed)**, it was submitted that a registered title may be impeached where procured through fraud, illegality, or procedural impropriety.

165. In addition, the Petitioner pointed to what it described as historical irregularities in transfers affecting the parcel between 1913 and 1988 and questioned the authenticity of certain indentures and administrative processes leading to renewal of the lease. It was argued that the Trust had failed to surrender original titles despite demands by the Ministry of Lands and had instead relied on photocopied documents contained in a temporary file.

166. Further, it was contended that the extension process allegedly commenced through a letter dated 19th October 1998 was irregular as it was not copied to key planning and survey authorities. The Petitioner argued that the sequence of preparation of a deed plan prior to completion of statutory steps such as indent and survey demonstrated an unprocedural process. These matters, counsel submitted, supported a finding that the Trust's title was procured through a corrupt scheme.

167. With respect to the claims by the Plaintiffs in ELC No. 102 of 2008, Counsel argued that the alleged squatters had not demonstrated any application for allocation, lawful

occupation, or evidence capable of sustaining a claim for adverse possession. It was submitted that the Plaintiffs neither held documentary proof of entitlement nor satisfied the legal thresholds required under the law governing adverse possession.

168. Counsel urged the court to find that the Petitioner is the lawful owner of the suit property and that the Trust's title should be revoked. The Court was accordingly invited to allow the Petition, dismiss the Plaintiffs' suit, and award costs to the Petitioner.

169. The 5th Respondent filed submissions on 20th February 2026. Counsel submitted that the land was never available for allocation, as the Interested Party/Respondent held a subsisting lease which was lawfully renewed in 2003, culminating in issuance of grants. Relying on **Sehmi & another vs Tarabana Company Limited & 5 others [2025] KESC 21 (KLR)**, it was argued that a leasehold interest remains vested in the lessee until lawfully extinguished, and therefore any alleged allotment to the Petitioners was irregular.

170. Counsel further maintained that a letter of allotment is merely an invitation to treat and cannot defeat an existing lawful title, particularly in light of section 26 of the Land Registration Act which allows inquiry into the legality of titles.

171. On the question of historical land rights, the 5th Respondent argued that the Plaintiffs' occupation, even if longstanding, was permissive and could not mature into adverse possession. Counsel pointed to colonial register entries showing assignment of the property to the Interested Party/Respondent in the 1940s and submitted that the Plaintiffs' own evidence acknowledged entry as employees or licensees. Reliance was placed on **Andafu vs Akhulunya [2025] KECA 714 (KLR)** and **Wambugu vs Njuguna [1983] eKLR** to argue that permissive possession cannot become adverse absent proof of revocation of permission, which the Plaintiffs failed to demonstrate.

172. Consequently, Counsel urged the Court to dismiss the Originating Summons, maintaining that the Plaintiffs had not established continuous, hostile occupation capable of displacing the Respondent's registered title.

Analysis and Determination

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

- i. Whether the Petitioner in ELC 824 of 2012 has established a legally recognizable and enforceable interest in L.R. No. 209/193 (now Nairobi Block 37/63).*
- ii. Whether the Plaintiffs in ELC No. 102 of 2008 have established their claim for adverse possession over L.R No. 209/193(now Nairobi Block 37/63).*
- iii. What are the appropriate reliefs if any?*

Whether the Petitioner in ELC 824 of 2012 has established a legally recognizable and enforceable interest in L.R. No. 209/193 (now Nairobi Block 37/63).

- 174.** The dispute before the court centers on competing claims to ownership of L.R. No. 209/193 Pangani (now Nairobi Block 37/63). The Plaintiffs in ELC No. 102 of 2008 assert entitlement to the suit property by way of adverse possession, contending that they and their forefathers have occupied the land openly, peacefully and as of right since colonial times.
- 175.** They maintain that, despite successive transfers of leasehold interests to various proprietors, the land remained largely unused by the lessees and has continuously served as their ancestral home, commonly known as ‘Kwa Njoroge Village.’
- 176.** The Petitioner in ELC Petition No. 824 of 2012, on the other hand, claims proprietary rights arising from an alleged allocation process initiated through approval conveyed by a letter dated 16th April 1997 and culminating in a letter of allotment dated 1st December 1998.
- 177.** According to the Petitioner, it complied with the allotment conditions by paying the requisite stand premium and charges, following which a lease was prepared in its favour. However, it alleged that prior to execution of the lease, its director was arrested and charged in connection with alleged irregularities relating to the parcel, and the property was subsequently registered in the name of the Ministry of

Finance, an action the Petitioner characterises as unlawful and in violation of its accrued rights.

178. The 5th Respondent, the Trust, maintains that it is the lawful proprietor of the suit property. According to the Trust, the property has remained vested in successive trustees since 1943 notwithstanding changes in individual trustees, and it therefore disputes the Plaintiffs' assertion of adverse possession, contending that no evidence has been produced to demonstrate continuous or lawful occupation capable of extinguishing its title.

179. In relation to the Petitioner's claim, the 5th Respondent avers that by a letter dated 19th October 1998, the Commissioner of Lands approved renewal of its lease for a further ninety-nine years, which process the Trust duly pursued. It states that upon the Government's failure to effect the renewal administratively, it instituted **Nairobi HCC Misc. No. 1531 of 2005** culminating in a judgment directing that the lease be extended and registered in its favour.

180. The Trust contends that its entitlement to the land was reaffirmed in **High Court Constitutional Petition 396 of 2016-Abdul Waheed Sheikh & Anor vs National Land Commission**. It further asserts that in or about 2003, it became aware of an attempted fraudulent registration of a grant purporting to vest the property in Joseph Bungei, and maintains that the alleged allotment to the Petitioner was irregular, unlawful and void ab initio.

181. Considering the foregoing, it is apparent that the present dispute involves competing claims of ownership. Each of the claimant is obligated to prove their respective claims. This requirement is anchored in the fundamental principle of law that he who alleges must prove. This legal maxim is enshrined in **Section 107(1) and (2)** of the **Evidence Act**, which provides as follows:

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

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

182. And **Sections 109** and **112** of the same Act which state:

“109. 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.

“112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

183. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] KECA 773 (KLR)** stated as follows:

***“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.*”**

184. With respect to the burden of proof, the learned Judges of Appeal in the case of **Palace Investments Limited vs Geoffrey Kariuki Mwenda & another [2015] KECA 616 (KLR)** posited thus:

“Denning J, in Miller vs- Minister of Pensions [1947] 2 All ER 372 discussing the burden of proof had this to say;-

***“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.*”**

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

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

“Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and “remains constant through a trial with the plaintiff, however, “depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.”

186. At the outset, the court observes that the 4th and 5th Respondents in Petition 824 of 2012 impugn the present

suits alleging breach of the doctrine of *res judicata*, contending that the present proceedings are barred by the judgment delivered on 18th May 2012 in **Nairobi High Court Miscellaneous Civil Case No. 1531 of 2005 (O.S.)**, and further challenged the *locus standi* of the Plaintiffs and the Petitioner, as well as the propriety of consolidating ELC No. 102 of 2008 with Petition No. 824 of 2012.

187. From the record, however, it is evident that these objections were previously canvassed and determined in the court's ruling delivered on 24th January, 2018. In that ruling, the court declined to strike out the consolidated proceedings and directed that the competing claims of the Plaintiffs, the Petitioner and the Trust be heard on their merits. The said objections are therefore moot.

188. The Plaintiffs in ELC No. 102 of 2008 challenged the authority of the deponents who testified on behalf of the Trust, an issue that was only raised during the hearing and subsequently in submissions. The deponents, however, expressly stated on oath that they are the trustees of the Trust. No evidence was tendered to controvert that assertion. The court finds the objection to be an afterthought, and unsubstantiated in fact.

189. The court now turns to the substantive issue and begins from the undisputed historical position that the 5th Respondent (the Trust) had an initial 99-year lease over the suit property. The same lapsed on 31st December, 2001.

190. The existence of the initial leasehold interest, and its subsequent renewal, formed the subject of prior litigation culminating in the judgment delivered on 18th May 2012 in **Nairobi High Court Miscellaneous Civil Case No. 1531 of 2005 (O.S.)**.

191. In that matter, the 5th Respondent successfully challenged the Government's refusal to extend its lease and the proposed conversion of the land into civil servants' tenant-purchase housing. The court directed that the lease be renewed and registered in favour of the 5th Respondent. This position was later reaffirmed in **Nairobi High Court Petition No. 396 of 2016**. The said judgments remain valid and binding, having neither been set aside nor overturned on appeal.

192. The Petitioner's case is that the lease held by the 5th Respondent expired by effluxion of time and that, as at 1st December, 1998, the suit property had reverted to the Government and was therefore available for fresh allocation. The Petitioner relies on a letter of allotment dated 1st December, 1998 and payments allegedly made in January and April 2003, asserting that compliance with the allotment conditions crystallized proprietary rights in its favour.

193. The Petitioner further contends that although a lease was prepared, it was never executed or registered following the arrest and prosecution of its director, after which the

property was irregularly registered in the name of the Ministry of Finance.

- 194.** The 5th Respondent, Sheikh Fazal Ilahi Noordin Charitable Trust, maintains that the land was never available for allocation, asserting that renewal of its lease had already been approved through correspondence from the Commissioner of Lands and that its entitlement was conclusively affirmed by the **High Court in Miscellaneous Civil Case No. 1531 of 2005**. It therefore argues that the purported allotment to the Petitioner was legally incapable of conferring any proprietary interest.
- 195.** The law on letters of allotment is settled. A letter of allotment constitutes no more than an offer by the Government and does not, without more, confer proprietary rights in land. Title only crystallizes upon fulfillment of the allotment conditions and the subsequent issuance and registration of a grant or lease.
- 196.** The Supreme Court reaffirmed this position in ***Torino Enterprises Limited vs Attorney General [2023] KESC 79 (KLR)***, while earlier authorities such as ***Republic vs City Council of Nairobi & 3 Others [2014] eKLR*** and ***Mbau Saw Mills Ltd vs Attorney General & 2 Others [2014] eKLR*** emphasize that land ceases to be available for allocation once a valid legal interest subsists.

- 197.** Even where an allottee demonstrates payment of stand premium or other charges, no enforceable proprietary right arises absent registration. The Petitioner candidly admitted during cross-examination that it holds neither a registered lease nor a certificate of title.
- 198.** In line with the principles articulated in ***Dina Management Limited vs County Government of Mombasa & 5 Others [2023] KESC 30 (KLR)***, the court must be guided by the formal processes of allocation, registration and lawful conferment of title, none of which were completed in favour of the Petitioner.
- 199.** More fundamentally, it is trite that only land available for allocation can be lawfully allotted. As at 1st December 1998, when the Petitioner's letter of allotment was issued, the 5th Respondent still held a subsisting lease over the suit property, set to expire on 3^{1st} December 2001, meaning that the land had not reverted to the Government and was not unalienated public land capable of fresh allocation.
- 200.** This position directly undermines the Petitioner's own case, particularly the assertion at paragraph 21(f) of the Amended Petition that the Trust's lease had expired prior to its alleged renewal. The evidence instead shows that the leasehold interest remained intact at the time of the purported allotment, rendering the allocation incapable of conferring any lawful proprietary rights.

201. The Petitioner also raised several allegations of illegality, procedural impropriety and fraud in the renewal of the Trust's lease. However, those issues could only have been interrogated in **Miscellaneous Civil Case No. 1531 of 2005** in which the court found that the Petitioner had given the court all the documents indicative of the process since the lease to the suit property lapsed.

202. This court cannot therefore revisit that determination or re-litigate the validity of the renewal process, as doing so would amount to an impermissible collateral attack on a subsisting judgment. Indeed, Mr. Bungei for the Petitioner states that it has instructed its Counsel to set aside the said Judgment.

203. In the premises, the court finds that the Petitioner, St. Benjamin Memorial Clinic Supplies Limited, has failed to establish a legally recognizable proprietary right over L.R. No. 209/193 (now Nairobi Block 37/63).

Whether the Plaintiffs in ELC No. 102 of 2008 have established their claim for adverse possession over L.R No. 209/193 (now Nairobi Block 37/63).

204. The law on adverse possession is provided for under the Limitation of Actions Act. **Section 7** of the **Act**, provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to

him or, if it first accrued to some person through whom he claims, to that person.”

205. Further provisions are made under **Section 13** which provides as follows:

“(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under sections 9, 10, 11 and 12 a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

(2) Where a right of action to recover land has accrued and thereafter, before the right is barred, the land ceases to be in adverse possession, the right of action is no longer taken to have accrued, and afresh right of action does not accrue unless and until some person again takes adverse possession of the land

(3) For the purposes of this section, receipt of rent under a lease by a person wrongfully claiming, in accordance with section 12(3), the land in reversion is taken to be adverse possession of the land.”

206. And **Section 17** of the **Act** states;

“Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished”

207. Finally, **Section 38(1)** and **(2)** states:

“(1) Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under this Act.”

208. The net effect of the foregoing sections is to extinguish the title of the proprietor of the land in favour of a party who has been in possession thereof for a minimum continuous period of 12 years.

209. Discussing the concept of adverse possession, the Court of Appeal in *Mtana Lewa vs Kahindi Ngala Mwangandi [2015] eKLR* stated thus:

“Adverse possession is essentially a situation where a person takes possession of land, asserts rights over it and the person having title to it omits or neglects to take action against such person in assertion of his title for a certain period, in Kenya 12 years.”

210. In discussing the essential elements in a claim for adverse possession, the Court of Appeal in *Richard Wefwafwa Songoi vs Ben Munyifwa Songoi [2020] eKLR* held:

“A person who claims adverse possession must inter alia show:

(a) on what date he came into possession;

(b) what was the nature of his possession;

(c) whether the fact of his possession was known to the other party;

(d) for how long his possession has continued;
and

(e) that the possession was open and undisturbed for the requisite 12 years.”

211. In a claim for adverse possession, the burden of proof is upon the person setting up and seeking to prove title by adverse possession. The required element of proof is the usual

standard of proof in civil cases, namely, on a balance of probabilities.

212.As already captured in case law, the plea of adverse possession is always based on facts which must be asserted, pleaded and proved. The person claiming adverse possession must show on what date he took occupation of the premises, the nature of his possession, whether his possession is known to the true owner, how long the possession went on, and whether his possession was open and undisturbed. Unless these questions are asserted and proved, a plea of adverse possession must fail.

213.Considering the foregoing, the court must in seeking to find whether the Plaintiffs have made a case for adverse possession answer the following questions:

214.The court has carefully considered the Plaintiffs' claim for adverse possession and finds that the manner in which the suit is framed discloses fundamental issues. It is settled law that a claim for adverse possession must be directed against the person entitled to immediate possession, ordinarily the registered proprietor whose title is alleged to have been extinguished by operation of limitation. In the present case, however, the Plaintiffs' pleadings reveal an inherent inconsistency.

215.While acknowledging that the leasehold interest was held by the 5th Respondent, they simultaneously challenge the

validity of that title by alleging fraud and prior transfers. As stated in *Haro Yonda Juaje v Sadaka Dzengo Mbauro & Kenya Commercial Bank Ltd [2014] eKLR*, a claimant cannot at once impeach the registered proprietor's title and seek to acquire that same land through adverse possession.

216. More critically, the Plaintiffs principally directed their claim against state entities, including the Permanent Secretary to the Treasury, notwithstanding their awareness of the 5th Respondent's asserted proprietary interest and the subsisting judgment of 18th May 2012 affirming that interest.

217. The law is unequivocal that adverse possession cannot lie against Government land by virtue of **Section 41** of the **Limitation of Actions Act**, a position reaffirmed by the Court of Appeal in *Sammy Mwangangi & 10 Others v Commissioner of Lands & 3 Others [2018] eKLR*.

218. The cumulative effect of these shifting and contradictory positions is that it becomes impossible to identify with precision the proprietor against whom limitation is alleged to have accrued a requirement that lies at the core of any claim for adverse possession.

219. Second, is the issue concerning the number and identity of the persons said to be claiming adverse possession. Vide the letter dated 6th March, 2003, produced by the Plaintiffs and addressed to the Ministry of Lands and Settlement, only sixteen persons were identified as having resided on the

parcel since 1956, and as being entitled to registration in their respective names.

220. It remains unexplained how that number subsequently expanded to the present claim advanced on behalf of 251 members of the self-help group. Persons who were not among the original sixteen cannot sustain a claim founded on adverse possession as the period after 2003 and the institution of the present suit falls short of the statutory twelve-year threshold.

221. The court further notes that even within the limited group identified in the Plaintiffs' own documents, namely the sixteen purported settlers listed in the letter dated 6th March 2003, the evidential record was markedly thin. Of those individuals, substantive evidence was largely centred on David Chege, whose testimony attempted to trace historical presence on the land.

222. Turning to the substantive elements of adverse possession, the court first considers the character of entry and occupation. The Plaintiffs' own account is that their forefathers entered the suit land as workers or servants associated with colonial-era occupants and continued in occupation under successive arrangements. Such entry, by its very nature, denotes possession founded on permission rather than adversity.

223. This conclusion is reinforced by the Plaintiffs' consistent self-description as servants, which is incompatible with an

assertion that their occupation was hostile to the title of the registered proprietor.

224. More fundamentally, no evidence was placed before the court to demonstrate when, if at all, that permissive occupation came to an end, whether through termination of employment or any other revocation of licence, a crucial element as explained by the Court of Appeal in **Kazungu & another vs Omar (Civil Appeal E042 of 2021) [2024] KECA 412 (KLR) (26 April 2024)**, where the court held:

“As is clear from the above authorities, it does not suffice to simply aver that the claimant was in possession for more than 12 years. The claimant must adduce evidence of the steps taken with a view to asserting rights which must be shown to be adverse to the title of the true owner. Where the claimant’s entry into the land was as a licensee, there must be evidence of the point at which the licence was terminated and the continued possession became adverse to that of the owner. Where entry into the land was, as the appellants contend, based on a tenancy arrangement with the perceived owner, the appellants ought to have adduced evidence showing the point at which payment of rent came to an end and that, thereafter, their occupation became adverse... In our view, as long as the

trespasser believes that he is on the land as a licensee, even if mistakenly so, such possession cannot be said to be adverse to that of the proprietor of the land.”

225. From the Plaintiffs’ own evidence, it emerges that it was only from 2000 through the series of letters addressed to Government authorities that they began actively seeking allocation of the land in their own names. If anything, that correspondence marks the earliest point at which an intention to assert rights independent of the registered proprietor could be inferred. Between that period to the institution of the suit is less than the 12 years necessary to advance a claim for adverse possession.

226. Ultimately, and for the foregoing reasons, the Plaintiffs’ claim founded on adverse possession cannot be sustained and accordingly fails.

What are the appropriate orders to issue?

227. In respect of the Plaintiffs case in **ELC No. 102 of 2008**, the court has found that the claim for adverse possession was not proved. Consequently, the reliefs sought under the Amended Originating Summons cannot issue, and the Plaintiffs’ suit is hereby dismissed.

228. With regard to the Petitioner in **ELC Petition No. 824 of 2012**, the court has already found that the Petitioner has not established any interest in the suit property capable of

protection under **Article 40** of the **Constitution**. Similarly, the claim for the current value of the suit property and mesne profits fails.

229. Questions of the propriety of the government's alleged transfer of the suit property to the permanent secretary do not arise on account of the decision in Nairobi High Court Misc 1531 of 2005.

230. Likewise, the allegations relating to the arrest and detention of the Petitioner's director at Kilimani Police Station were not supported by cogent evidence demonstrating unlawful conduct attributable to the Respondents or any constitutional breach arising therefrom.

231. The acquittal of the director in the criminal proceedings, without more, does not of itself establish a violation of fundamental rights warranting constitutional remedies.

232. The court notes that, on the Petitioner's own evidence, payments were allegedly made pursuant to the allotment process. In law, the only conceivable remedy that might arise in such circumstances would be a refund of monies paid to the allocating authority from the said authority.

233. However, no specific prayer for refund was sought in the Amended Petition before this court. The court cannot therefore grant relief that has neither been pleaded nor prayed for. Ultimately the entirety of the Petitioner's claim fails.

234. For those reasons, the court makes the following final orders:

- a) ELC Civil Case No. 102 of 2008 is hereby dismissed with costs.**
- b) ELC Petition No. 824 of 2012 is hereby dismissed with costs.**

Dated, signed and delivered virtually in Nairobi this 26th day of February, 2026.

O. A. Angote
Judge

In the presence of;

Mr. Osodo for Petitioner

Mr. Havi for Interested Parties

Mr. Arusei for Petitioner

Mrs Kerio for Plaintiff in 102/2008

Mr. Abdulmalik for 1st Respondent (NLC)

Mr. Allan Kamau for 2nd, 3rd and 5th Defendants

Mr Osodo holding brief for Musungu for Applicant

Court Assistant: Tracy