



REPUBLIC OF KENYA



**Aniket Property Investment Limited v Mwakibibo & 10 others (As the Trustees of the Ahfat Trust) (Civil Suit 134 of 2012) [2026] KEELC 1543 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KEELC 1543 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
CIVIL SUIT 134 OF 2012  
LL NAIKUNI, J  
JANUARY 30, 2026**

**BETWEEN**

**ANIKET PROPERTY INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**HAMADI JUMA MWAKIBIBO ..... 1<sup>ST</sup> DEFENDANT**

**VENTURE HOLDINGS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**DAVID K KANDIE ..... 3<sup>RD</sup> DEFENDANT**

**DRIEDRICK ALFONS JOSEY BRINKMAN ..... 4<sup>TH</sup> DEFENDANT**

**AMANA ABDALLA NG'ANG'A ..... 5<sup>TH</sup> DEFENDANT**

**KHALFAN MLAI ..... 6<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR, KWALE ..... 7<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL ..... 8<sup>TH</sup> DEFENDANT**

**FARDOSA AHMED ABDULLE ..... 9<sup>TH</sup> DEFENDANT**

**MOHAMED AHMED ABDULLE ..... 10<sup>TH</sup> DEFENDANT**

**MOHAMED SALIM BALALA ..... 11<sup>TH</sup> DEFENDANT**

**AS THE TRUSTEES OF THE AHFAT TRUST**

**JUDGMENT**

**I. Preliminaries**

1. The rather lengthy and elaborate Judgement of this Honourable Court pertains to a claim made out by Aniket Property & Investment Limited, the Plaintiff herein and thus instituted a civil suit through



- a Plaintiff against Hamadi Juma Mwakibibo, Venture Holdings, Limited, David K. Kandie, Driedrick Alfons Josey Brinkman, Amana Abdalla Ng'ang'a, Khalfan Mlai, The Land Registrar, Kwale , the Attorney General, Fardosa Ahmed Abdulle, Mohamed Ahmed Abdulle and Mohammed Salim Balala (As trustees of the Ahfat Trust), the Defendants herein. Significantly, the Court observes that the matter entailed intricate issues, bulky and protracted oral and documentary evidence adduced by the parties herein being a year 2012 case.
2. In the course of the proceedings, the Plaintiff with the leave of Court filed an Amended Plaintiff dated 19<sup>th</sup> May, 2022 and filed on the same day.
  3. Upon filing and service of the Plaintiff, the respective Defendants filed their Statements of Defence as follows:-
    - a). the 1<sup>st</sup> Defendant filed a Statement of an Amended Defence dated 12<sup>th</sup> September, 2013 and filed on 13<sup>th</sup> September, 2013;
    - b). the 2<sup>nd</sup> Defendant filed their defence dated 7<sup>th</sup> August 2012 and filed on 8<sup>th</sup> August 2012.
    - c). The 3<sup>rd</sup> and 6<sup>th</sup> Defendant filed their Amended Defence dated and filed on 7<sup>th</sup> December 2012. The 4<sup>th</sup> Defendant responded through a Defence dated 22<sup>nd</sup> November 2012 and filed on 23<sup>rd</sup> November 2012.
    - d). The 5<sup>th</sup> Defendant filed their defence dated 22<sup>nd</sup> November 2012 and filed on 23<sup>rd</sup> November 2012.
    - e). The 7<sup>th</sup> and 8<sup>th</sup> Defendants filed their defence dated 8<sup>th</sup> March, 2013 and filed on 12<sup>th</sup> March, 2013.
    - f). The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants responded to the Plaintiff's claim through a defence dated 15<sup>th</sup> June 2022 and filed on 16<sup>th</sup> June 2022.
  4. It is instructive to note that, upon the request by the parties, on 12<sup>th</sup> November, 2021, the Honourable Court conducted a site visit ("Locus in Quo") and a report was prepared and shared with the parties. The said report has been re – produced verbatim herein and forms part of the Judgement herein for ease of reference.

## II. The description of the Parties

5. The Plaintiff was described as a Limited liability Company incorporated in Kenya and having its registered office at Nairobi. The 1<sup>st</sup> Defendant was described as a male adult residing in Ukunda and the 2<sup>nd</sup> Defendant was described as a Limited liability Company incorporated in Kenya under the provision of the Companies Act, Cap, 486 and has its registered Office at Nairobi. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants were described all as adult males of sound mind and understanding whose abode and place of business or profession were unknown to the Plaintiff. The 7<sup>th</sup> Defendant was described as the Land Registrar, Kwale established under the provision of Sections 7, 12 & 14 of the Land Registration Act, No. 3 of 2012; whereas the 8<sup>th</sup> Defendant was the Principal Legal Advisor to the Government of Kenya, pursuant to the provision of Article 156 of the Constitution of Kenya, 2010. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants were described all as male and trustees of the Ahfat Trust.
6. Court directions before the hearing
7. On 5<sup>th</sup> October, 2012, the parties entered into a consent that: -



- a. *The Constitution* Petition 57/2012 be stayed without prejudice with 2<sup>nd</sup> Respondent right to move court for striking out of security for costs.
  - b. The Plaintiff in ELC No. 134/2012 be allowed to join the alleged registered properties of the other sub - division carried out of Plot No. 203 within 7 days together with orders to preserve the state as shall be necessary.
  - c. Without prejudice to any of the parties legal rights possession as agreed to be held jointly between the Plaintiff (in ELC No. 134/2012) and the Plaintiff (in ELC No. 211/2006) with the costs of security to be equally shared.
  - d. This matter be mentioned on 30<sup>th</sup> October, 2012 for purposes of further directions.
  - e. Save for order No. 3 above interim orders continue to subsist.
  - f. The orders here to be recorded in ELC No. 211/2006 and Petition No. 57/2012.
  - g. HCCC 211/2006 shall be mentioned on 30<sup>th</sup> October, 2012 together with this matter.
8. On 19<sup>th</sup> October, 2017, after confirming that the Plaintiff had complied with Order 11 of the Civil Procedure Rules 2010, the Honourable Court set the hearing date on 12<sup>th</sup> March, 2018. The Plaintiff called their witnesses and closed his case on 12<sup>th</sup> March, 2018 and the Defendants called their witnesses and marked their cases closed.

#### **A. The Plaintiff's case**

9. From the pleadings before court, the facts were that by an agreement made in writing and duly executed between Mr. Vipin Maganlal Shah and Mr. Vijay Lakhani being directors of the Plaintiff's company (Hereinafter referred to as "The Directors of the Plaintiff") and the 1<sup>st</sup> Defendant on 21<sup>st</sup> December 2007, terms and conditions stipulated thereof. Accordingly, the 1<sup>st</sup> Defendant agreed to sell to the said Directors of the Plaintiff's Company jointly all that land compromised in the Title known and registered at the Kwale Lands Registry as Kwale/Diani Beach Block/203 measuring approximately 4.538 Heacres (11.2138 Acres). (Hereinafter referred to as 'The Suit Property') for a purchase price of a sum of Kenya Shillings Thirty Three Million (Kshs.33,000,000.00/=) only.
10. Notwithstanding making the payment of the requisite deposit and further monies under the aforestated Agreement and despite repeated requests so to do, the 1<sup>st</sup> Defendant herein failed, neglected and/or refused to take any steps towards completion of the said Agreement for Sale as provided therein. In the premises, the Directors of the Plaintiff's company jointly filed a suit namely, 'Mombasa HCCC No. 315 of 2008' seeking 'inter alia', specific performance of the said Agreement for Sale and obtained a Decree therein against the 1<sup>st</sup> Defendant compelling him to specifically perform the Agreement for Sale entered into as aforestated.
11. Following this, the said Directors of the Plaintiff's company transferred their rights in and to the said suit Property to the Plaintiff herein, trading in the name and style of "Aniket Property & Investments Limited" in whose name the said Property was subsequently registered. All the original Title documents pertaining to the suit Property were handed over by the 1<sup>st</sup> Defendant's Advocates to the Advocates acting for and on behalf of the Plaintiff herein in whose possession they continue to remain. The 1<sup>st</sup> Defendant, as of 3<sup>rd</sup> March 2005, ceased to have any right, title or interest in the said Property or, the alleged Sub-divisions thereof, capable of being sold and/or transferred.
12. At no time had the Plaintiff herein parted with possession of or surrendered the original Title Deed in respect of the said Property now dealt with or parted with possession of the said property. To



do so would amount to a contravention of the various Court Orders issued in relation to the said property. Prior to completion of the aforesaid transaction, and in the course of time, the attention of the said Directors of the Plaintiff's Company was drawn to civil suit "Mombasa High Court Civil Case Number 211 of 2006, Seaview Investments Limited – Versus - Hamadi Juma Mwakibibo & The Attorney General. The said suit concerned the same said suit Property. In the premises, the said Directors of the Plaintiff's company insisted on the said Mombasa HCCC No. 211 of 2006 being determined before the final payment due was released to the 1<sup>st</sup> Defendant.

13. Indeed, on 11<sup>th</sup> July, 2012 the said Directors obtained a temporary injunctive orders restraining the Defendants and their agents from having any dealings and/or transactions with the suit property. Subsequently, the said orders were extended on 5<sup>th</sup> October, 2012, 16<sup>th</sup> October, 2012, 29<sup>th</sup> October, 2012 and 14<sup>th</sup> October, 2021 respectively.
14. The Advocates for the 1<sup>st</sup> Defendant in that suit, Messrs. Stephen Oddiaga & Company, Advocates thereafter forwarded to the Plaintiff's Advocates, Messrs. A. B. Patel & Patel, Advocates a Notice of Withdrawal of suit filed in Court and an Order issued by the Court in respect of the Mombasa HCCC No.211 of 2006.
15. The Plaintiff in the said Mombasa HCCC No.211 of 2006 thereafter sought to join, the Plaintiff herein as a party to the said suit and obtained relief restraining the Plaintiff herein from transferring selling, sub-letting leasing, charging, alienating or dealing in any manner whatsoever with the Property known as Kwale/Diani Beach Block 203 or the alleged Sub-divisions thereof being Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 which at the time had not been effected and/or registered. The said application in Mombasa HCCC No. 211 of 2005 was pending before the Court.
16. In view of this development and pending further orders of this Honourable Court in Mombasa HCCC No.315 of 2008, a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs.13,500,000.00/) was deposited in a joint interest earning account bank account held between the Plaintiffs and the 1<sup>st</sup> Defendant's Advocates to await the outcome of the proceedings in HCCC No. 211 of 2005.
17. The 1<sup>st</sup> Defendant herein in connivance and collusion with the Land Registrar, Kwale had fraudulently and unlawfully caused alleged Title Deeds/Certificates of Lease-to be issued purporting that he was the registered proprietor of the afore - stated alleged Sub - divisions namely, Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542and 1543 and sought to purport to sell Kwale/Diani Beach Block/1536 to the 2<sup>nd</sup> Defendant; Kwale/Diani Beach Block/1536 to the 3<sup>rd</sup> Defendant; Kwale/Diani Beach Block/1538 to the 4<sup>th</sup> Defendant; Kwale/Diani Beach Block/1539 to the 5<sup>th</sup> Defendant and Kwale/Diani Beach Block/1542 to the 6<sup>th</sup> Defendant whereas he retained the purported Kwale/Diani Beach Block/1537, 1540, 1541 himself pursuant to an alleged Agreement for Sale dated 6<sup>th</sup> March 2012.
18. The Plaintiff relied onto the following particulars of frauds: -
  - a. The 1<sup>st</sup> Defendant had obtained and the 7<sup>th</sup> Defendant had purported to issue alleged certificates of lease in respect of the alleged sub - divisions of the property comprised in Kwale/Diani Beach Block/203 namely Kwale/Diani Beach Blocks/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 despite the 1<sup>st</sup> Defendant having disposed of his right, title and interest in Kwale/Diani Beach Block/203 to the Plaintiff herein who was duly registered as proprietor on 3<sup>rd</sup> March 2009;



- b. The 1<sup>st</sup> Defendant had no right, title or interest in the property comprised in Kwale/Diani Beach Block/203 to enable the Land Registrar, the 7<sup>th</sup> Defendant cause the sub – division of the suit land on the application of the 1<sup>st</sup> Defendant;
  - c. no entries were capable of being made in respect of the register relating to Kwale/Diani Beach Block/203 or the alleged Sub-divisions thereof referred to above by reason of the various Orders of the Court issued herein;
  - d. no lawful sub-division of the said Property could be effected or registered and Title issued thereof without due process of the law or first surrendering the Original Title in the custody of the Plaintiff in spite of which the 1<sup>st</sup> Defendant obtained alleged Certificates of Titles which the 7<sup>th</sup> Defendant purported to issue;
  - e. any entries made in respect of the said property and the alleged Sub-divisions thereof and Certificates of Lease issued for the alleged Sub-divisions were a nullity ab initio in law and of no consequence whatsoever;
  - f. in spite of the Plaintiffs proprietary interests being protected under *The Constitution*, the alleged Certificates of Lease of the alleged Sub-divisions of the said Property appear to have been obtained by the 1<sup>st</sup> Defendant from the 7<sup>th</sup> Defendant without first surrendering the Title in respect of Kwale/Diani Beach Block/203;
  - g. the Plaintiff averred that the alleged Certificates of Lease in respect of the alleged Sub - divisions of the said property were a nullity and incapable of, in the circumstances, conferring any right, title of interested upon the 1<sup>st</sup> to 6<sup>th</sup> Defendants in the said Property or the alleged Sub - divisions thereof; and
  - h. purporting to sell and transfer to the 9<sup>th</sup> to 11<sup>th</sup> Defendants Kwale/Diani Beach Block/1542 when there were Court Orders in force restraining him doing so.
19. The Plaintiff further averred that persons unknown to it had shown extreme hostility to its servants and employees and had and continued to trespass on the said Property without any right and in breach of the Court Orders issued by this Honourable Court in the suits referred to hereinabove. A further suit namely Constitutional Petition Number 57 of 2012 had been filed by the Plaintiff in Mombasa HCCC No. 211 of 2005 and further conservatory Orders had been issued by this Honourable Court on the 25<sup>th</sup> May 2012. However, the Plaintiff herein had not been made a party thereto but was served with the pleadings therein on 14<sup>th</sup> June 2012.
  20. The Plaintiff therefore averred that the 1<sup>st</sup> to the 11<sup>th</sup> Defendants could not acquire any rights to the said property or the alleged sub – divisions thereto until and unless the Plaintiff transfers its proprietorship rights therein to the Defendants. In the premises, any purported dealings or entries allegedly conferring proprietorship rights on the said Defendants were a nullity and of no consequence at all given their illegality and the fact that they were contra statute. By reason of the matters afore - stated, the Plaintiff stood to suffer irreparable loss and damage in that it would be deprived of the use and benefit of its said property. Save as afore - stated, these were no other suits pending in as Court between the parties hereto over the said subject matter.
  21. The said Property was situated at Ukunda, Diani within the jurisdiction of this Honourable Court.
  22. The Plaintiff prayed for Judgment against the Defendants jointly & severally:-



- a. An order restraining the 1<sup>st</sup> to 11<sup>th</sup> Defendants whether by themselves or through their servants, employees, agents or howsoever else from trespassing onto the Plaintiffs Property known as Kwale/Diani Beach Block/203 or any purported Sub - division thereof namely, Kwale/Diani Beach Blocks/1536, 1537, 1538, 1539, 1540, 1541, 1542 or 1543 or in any other manner whatsoever interfering with the Plaintiffs' possession thereof.
  - b. An order restraining the 1<sup>st</sup> to 11<sup>th</sup> Defendants from selling, letting, leasing, sub – letting disposing off, transferring, alienating, charging, transacting or dealing in any manner whatsoever with the alleged Sub-divisions known as Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 or 1543;
  - c. a declaration that all the alleged Certificates of Lease in respect of the alleged Sub - divisions of the Property (known as Kwale/Diani Beach Block/203) namely, Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 or 1543 are a nullity and of no consequence whatsoever;
  - d. a further declaration that the Plaintiff herein is the lawful registered Proprietor of Kwale/Diani Beach Block/203 and that the register held by the Lands Registry at Kwale should be rectified to reflect this position;
  - e. in the alternative, damages against the 7<sup>th</sup> and 8<sup>th</sup> Defendants being the difference in value of the said Property at current market rates and the purchase price thereof:
  - f. further and in the alternative, damages for conversion and loss of use and benefit of the said Property.
  - g. further and in the alternative, damages for the losses sustained by the Plaintiff on account of stamp duty and all other costs and expenses incurred by it and attributable to the acquisition of the said Property including the costs of all the litigation in respect thereof:
  - h. interest at court rates on any damages awarded hereinabove from the date of filing this suit to the date of payment in full;
  - i. any further or other relief this Honourable Court deems fit to grant; and
  - j. costs of and incidental to this suit.
23. The Plaintiff called PW - 1 on 12<sup>th</sup> March, 2018 at 2.00 pm and the witness testified as follows: -

**A. Examination in Chief of PW - 1 by Mr. Khagram Advocate.**

24. PW - 1 was sworn and testified in the English language, He identified himself as being Vijay Lakhani, a Citizen of Kenya and holder of the National Identity card bearing all the particulars as shown to Court. He resided in Nyali Estate of the County of Mombasa. He was a businessman and the manager of Aniket Property Investment Limited, the Plaintiff. He reiterated that he was aware of the suit property known as Kwale/Diani Beach Block/203. PW - 1 stated that he had recorded his witness statement filed on 11<sup>th</sup> July, 2012, which was at page 283, and that he had signed the statement.
25. PW - 1 further testified that the land had been offered in December, 2007. He explained that he had consulted his late partner, Vipin Maganlal Shah, and they had decided to purchase the land at the consideration of a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-).
26. PW - 1 testified that the agreement for sale had been dated 21<sup>st</sup> December, 2007. He stated that the agreement was at Page 130 of his list of documents filed on 11<sup>th</sup> July, 2012. The sale agreement had



- been between the Plaintiff and Hamadi Juma Mwakibo, the 1<sup>st</sup> Defendant herein as the Vendor. PW - 1 confirmed that they had paid the deposit as required. PW - 1 referred to the agreement for sale at Pages 130 to 132, marked P. MFI – 1. He explained that, in the beginning, it had been agreed that there was a lease about to expire and that it was to be extended for a further 50 years. While they had been waiting for the extension of the lease, they had been made to understand that Mr. Mwakibobo had instructed another lawyer to sell the property to a third party.
27. PW - 1 reiterated that they had filed a case, “HCCC No. 315 of 2008, Vipin Maganlal Shah and Vijay Lakhani – Versus – Hamadi Juma Mwakibobo”, as shown at Pages 13 to 15. They had been seeking specific performance of the agreement dated 21<sup>st</sup> December, 2007. At Page 47 was a statement of admission by the Defendant. Paragraph 3 admitted Paragraph 3 of the Plaintiff and sought additional monies.
  28. PW - 1 referred to Page 27, being an order issued by the High Court in HCCC No. 315 of 2008. He testified that the matter had proceeded and that at Page 87 was the decree of the court. Judgment had been entered on admission. PW - 1 explained that, according to the decree, monies had been to be paid to the firm of the 1<sup>st</sup> Defendant and Stephen Oddiaga & Company Advocates. He stated that the 1<sup>st</sup> Defendant was in court that day. They had reached an agreement that the land be transferred to the Plaintiff, Aniket Property Investment Limited. At Page 122 was a consent allowing extension of time to deposit the sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000/-) into a joint account between the parties’ advocates.
  29. PW - 1 referred to Page 133, being a letter dated 20<sup>th</sup> February, 2009 from Hamadi Juma Mwakibobo, the 1<sup>st</sup> Defendant to A.B. Patel & Patel Advocates. At Page 134 was another letter directing release of the sum of Kenya Shillings Eight Million (Kshs. 8,000,000/-) and the balance to be released to him. PW - 1 testified that at Page 135 there was another letter from the 1<sup>st</sup> Defendant instructing payment of a sum Two Million Five Thousand (Kshs. 2,500,000/-) to Mwinyikai Thomas.
  30. PW - 1 referred to Page 136, being a letter from Messrs. Stephen Oddiaga & Co. Advocates to Messrs. Marende Birir & Co. Advocates. At Page 137 was a cheque for Kenya Shilling Four Million Two Twelve Thousand (Kshs. 4,212,000/-), and at Page 138 a cheque for payment of Kenya Shillings One Million Two Hundred and Fifty Thousand (Kshs. 1,250,000/-) to Said M. Tomas as per the letter at Page 135. At Page 41 was a letter from the Law Messrs. Stephen Oddiaga & Co. Advocates to A.B. Patel & Patel Advocates confirming that they were holding the original Title Deed.
  31. PW - 1 testified that copies of pleadings in HCCC No. 315 of 2008 were marked as MFI – 2. At Page 142 was a certified copy of the Title Deed, marked as P. MFI – 3. At Page 144 was a letter of consent certified by Stephen Oddiaga Advocate. At Page 145 was a certificate of official search, also certified by Stephen Oddiaga Advocate, issued on 3<sup>rd</sup> March, 2009. The Title Deed itself had been issued on 3<sup>rd</sup> March, 2009. At Page 147 was a letter of consent to the Deputy Registrar signed by A.B. Patel & Patel Advocates and Stephen Oddiaga & Co. Advocates.
  32. PW - 1 reiterated that thereafter Judgment had been entered as shown at Page 146. He emphasized that he had never given any consent to the 1<sup>st</sup> Defendant to sell the property. PW - 1 recalled another suit, “HCCC No. 211 of 2006, Seaview Investment Limited – Versus – Juma Mwakibobo, in which Seaview Investment Limited”. had claimed ownership of the property. The court had ordered that pending resolution of HCCC No. 211 of 2006, the money be deposited in a joint account. The suit had later been withdrawn, as seen at Page 170. Seaview Investment Limited. had filed an application to challenge the withdrawal, which was disallowed. At Pages 171–172 was an order restraining Aniket Property & Investments Ltd. and at Page 173 was an application.



33. PW - 1 testified that the orders of Judgment obtained in HCCC No. 315 of 2008 had never been set aside. At Page 193 was a letter from Oddiaga & Co. Advocates to A.B. Patel & Patel Advocates confirming that the title was with them and complaining that somebody was attempting to sell part of the property, yet the sub - division plans had not been registered. He enclosed an agreement for sale between Hamadi Juma Mwakibibo and Venture Holding Limited, the 2<sup>nd</sup> Defendant herein as seen at Page 195. The agreement had been witnessed by Salome M. Olunga (Page 202).
34. PW - 1 referred to Page 204, being a certificate of lease dated 3<sup>rd</sup> October, 2011 for Plot No. 1541, one of the sub - divisions. He stated that the Certificate of Lease at Page 162 had been issued on 3<sup>rd</sup> March, 2011. He recalled that there had been an order of injunction issued in the civil case HCCC No. 315 of 2006 and that he had registered a caution, as shown at Pages 207 – 208. He confirmed that he had registered the caution on 27<sup>th</sup> October, 2008 for Plot No. 203.
35. PW - 1 reiterated that the caution had never been lifted. The records in respect of Plot No. 203 had never been closed. He testified that he was not aware how the Land Registry had created records for sub - division in the year 2011 (Pages 244–257). At Page 246, the owner of Plot No. 1541 was shown as the Government of Kenya, while at Page 247 the same plot was shown in the name of Hamadi Juma Mwakibibo. At Page 248, Plot No. 1542 was in the name of the Government of Kenya; at Page 249, Plot No. 1583 was also in the name of the Government of Kenya. At Page 251, Plot No. 1536 was in the name of Hamadi Juma Mwakibibo, being a sub - division of Plot No. 203. PW - 1 finally referred to Page 21, being an order in Petition No. 57 of 2021.
36. At this juncture, his Advocate, Mr. Khagram applied to have PW - 1 to be stood down to enable them get all the original documents for PW - 1 to produce them. The adjournment and application was allowed by the court and hearing was scheduled for 19<sup>th</sup> and 20<sup>th</sup> September, 2018 for further hearing.
37. Mr. Ondego advocate recalled PW - 1 on 19<sup>th</sup> September, 2018 who testified that:-

**B. Re - calling of PW - 1 by Mr. Ondego Advocate.**

38. On 14<sup>th</sup> March, 2019, the PW - 1 was recalled and he testified that: -PW - 1 testified that he had been asked about the original documents for the purchase of the suit property. He stated that he had the original sale agreement dated 8<sup>th</sup> January, 2008. The agreement had been duly entered between Hamadi Juma Mwakibibo, Vivin Maganlal Shah, and Vijay Lakhani. It concerned Plot No. Kwale/Diani Beach Block/203 measuring 4.538 Hectares. PW - 1 explained that the agreement had been signed before Nabhan S. Swaleh Advocate.
39. PW - 1 reiterated that he recalled mentioning there had been a previous case, No. 211 of 2006, which appeared at Page 169 onwards. He confirmed that the documents had also been filed as part of the supplementary list of documents and that they had been filed in that suit.
40. PW - 1 referred to a Replying Affidavit filed on 19<sup>th</sup> November, 2009, sworn by the 1<sup>st</sup> Defendant on 18<sup>th</sup> November, 2009. He testified that the affidavit did not refer to Plot Nos. 1536 – 1543. In paragraph 13, the 1<sup>st</sup> Defendant had deponed that he had sold and transferred the property and had attached the sale agreement at Pages 30–32. At Page 33 was the transfer of land which the 1<sup>st</sup> Defendant had produced in the civil case No. 211 of 2005.
41. PW - 1 was referred to Page 35, being a Certificate of Lease in the Plaintiff's name. He testified that at Page 141 of the original bundle there was a letter from Messrs. Stephen Oddiaga & Company Advocates to A.B. Patel & Patel Advocates. At Page 142 was the certificate of lease certified by Stephen Oddiaga Advocate. At Page 144 was a letter of consent, and at Page 145 a certificate of official search



- for Plot No. 203. PW - 1 explained that at Page 141 of the supplementary bundle there was a letter from K.A. Kasmani & Co. Advocates to M/s. A.B. Patel & Patel Advocates enclosing an order in Misc. Application No. 134 of 2009, in which Aniket Properties Limited had been made a party. He referred to Page 171 of the original bundle, being an order issued on 25<sup>th</sup> March, 2009 in Case No. 211 of 2006. PW - 1 reiterated that Case No. 211 of 2006 had been concluded, and Page 170 of the original bundle showed that the suit had been withdrawn.
42. PW - 1 testified that at Page 158 of the original bundle there was a decree in “Mombasa High Court Case No. 315 of 2008”, issued on 11<sup>th</sup> December, 2009. In the supplementary bundle, at Page 93, there was an order. At Page 95 was an application for registration of the court order, and at Page 96 a letter by Stephen Oddiaga & Company Advocates to the Deputy Registrar, which had been reduced to an order of the court as shown at Page 98.
43. PW - 1 confirmed that the original Certificate of Lease at Page 35 had been handed over to him. At Page 15 of the Supplementary bundle was a leasehold for Plot No. 203. At Page 206 was the Green Card for Plot No. 203 in the name of Hamadi Juma Mwakibibo, 1<sup>st</sup> Defendant. The Certificate of Lease had been issued on 18<sup>th</sup> October, 2007. At Page 196 was an agreement for sale dated 6<sup>th</sup> March, 2012. At Page 204 was a purported subdivision for Plot No. 1541. At Page 193 was a letter from Stephen Oddiaga to A.B. Patel & Patel Advocates. At Page 35 of the new bundle was a Certificate of Lease for Plot No. 203 issued on 3<sup>rd</sup> March, 2009.
44. PW - 1 reiterated that they had never parted with the original title for Plot No. 203. He stated that he had the original letter of consent from the Land Control Board, handed over to the Plaintiff, as shown at Page 168. He testified that there had been a demand notice for land rent of a sum of Kenya Shillings Seventy Thousand (Kshs. 77,000/-), which had been paid in cash, dated 17<sup>th</sup> February, 2009. PW - 1 also confirmed that he had a stamp duty declaration form.
45. PW - 1 recalled that he had been looking at the original title for Kwale/Diani Beach/203. He testified that he had the original Certificate of Lease issued on 3<sup>rd</sup> March, 2009, and confirmed that a copy of the same was at Page 5 of the Plaintiff’s further list of documents filed on 9<sup>th</sup> January, 2019. PW - 1 testified that the original had been shown to the court and that it was identical to the copy at Page 5. Having inspected and compared the original and the copy, the original had been returned to him.
46. PW - 1 stated that he wished to produce the entire bundle filed on 11<sup>th</sup> July, 2012 as Exhibit 1. He produced the Plaintiff’s Supplementary List of Documents filed on 19<sup>th</sup> September, 2018 as Plaintiff Exhibit No. 2, and the Plaintiff’s Further Supplementary List of Documents filed on 9<sup>th</sup> January, 2019 as Plaintiff Exhibit No. 3. At Page 20 of Plaintiff Exhibit No. 3 was an application for consent of the Land Control Board by Hamadi Juma Mwakibibo proposing to sell to Aniket Property Investment Limited. At Page 22 was the Letter of Consent dated 4<sup>th</sup> February, 2009, with the consideration of a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-). At Page 23 was the valuation requisition for stamp duty dated 26<sup>th</sup> February, 2009, the declared value having been accepted by John W. Gitonga, the District Valuer, Kwale. At Page 24 was the stamp duty declaration assessment and pay-in-slip, showing that the sum of Kenya Shillings Six Sixty Thousand (Kshs. 660,000/-) had been paid.
47. PW - 1 referred to Page 26, being a banker’s cheque for sum of Kenya Shillings Six Sixty Thousand (Kshs. 660,000/-). At Page 25 was a copy of the receipt for sum of Kenya Shillings Six Sixty Thousand and fourty (Kshs. 660,040/-) dated 27<sup>th</sup> February, 2009, and another receipt for a sum of Kenya Shillings One Hundred (Kshs. 100/-) being commission on stamp duty received. At Page 27 was the



- Transfer of Lease for Title No. Kwale/Diani Beach/203 from Hamadi Juma Mwakibibo to Aniket Properties and Investments Limited, received for registration on 3<sup>rd</sup> March, 2009.
48. PW - 1 explained that in the presentation book in the Attorney General's list of documents filed on 12<sup>th</sup> March, 2019, there was an entry dated 3<sup>rd</sup> March, 2009 showing a transfer from Hamadi Juma Mwakibibo to Aniket Property & Investment Ltd. for a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-). He recalled Case HCCC No. 211 of 2006. At Page 87 of Plaintiff Exhibit No. 3 was an affidavit in which paragraph 3 attached some exhibits. At Page 89 was an application for registration of a court order in Misc. No. 134 of 2009 for Title Kwale/Diani Beach/203, with remarks at the top that the Registrar was ".....unable to register because the registered proprietor was not party to the suit...". At Page 88, paragraph 4(5), Aniket Properties had applied to be made a party.
  49. PW - 1 testified that in the presentation book in the Attorney General's list there was an entry made on 4<sup>th</sup> March, 2009 with the remark "rejected." At Page 91 was the transfer, bearing a stamp certifying that stamps on the documents had been embossed, and at the right-hand side was the name G.S. Bimudu. At Page 92 was a copy of the Green Card attached to the affidavit at Page 87. Entry No. 9 showed the proprietor as Aniket Property & Investment Limited as at 3<sup>rd</sup> March, 2009. The initial Entry No. 9 had been a caution that was rejected.
  50. PW - 1 referred to Page 69, being a lease to Hamadi Juma Mwakibibo, presented on Presentation Book No. 053/2007. In the Attorney General's list of documents, Entry No. 053 of 18<sup>th</sup> October, 2007 was a lease by the Government of Kenya to Hamadi Juma Mwakibibo, with receipt No. 042334, the same as at Page 69 of Plaintiff Exhibit No. 3. The lease at Page 36 was an extension of lease for 50 years at an annual rent of a sum of Kenya Shillings Seventy Seven Thousand (Kshs. 77,000/-) with effect from 1<sup>st</sup> August, 2006.
  51. PW - 1 referred to Page 113, being a letter from the Commissioner of Lands dated 9<sup>th</sup> November, 2006 to the District Land Registrar, Kwale. At Page 112 was a surrender of lease dated 7<sup>th</sup> November, 2006. At Page 114 was a letter dated 4<sup>th</sup> February, 2008 from the Commissioner of Lands to the District Land Registrar, with Stephen Oddiaga & Co. Advocates acting for Mr. Hamadi Juma Mwakibibo, the 1<sup>st</sup> Defendant. At Pages 44 – 45 was a letter by Stephen Oddiaga & Co. Advocates to A.B. Patel & Patel Advocates, who had been acting for the Plaintiff. At Page 46 was the agreement for sale between Hamadi Juma Mwakibibo and Venture Holdings Limited, which had precipitated this suit.
  52. PW - 1 reiterated that after year 2009 the Land Registrar had never called him to return the title for cancellation. The Land Registrar had not indicated that any sub - division had been registered. He stated that he did not think any sub - division could have been done when the original title was with them. PW - 1 referred to Page 81 onwards, being a copy of the Green Card. Entry No. 1 showed the registered proprietor as the Government of Kenya. At Page 82, Entry No. 1 dated 18<sup>th</sup> October, 2007 showed the name of Hamadi Juma Mwakibibo. At Page 83 was a caution (Entry No. 4) by PW - 1. Entry No. 7 dated 27<sup>th</sup> November, 2008 referred to suit No. 315 of 2008. Entry No. 8 dated 22<sup>nd</sup> January, 2009 showed that the court order had been lifted, and Entry No. 9 at Page 85 showed that the property had been registered in the name of Aniket Property & Investment Limited on 3<sup>rd</sup> March, 2009, and a Title Deed had been issued.
  53. PW - 1 testified that in the 7<sup>th</sup> and 8<sup>th</sup> Defendants' list of documents filed on 28<sup>th</sup> February, 2014, at Page 6 and Page 82, the top was written "combination." The two Green Cards were identical. Entries No. 4, 5, and 6 at Page 83 were the same as those at Page 8 of the 7<sup>th</sup> and 8<sup>th</sup> Defendants' documents of 28<sup>th</sup> February, 2014. The same was also identical at Page 84 and Page 10, which had Entries No. 7 and 8. Page 85 had Entries No. 9 and 10 when title was issued. At Page 12 in the 7<sup>th</sup> and 8<sup>th</sup> Defendants' list



of documents, Entry No. 9 showed that title had been issued, and Entry No. 9 also showed that title had been closed on subdivision on 3<sup>rd</sup> October, 2011

54. PW - 1 reiterated that they had not applied for subdivision, nor had they surrendered the original title deed. At Page 14 was issuance of a certificate of lease, which was not signed. He emphasized that Hamadi Juma Mwakibibo was no longer registered in October, 2011, and they had not asked for registration of any subdivision. He stated that it was shocking that titles had been issued.
55. PW - 1 referred to Page 37, being a payment receipt No. 0423348 dated 5<sup>th</sup> September, 2006. At Page 111 in P. Exhibit 3 was the same receipt dated 5<sup>th</sup> September, 2006. At Page 113 was the same document as at Page 38 of the 7<sup>th</sup> and 8<sup>th</sup> Defendants.
56. PW - 1 concluded by stating that, as far as he was concerned, the Plaintiff remained the owner of the suit property. He reiterated that they still had the original title deed and had not sub - divided it whatsoever. At Pages 9 and 11 of Plaintiff Exhibit 3, the owner was shown as Aniket Property & Investment Limited, and the official searches had been signed by the Land Registrar. PW - 1 confirmed that he was seeking the reliefs in the re - Amended Plaintiff and the costs of the suit.

### **C. Cross examination of PW - 1 by Mr. Makuto Advocate.**

57. PW - 1 testified during cross-examination that he recalled looking at the original title for Kwale/Diani Beach/203. He confirmed that he had the original Certificate of Lease for the suit land issued on 3<sup>rd</sup> March, 2009, and explained that a copy was at Page 5 of the Plaintiff's further list of documents filed on 9<sup>th</sup> January, 2019. PW - 1 stated that the original had been shown to the court and that it was identical to the copy at Page 5. He reiterated that, having inspected and compared the original and the copy, the original had been returned to him. PW 1 further testified that he wished to produce the entire bundle filed on 11<sup>th</sup> July, 2012 as Exhibit 1, the Plaintiff's Supplementary List of Documents filed on 19<sup>th</sup> September, 2018 as Plaintiff Exhibit No. 2, and the Plaintiff's Further Supplementary List of Documents filed on 9<sup>th</sup> January, 2019 as Plaintiff Exhibit No. 3. He explained the contents of those exhibits, including the application for consent of the Land Control Board, the letter of consent dated 4<sup>th</sup> February, 2009, the valuation requisition for stamp duty, the banker's cheque and receipts, the transfer of lease, and the presentation book entries.
58. PW - 1 confirmed that he had never parted with the original title for Plot No. 203, that he had the original letter of consent from the Land Control Board, and that he had paid the land rent of a sum of Kenya Shillings Seventy Seven Thousand (Kshs. 77,000/-) in cash on 17<sup>th</sup> February, 2009. He stressed that he also had a stamp duty declaration form.
59. PW - 1 concluded by stating that, as far as he was concerned, the Plaintiff remained the owner of the suit property, that they still had the original title deed, and that they had not subdivided. He confirmed that he was seeking the reliefs in the re - Amended Plaintiff and the costs of the suit. PW - 1 testified that he had one certificate of lease issued on 3<sup>rd</sup> March, 2009, as shown at Page 5 of Plaintiff's Exhibit No. 3. He stated that the transfer was dated 23<sup>rd</sup> February, 2009. At Page 27 of Plaintiff's Exhibit No. 3 was the transfer dated 23<sup>rd</sup> February, 2009, and at Page 28 the transfer had been registered on 3<sup>rd</sup> March, 2009.
60. PW - 1 referred to Page 54 of Exhibit 3, being a Notice of Motion application dated 26<sup>th</sup> February, 2009. He explained that the affidavit in support, starting at Page 56, had been sworn on 26<sup>th</sup> February, 2009 by Mr. James Isabirye. PW - 1 testified that at Page 80 of the Plaintiff's further list of documents there was a letter dated 20<sup>th</sup> February, 2009 from the District Land Registrar, Kwale, to Kasmani Advocates in reference to Kwale/Diani Beach/25, sub - division to Plots No. 203 and 204. According to this letter, suit No. 211 of 2006 had been withdrawn by the Plaintiff on 10<sup>th</sup> December, 2008. The letter had



referred to Kwale/Diani Beach Block/25, sub - division Plots Nos. 203 and 204, and stated that the titles 203 and 204 had been surrendered to the Government.

61. PW - 1 confirmed that the letter was dated 20<sup>th</sup> February, 2009 and that it bore an exhibit stamp at the bottom for the affidavit of Mr. James Isabirye. He reiterated that at Page 56 was the affidavit of James Isabirye, and at Page 80 the letter was marked as "C5." At Page 57, paragraph 6 referred to exhibit "C5." PW - 1 explained that at Page 54, order No. 3 had sought to restrain the Land Registrar from making further entries in Title No. Kwale/Diani Beach/203 and 204 and the sub - divisions to Plot Nos. 1536 to 1543.
62. PW - 1 testified that HCCC No. 211 of 2006 had come to be known to them on 24<sup>th</sup> June, 2010, when it had been brought to the attention of their lawyer. He stated that the court had ordered that the balance of the purchase price to be deposited in a joint account in the names of Messrs. Stephen Oddiaga Advocates, who had been acting for the 1<sup>st</sup> Defendant, and Messrs. A.B. Patel Advocates, who had been acting for the Plaintiff company. PW - 1 confirmed that up to date, that money was still held in the said joint account.

#### **D. Cross examination of PW - 1 by Mr. Kounah Advocate.**

63. PW - 1 confirmed that he had met the 1<sup>st</sup> Defendant. He stated that he first met him when the 1<sup>st</sup> Defendant offered to sell him the suit land in December, 2007. PW - 1 explained that the sale agreement had been executed on 21<sup>st</sup> December, 2007. He confirmed that they had visited the suit property together.
64. PW - 1 reiterated that he knew the piece of land well because a Whiteman had been living on it. It had been Plot No. 203. He described it as a very nice property, with the Diani Beach road cutting across. Part of the property had been on the beach and the other half across the road. It had measured 12 acres (4.538 hectares) less the quarter piece at the back. The portion running from the road to the beach had been around 6 acres. There had been a house located in the middle of the plot, touching the beach of the Indian Ocean.
65. PW - 1 referred to the agreement at Page 130 of Plaintiff's Exhibit 1. He explained that the back portion had been between a quarter and half an acre. He stated that he had not been told by the seller. He testified that there had been a white house on the beach plot and a small house on the plot away from the beach. The small house, belonging to a European, had been on the portion away from the beach.
66. PW - 1 referred to Page 25 of Plaintiff's Exhibit 1, paragraph 13. He emphasized that from the beginning he had known they were not buying the whole plot. Clause 1 of the agreement for sale had not mentioned the size of the portion sold to a third party. He confirmed that the agreement had been entered between himself, Mr. Vipin Maganlal Shah (now deceased), and the 1<sup>st</sup> Defendant.
67. PW - 1 informed Court that he was a Caretaker of the Plaintiff company. He explained that the directors and shareholders of the Plaintiff company were Dilean Shah and Mina Shah who were husband and wife, with Mina Shah being sister to the late Vipin Maganlal Shah. He confirmed that he was neither a director nor a shareholder of the Plaintiff company. He stated that Vipin Maganlal Shah had passed on in the year 2009/2010. He explained that he did business with the Plaintiff company and that they had appointed him as Caretaker, though there was no resolution to that effect.
68. PW - 1 confirmed that he had produced the Certificate of Lease in the name of the Plaintiff company, as shown at Page 5 of Plaintiff's Exhibit No. 3. He testified that he was not aware that the Certificate of Lease had been procured illegally. He explained that the Certificate of Lease had been procured by



- Mr. Hamadi Juma Mwakibibo and his lawyer, Mr. Oddiaga, at that time. He referred to the transfer at Page 217, dated 23<sup>rd</sup> February, 2009, and registered on 3<sup>rd</sup> March, 2009.
69. PW - 1 stated that he could see the order dated 2<sup>nd</sup> March, 2009 at Page 87 of Plaintiff's Exhibit 1. Order No. 3 had restrained the Land Registrar from making further entries in Title No. Kwale/Diani Beach/203 and 204 and sub - divisions to Plots Nos. 1536 to 1543 until further orders of the court. He testified that he had paid a sum of Kenya Shillings Three Million (Kshs. 3, 000, 000/=) of the purchase price to the 1<sup>st</sup> Defendant, with the balance having been put in a joint account as per a court order.
70. PW - 1 referred to the list of documents filed by the Attorney General on 12<sup>th</sup> March, 2019. Entry No. 53 was a lease issued. Entry No. 54 of 18<sup>th</sup> October, 2007 was a surrender of lease by Hamadi Juma Mwakibibo and the Government of Kenya. The description of the property was Kwale/Diani Beach/203. He confirmed that at Page 4 of Plaintiff's Exhibit 3 there was a lease received for registration on 18<sup>th</sup> October, 2007 for Kwale/Diani Beach/203.
71. PW - 1 explained that he had never seen a title deed, only a Certificate of Lease. He testified that the Green Card showed a cancellation of Entry No. 9 and another Entry No. 9 in which Aniket Investment Property Limited was issued with a title deed. He referred to Page 9 of Plaintiff's Exhibit No. 3, being a Certificate of official search for Title No. Kwale/Diani Beach Block/203 dated 3<sup>rd</sup> March, 2009 in the name of the Plaintiff. Entry 10 stated Certificate of Lease issued, not title deed.
72. PW - 1 confirmed that Page 20 was an application for consent of the Land Control Board. He stated that he had not seen it before and had not been to the Land Control Board. He referred to Page 131 of Plaintiff's Exhibit 1, which contained special conditions. Clause 9(e) required the Vendor to obtain Consent of the Commissioner of Lands and Clearance Certificate. He reiterated that there had been no Letter of Consent from the Land Control Board. He stated that he would have to ask his lawyer if they had obtained consent from the Commissioner of Lands. He referred to Page 22 of Plaintiff's Exhibit 3, being a Letter of Consent from the Land Control Board. He explained that in the sale agreement they had been to obtain consent of the Commissioner of Lands as required under the lease.
73. PW - 1 referred to Page 25 of Plaintiff's Exhibit 3, being a customer transaction voucher for Kwale/Diani Beach Block 2 for transfer of lease. He testified that he could see the 1<sup>st</sup> Defendant's list of documents. At Page 38, Entry 9 of 3<sup>rd</sup> October, 2011 indicated closed on subdivision and referred to Diani Beach/Block/203. Entry 6 was a court order dated 11<sup>th</sup> November, 2008 in Case No. 315 of 2008. Entry 7 of 27<sup>th</sup> November, 2008 was a court order dated 20<sup>th</sup> November, 2008 for interim order extended. Entry No. 8 of 22<sup>nd</sup> January, 2009 was a court order dated 21<sup>st</sup> January, 2009 lifting Entries Nos. 3-7. Entry No. 9 was closure on sub - divisions to Plot Nos. 1536 to 1543 for Block 203.
74. PW - 1 explained that the entries at Page 38 were typed, while the Green Card annexed to the Plaintiff's supplementary documents at Pages 81-85 was handwritten. Entry No. 9 was a cancellation with remarks "documents rejected." He testified that he was not aware who had obtained the Green Card in the Plaintiff's further list of documents.
75. PW - 1 referred to Page 141 of Plaintiff's Exhibit No. 1, being a letter dated 6<sup>th</sup> March, 2009 from Messrs. Stephen Oddiaga & Co. Advocates to Messrs. A.B. Patel Advocates. It had talked of a title deed, with Mr. Oddiaga acting for the 1<sup>st</sup> Defendant. He explained that the transfer at Pages 27-28 of Plaintiff's further list of documents had been drawn by Stephen Oddiaga & Co. Advocates. Mr. Oddiaga had forwarded a copy of the Certificate of Title (Page 142) and a search (Page 145).
76. PW - 1 emphasized that after 6<sup>th</sup> March, 2009 they had been told there was a pending case on the same piece of land, suit No. 211 of 2006, and the court had allowed the outstanding balance of the purchase



price to be put in a joint account to be held between his lawyer, A.B. Patel & Patel, and Mr. Oddiaga until Case No. 211 was concluded. He confirmed that the original title had been given to his lawyer by Mr. Stephen Oddiaga.

77. PW - 1 concluded by stating that if there was a search showing that the property had been sub - divided as at 2<sup>nd</sup> March, 2009, that was the evidence before the court.

#### **E. Cross Examination of PW - 1 By Mr. Ndambiri Advocate.**

78. PW - 1 testified that when he had filed this civil suit, he had named Venture Holdings Limited, the 2<sup>nd</sup> Defendant, as a party. He explained that Venture Holdings Limited had put a signboard outside the plot and had started drilling up a borehole on the land. He confirmed that the identity of the place had been Plot No. 203. PW - 1 stated that he had produced some documents and had looked at most of them. He reiterated that it was true the documents had been in three bundles and that they were part and parcel of his evidence. He confirmed that he was familiar with their contents.
79. PW - 1 testified that he and Mr. Shah had entered into a sale agreement dated 21<sup>st</sup> December, 2007 with the 1<sup>st</sup> Defendant. He explained that before entering into the sale agreement, he had developed an interest in the land but had not carried out a search prior to 21<sup>st</sup> December, 2007. He stated that he had gone through the draft sale agreement before signing and had understood that the parcel he was purchasing was less a portion.
80. PW - 1 stated that he had also understood the contents of the agreement, namely that the Vendor was to take 15 days to set all the necessary documents, including the title deed and the extension of the lease. He testified that the Vendor had shown him the previous title deed a day before signing the agreement. He explained that the document had been a photocopy and had indicated the required extension of lease. He stated that he had not made any inquiry about the whereabouts of the original documents and did not remember if the copy he had seen had been a certified copy.
81. PW - 1 referred to the Certificate of Lease at Page 34 of Plaintiff's Exhibit 3. He stressed that he had been informed it required an extension of lease. He reiterated that no having seen an original title. He explained that the sale agreement had not been concluded within 15 days as stated in the agreement. He referred to paragraph 9 of the sale agreement at Page 130 of Plaintiff's Exhibit No. 1 and confirmed that he had understood the full meaning of that paragraph, including the requirement of Clause 9 (e).
82. PW - 1 testified that they had paid the deposit required. He explained that the deposit had been a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000/=), not a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3, 500, 000/=) as he had earlier informed the Court in his testimony. He explained that under Clause 4 of the agreement had indicated that the deposit to be paid was a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-). They received the completion documents but he could not remember the date this happened.
83. PW - 1 confirmed that in the year 2008 they had filed HCCC No. 315 of 2008 against the 1<sup>st</sup> Defendant. He explained that it had taken a year before the Vendor had performed his part of the agreement. He referred to Page 154 of Plaintiff's further list of documents, being an affidavit he had signed on 5<sup>th</sup> November, 2008. He stated that in paragraph 7 he had referred to having seen the original title documents, though he did not remember if he had seen the original title by that date.
84. PW - 1 reiterated that in the year 2008 a portion of the property had been sold to a third party, as shown in paragraph 12. He testified that he had been told it had been sold, though the portion had not been transferred. He confirmed that in HCCC No. 315 of 2008 there had been a Decree on Consent



- Judgment entered, and he referred to paragraph 3 of the decree. He explained that in the year 2008 there had been a sub - division plan and that the documents had been delivered to his lawyer. His lawyer had told him they had received the original lease and documents allowing them to sub - divide the property.
85. PW - 1 stated that he was not aware if a transfer had been forwarded to their lawyer by the Vendor's lawyer. He reiterated that in the agreement it had been agreed that the balance of the purchase price was to be paid, but the entire balance had not been paid. He explained that another suit had been filed to stop payment because of the case by Seaview.
86. PW - 1 testified that he was not aware that Mr. Oddiaga Advocate had put an advertisement in the newspaper to sell Plot No. 203 on 2<sup>nd</sup> December, 2008 to recover his fees. He stated that they had opposed that application and that he had sworn an affidavit to stop the action, as shown at Page 135 of Plaintiff's Exhibit No. 3. He referred to paragraph 9 of that affidavit. He reminded the Court that by September, 2010, Mr. Shah had passed away.
87. PW - 1 stated that he did not know whether Aniket Investment Properties Limited had been introduced to HCCC No. 315 of 2008. He explained that the lawyer acting for Aniket Investment Limited, the Purchasers, when the property had been transferred had been Messrs. A.B. Patel Advocates, while Messrs. Oddiaga Advocates had acted for the Vendor. He confirmed that it had been his first time to have been involved in a land transaction.
88. PW - 1 referred to clause 9(e), which had required the Vendor to obtain Consent from the Land Control Board. He stated that he could see the Letter of Consent at Page 22 of Plaintiff's Exhibit No. 3, which must have been the Consent given to the Land Registrar to effect the transfer to the Plaintiff. He explained that it had a serial number and had been signed by the Chairman of the Land Control Board, Msambweni, not the Commissioner of Lands. He reiterated that he did not know who had presented the said document to effect the transfer.
89. PW - 1 testified that he was not aware that parties to a transaction of lease must sign an application for consent. He stated that he had not attended a meeting of the Land Control Board and did not know if directors of the Plaintiff company had attended. He referred to the transfer at Page 27 of Plaintiff's Exhibit No. 3 and stated that he did not remember when he had seen it for the first time, though it had been provided to his lawyer and he had seen it.
90. PW - 1 explained that he could see the document at Page 33 of Plaintiff's Exhibit 2 and that at Page 34 there was a stamp, while the one at Page 28 was not stamped. He reiterated that the person who had presented the document must have been the Vendor. He stated neither him nor the directors of Aniket Property & Investment Limited had instructed Mr. Oddiaga Advocate to present the documents. He confirmed that his lawyer should know better.
91. PW - 1 testified that he had no knowledge of the procedures and was not aware if the original title had been presented. He referred to the valuation requisition at Page 23 of Plaintiff's Exhibit No. 3. He explained that paragraph 8 indicated the date of transfer as 10<sup>th</sup> February, 2009. He stated that the transfer at Page 34 of Plaintiff's Exhibit No. 2 had been registered on 3<sup>rd</sup> March, 2009, while the transfer at Page 33 had been dated 26<sup>th</sup> February, 2009. He testified that he would not be able to state about a document of transfer dated 10<sup>th</sup> February, 2009 because it had been handled by their lawyers.
92. PW - 1 confirmed that he was aware a Certificate of Lease had been issued in the name of Aniket Property & Investment Limited and that he had come to know of it on 3<sup>rd</sup> March, 2009. He stated that his lawyer had informed him of this in his office. He referred to Page 141 of Plaintiff's Exhibit 1, being a letter dated 6<sup>th</sup> March, 2009 from Messrs. Stephen Oddiaga Advocate to Messrs. A.B. Patel & Patel Advocates. He explained that he had only seen a copy of the title. He testified that he had first seen the



original title in his lawyer's office but could not remember the date. He reiterated that he had held the copy in the lawyer's office after Mr. Oddiaga had sent it to him.

93. PW - 1 stated that after he had heard there was a transfer in favour of the Plaintiff, he had conducted a search. He referred to the search at Page 9 of Plaintiff's Exhibit No. 3. He explained that his lawyer must have conducted the search, though he himself had conducted a search on 22<sup>nd</sup> April, 2010. He referred to the letter of 6<sup>th</sup> March, 2009, which had enclosed a certified copy of the title deed and a search at Page 145. He reiterated that Entry of 3<sup>rd</sup> March, 2009 indicated a certificate of lease issued.
94. PW - 1 testified that in the Certificate of Official search at Page 11 of Plaintiff's Exhibit 3, Entry No. 3 of 3<sup>rd</sup> March, 2009 showed Aniket Property and Investments Ltd. and title deed issued. He confirmed that one search indicated a certificate of lease had been issued while the other indicated a title deed had been issued.
95. PW - 1 reiterated that they had not instructed Messrs. Oddiaga & Co. Advocates and that he did not know why they had been presenting documents. He stated that he had seen the Green Card of Plot No. 203 at Kwale and that it should have been part of the documents. He explained that he had found it was Venture Holdings Limited after he had taken photographs. He confirmed that the ownership in the name of Venture Holdings had been found out by his lawyers.
96. PW - 1 referred to Pages 81 – 85 of Plaintiff's Exhibit No. 3, which his lawyers had obtained. He explained that Entry No. 9 had been cancelled and another Entry No. 9 of 3<sup>rd</sup> March, 2009 had shown Aniket Property & Investment Limited, while Entry No. 10 of 3<sup>rd</sup> March, 2009 had shown title deed issued. He further explained that the title he had seen in his lawyer's office was reading a Certificate of Lease.
97. PW - 1 confirmed that he could not remember having seen a copy of the rent clearance certificate. He stated that he had no idea why the documents had been obtained from Messrs. Oddiaga Advocate. PW - 1 explained that he had not been aware that the transactions conducted by Messrs. Oddiaga Advocate had been irregular or not captured in the land office. He reiterated that he had not been aware that in the year 2011 the title for Plot No. 203 had closed as a result of the sub - divisions caused by the registered owner. PW - 1 confirmed that he had not instructed lawyer, Mr. Oddiaga.

#### **F. Cross examination of PW - 1 by Mr. Ondabu Advocate for the 3<sup>rd</sup> and 5<sup>th</sup> Defendants.**

98. PW - 1 confirmed that he could see the 7<sup>th</sup> and 8<sup>th</sup> Defendants' list of documents filed on 7<sup>th</sup> February, 2014. At Page 14 was a copy of a Green Card. As at 3<sup>rd</sup> October, 2011, the registered proprietor had been Hamadi Juma Mwakibibo. Entry No. 3 had been in the name of Mr. David Kandie. There had been no entry before Entry No. 3, but there had been a restriction thereafter.
99. PW - 1 referred to Page 20, being another Green Card in the name of Hamadi Juma Mwakibibo. Entry No. 3 had been M/s. Amana Abdalla Nganga. Before Entry No. 3, there had been no restriction registered. He testified that he could see the Plaintiff's further supplementary list of documents filed on 9<sup>th</sup> January, 2019. At Page 22 was a Letter of Consent issued to Hamadi Juma Mwakibibo from Msambweni Land Control Board to Aniket Property & Investment Limited.
100. PW - 1 explained that he had a letter of consent from the Commissioner of Lands dated 2<sup>nd</sup> September, 2008. He reiterated that he had not had two consents, but that it had been provided for by the letter. He confirmed that the property they had been buying had been Plot No. 203.
101. PW - 1 referred to Page 25 of their further list of documents, being a voucher for stamp duty paid for Block 203 in the sum of Kenya Shillings Six Sixty Thousand and Fourty Hundred (Kshs. 660,040/-).



It had indicated Land Reference No. Kwale/Diani/Block 2. The payment had been made on 27<sup>th</sup> February, 2009. He testified that he could see the Plaintiff's list of documents filed on 11<sup>th</sup> July, 2012, which contained a decree in "Civil Suit No. 315 of 2008 – Vipin Manlal Shah and Vijay Lakhani – Versus – Hamadi Juma Mwakibibo". He explained that the Decree had related to Block Kwale/Diani Beach/203. He reiterated that the suit herein was over Block 203. He stated that he did not remember what had happened with the decree in HCCC No. 315 of 2008, but confirmed that the decree had been issued.

102. PW - 1 testified that he was the manager of the Plaintiff company. He repeated that he was not a director of the Plaintiff company and had not attached a resolution appointing him to act for the company in the case. He reiterated that he was not a shareholder of the Plaintiff company.
103. PW - 1 referred to the Re-Amended Plaint filed on 12<sup>th</sup> October, 2012. He explained that when one was buying land, one applied for a search. He stated that the Green Card did not show that there had been a restriction. He reiterated that he did not recall if they had issued notice to the Attorney General before filing the suit.
104. PW - 1 testified that he could see the defence filed by the 7<sup>th</sup> and 8<sup>th</sup> Defendants, which stated that mandatory notice had never been issued against the Attorney General. He referred to the witness statement by the 7<sup>th</sup> Defendant filed on 7<sup>th</sup> November, 2016. He explained that in paragraph 9 it had been stated that from the records there had never been any presentation of transfers and/or registration over the suit property. PW - 1 reiterated that he was the Caretaker for the Plaintiff and that he looked after their property.
105. PW - 1 referred to the 1<sup>st</sup> Defendant's Amended Defence filed on 13<sup>th</sup> September, 2013. He explained that paragraph 22 had stated that Vijay Lakhani had no locus standi in the matter. PW - 1 refuted that he was not a busybody wasting the court's time. He testified that the property had not been sub-divided and that they had the original title, which was why they were before the court.
106. PW - 1 referred again to the Re - Amended Plaint filed on 12<sup>th</sup> October, 2012. He explained that in the alternative they were seeking damages against the 7<sup>th</sup> and 8<sup>th</sup> Defendants. He confirmed that the 7<sup>th</sup> and 8<sup>th</sup> Defendants were the Land Registrar, Kwale, and the Attorney General.

#### **G. Cross examination of PW - 1 by Mr. Siminyu Advocate.**

107. PW - 1 testified that they had purchased the property on 8<sup>th</sup> January, 2008. He stated that the sale agreement at Page 130 of Plaintiff's Exhibit No. 1 had been prepared by Advocates N.S. Swaleh. He confirmed that it was true the agreement did not indicate "drawn by S.N. Swaleh witnessed."
108. PW - 1 explained that the property they had been buying was Kwale/Diani Beach/203 measuring 4.538 hectares, less the back portion sold to a third party. He reiterated that the back portion had been 0.5 acres. He stated that it had not been difficult to show in the sale agreement "less 0.5 acres." He explained that from the agreement one could not make out what the back portion was. He testified that the back portion of 0.5 acres had been owned by a European person who had a house there and lived there.
109. PW - 1 stated that before he had purchased it, they had done due diligence. He reiterated that before buying, they had known it was less the back portion of 0.5 acres. He referred to Page 25 of the supplementary list, where they had paid a sum of Kenya Shillings Six Hundred Thousand and Fouty Hundred (Kshs. 600,040/-) for the plot. At Page 24 was the stamp duty declaration form for transfer of Kwale/Diani Beach/203 measuring 4.538 hectares. He explained that when they had purchased the property, it had been 4.538 hectares less the back portion, but they had paid stamp duty for 4.538 hectares.



110. PW - 1 confirmed that the lease had been registered in the name of the Plaintiff. He stated that he had a copy of the Certificate of Lease. He referred to the Plaintiff's list of documents filed on 11<sup>th</sup> July, 2012, which contained a lease registered in the name of Hamadi Juma Mwakibibo. He explained that in the Plaintiff's further supplementary list of documents at Page 5 there was a Certificate of lease in the name of Aniket Properties Limited for 4.538 hectares, not less the back portion. He reiterated that the European person had been on 0.5 acres, though he did not know if it was the 4<sup>th</sup> Defendant. He stated that Aniket Properties & Investment Limited had transferred the entire portion in its name and was to register a sub - division later on.
111. PW - 1 testified that he could see the 7<sup>th</sup> and 8<sup>th</sup> Defendants' list of documents filed on 28<sup>th</sup> February, 2014. At Page 28 was a Green Card for parcel No. 1542. The sub - division had been opened on 3<sup>rd</sup> October, 2012. Entry No. 1 had been Hamadi Juma Mwakibibo dated 3<sup>rd</sup> October, 2011. A certificate had been issued on 3<sup>rd</sup> October, 2011. Entry No. 3 had been Khalfan Elai, and a certificate had been issued. It had been certified by the Land Registrar. Entry No. 5 had been a restriction of "no dealing until Petition No. 57 is heard and determined." PW - 1 reiterated that he had not been a party to Petition No. 57 and was not aware if it had been concluded. He stated that he did not know the parties in Petition No. 57.
112. PW - 1 referred to the witness statement of the 7<sup>th</sup> Defendant filed on 4<sup>th</sup> November, 2016. He explained that paragraph 14 had stated that the lands registry had only proceeded to deal with the property after orders lifting all the restrictions. Paragraph 15 had stated that the property had been sub - divided into Parcel Numbers 1536 -1543, with parcel 1542 lying between 1536 and 1543. PW - 1 reiterated that he had done due diligence as he was registering the property.
113. PW - 1 referred to Page 69 of Plaintiff's Further Supplementary list of documents, being a lease in the name of Hamadi Juma Mwakibibo. He explained that he could also see the Plaintiff's list of documents filed on 11<sup>th</sup> July, 2012. He stated that before registering the lease, he had done due diligence. He referred to a lease received for registration on 18<sup>th</sup> October, 2007, dated 7<sup>th</sup> November, 2008, though it was not clear. He explained that at Page 72 of Plaintiff's further supplementary list of documents there was a lease dated 7<sup>th</sup> November, 2006, which stated:- "I certify that Hamadi Juma Mwakibibo appeared on 18<sup>th</sup> October, 2007." He reiterated that it was the same document as in the original list, though the "07" was not clear. In one document, the "07" had been cancelled. He confirmed that it was the same document and that he could see signatures at the bottom of both documents.
114. PW - 1 testified that they had had several cases over the same suit property, namely:
- a. Civil Case No. 211 of 2006;
  - b. Civil Case No. 134 of 2012;
  - c. Civil Suit No. 315 of 2008.
115. PW - 1 reiterated that there had been three cases in total. He stated that he was aware the property had at one time been auctioned by Messrs. Stephen Oddiaga Advocate. He explained that at that time they had already bought it, but Mr. Oddiaga Advocate had been claiming his fees. He reiterated that they had not been party to that case, although the property had been in their name. He stated that he had the Registry Index Map but had no idea if the RIM had been registered.
116. PW - 1 referred to Page 20 of Plaintiff's Exhibit no. 3. He explained that the property had been a beach property but with a road cutting across. He stated that it had been a beach plot. At Page 20 was an application for consent of the Land Control Board. He stated that they had had an advocate acting for



them in the entire transaction. He confirmed that the purchase price for the suit property had been a sum of Kenya Shillings Thirty Three Million (Kshs. 33, 000, 000/=), of which around 50% of it had been paid to Hamadi Juma Mwakibibo.

117. PW - 1 testified that the balance had been put in a fixed deposit account of the lawyers, to await the outcome of Case No. 211 of 2006. However, he explained that Case No. 211 of 2006 was no longer pending and had been determined. He reiterated that in Case No. 211 of 2006 the court had not ordered that the money be released. He confirmed that it was not wrong to state that Mr. Mwakibibo was an unpaid seller. He explained that in the present case, Civil Case No. 134 of 2021, there was no order stopping payment to Hamadi Juma Mwakibibo, because there had been sub - division and titles issued.

#### **H. Re - examination of PW - 1 by Mr. Khagram Advocate.**

118. PW - 1 reiterated that it was not correct that the Plaintiff's title documents were forgeries. He stated that they had purchased the property and had been coming to court for one issue after another. PW - 1 explained that the Plaintiff had signed a sale agreement with the 1<sup>st</sup> Defendant and had been paid the deposit of the purchase price. He reiterated that immediately they had found out that the 1<sup>st</sup> Defendant had attempted to sell the property to Buddon Investments, they had filed Civil Suit No. 315 of 2008, as shown at Page 13 of Plaintiff's Exhibit 1. The agreement for sale between the Plaintiff and the 1<sup>st</sup> Defendant was at Page 130.
119. PW - 1 testified that the land had originally been purchased by himself and Vipin Makanlal Shah. At the time of transfer, they had nominated Aniket Properties & Investments Limited for the transfer to be done in its name, and at that time Vipin Makanlal Shah had still been alive. He referred to Clause 9 of the sale agreement at Page 131, confirming that the land had never been sub - divided. PW - 1 explained that they had then filed Civil Suit No. 315 of 2008 to compel the 1<sup>st</sup> Defendant to complete the sale agreement, and a decree had been issued by the court. He reiterated that he had visited the property and that the back portion had been about 0.5 acres.
120. PW - 1 referred to Page 113 of the Plaintiff's supplementary list of documents, being a decree. Clause 3 had provided that the transfer was to be effected in the name of the Plaintiff and/or its nominee. He explained that the entire Plot No. 203 had been to be transferred, and they were supposed to sub - divide and give back 0.5 acres. He testified that they had undertaken to take the sub - division themselves because they had been concerned that the 1<sup>st</sup> Defendant had attempted to sell the property to other third parties.
121. PW - 1 referred to Page 123 of the supplementary list, being an order issued on 2<sup>nd</sup> March, 2009. At Page 89 of the further supplementary list was an application for registration dated 2<sup>nd</sup> March, 2009, described as a court order. He explained that the remarks at the top had been that the Land Registrar was unable to register because he had been party to the suit. PW - 1 testified that he could see the 1<sup>st</sup> Defendant's further list of documents filed on 14<sup>th</sup> March, 2019, where the entry dated 14<sup>th</sup> March, 2019 indicated "court order Seaview Investment etc. rejected." Above it had been dated 3<sup>rd</sup> March, 2009, being a transfer to Aniket Properties & Investments Limited. At Page 27 of the further supplementary list of documents was a transfer received on 3<sup>rd</sup> March, 2009, the Presentation Book No. 033/3/09. He confirmed that the transfer in the name of Aniket Properties & Investments Limited had been registered on 3<sup>rd</sup> March, 2009.
122. PW - 1 referred to Page 112 of the Plaintiff's further list of documents, being a Judgment and Decree at Pages 113–114. Clause 2 of the order issued on 11<sup>th</sup> December, 2008 had registered the 1<sup>st</sup> Defendant, and any action contrary to that order had been illegal and in contempt of court. He explained that



- Aniket Properties & Investments Limited had paid the full amount, though a certain amount had been put in a joint account held by the two Advocates for the Vendor & Purchser because it had been brought to their attention that there had been Case No. 211 of 2006 pending in court over the same property, as shown at Page 171 of Plaintiff's Exhibit 1. He reiterated that that case had been withdrawn on 25<sup>th</sup> February, 2009.
123. PW - 1 referred to Page 146 onwards of the further supplementary list of documents, being an extension of the consent order for payment of the balance of the purchase price into a joint account. He explained that there had been another suit, No. 119 of 2018, filed by the 1<sup>st</sup> Defendant through Mr. Oddiaga Advocate for the release of the funds. He testified that Seaview had tried to relitigate and that the Defendants herein had been joined in the case. Before a final decision had been made, they had filed the present suit to safeguard their interest. PW - 1 testified that Mr. Mwakibibo had not paid Mr. Oddiaga's fees and that was why he had been holding the title documents to project himself.
  124. PW - 1 confirmed that Aniket Property & Investment Limited's Plot No. 203 had still been in existence as at 3<sup>rd</sup> March, 2009. He referred to Page 109 of the further supplementary list of documents, being a letter dated 10<sup>th</sup> August, 2006 for extension of lease for 50 years with effect from 1<sup>st</sup> August, 2006. He explained that if Plot No. 203 had not been in existence, no sub - division would have been done. He referred to Page 112, being a surrender of lease in consideration of the extension of lease for 50 years, Page 113 being a letter dated 9<sup>th</sup> November, 2006, and Page 114 being a letter dated 4<sup>th</sup> February, 2008.
  125. PW - 1 testified that at Page 99 the title in the name of Aniket Property & Investments Limited had been issued on 3<sup>rd</sup> March, 2009, and a Certificate of Title issued. He referred to the lease in the Plaintiff's list of documents and further supplementary list of documents at Pages 14 and 89, Presentation Book No. 053/07, date received 18<sup>th</sup> October, 2007. He referred to Page 3 of the Plaintiff's further list of documents, being a replying affidavit in Civil Suit No. 211 of 2006. He reiterated that the Defendants had been joined in that suit. He explained that Civil Suit No. 211 of 2006 had related to property number Kwale/Diani Block/25, which had been sub - divided into Plots 203 and 204, as shown in paragraph 10 of the replying affidavit. He confirmed that the transaction in favour of Aniket on 3<sup>rd</sup> March, 2009 had been effected after Civil Suit No. 211 of 2006 had been withdrawn.
  126. PW - 1 reiterated that the back portion had been about 0.5 acres. He testified that he had visited the property at the time of the agreement for sale. He explained that the property had been divided by the Diani Beach Road, with the back portion on the Ukunda side, not on the beach. He referred to Page 193 of Plaintiff's Exhibit 1, being a letter by Messrs. Stephen Oddiaga & Company Advocates to Messrs. A.B. Patel & Patel dated 14<sup>th</sup> June, 2012. He referred to Page 204, being a certificate of lease in the name of Hamadi Juma Mwakibibo issued on 3<sup>rd</sup> October, 2011 over Plot 1541.
  127. PW - 1 testified that at Page 17 of the 2<sup>nd</sup> Defendant's documents there was a title for sub - division No. 1543 issued on 3<sup>rd</sup> November, 2011, and at Page 18 a record showing sub - division had been issued, yet the original title for Plot 203 had been with them and the 1<sup>st</sup> Defendant had been restrained from carrying out anything. He reiterated that after the year 2008 the 1<sup>st</sup> Defendant could not carry out sub - division on Plot 203 as per the decree in Civil Suit No. 211 of 2006.
  128. PW - 1 stated that the searches showing the Plaintiff as owner of the property were not fraudulent. He explained that he was not aware who had signed the consents. He referred to the Plaintiff's list of documents, which contained a letter of consent to transfer dated 4<sup>th</sup> September, 2008 from the District Land Officer to Hamadi Juma Mwakibibo. He reiterated that it was not true that consent had not been given. He confirmed that stamp duty had been paid, with the stamp duty declaration form for Plot



No. 203 assessed at a sum of Kenya Shillings Six Sixty Thousand Fourty Hundred (Kshs. 660,040/-), received on 27<sup>th</sup> February, 2009. Payment had been by Cheque No. 029706, as shown at Page 26.

129. PW - 1 referred to Page 33 of the supplementary list of documents, being a transfer with stamps imposed. He explained that it would not have been possible to impose the stamps if the same had not been paid. He confirmed that the 1<sup>st</sup> Defendant had been collecting various payments from them in respect of the property and that there were various documents to support that.
130. PW - 1 referred to Page 54 of the further supplementary documents filed on 9<sup>th</sup> January, 2019, being a notice of motion supported by an affidavit. He explained that Paragraph 5(f) referred to annexures. At Page 81 was a certified copy of the Green Card for Plot 203 and title issued to the 1<sup>st</sup> Defendant. Entry No. 4 had been a caution by PW - 1, Entry No. 5 a prohibition, and Entry No. 6 a court order prohibiting dealings. Entry No. 9 of 3<sup>rd</sup> March, 2009 had shown Aniket Property & Investments Limited was registered and title deed issued. He reiterated that these had been handwritten copies and not typed.
131. PW - 1 concluded by stating that all the allegations about forgeries and fraud had no basis. He emphasized that the subject matter in Civil Suit No. 315 of 2008 had been Plot No. 203. He confirmed that he was in court to fight for their rights.
132. The Plaintiff through its Counsel on record Mr. Khagram Advocate marked their case closed on 20<sup>th</sup> January, 2021.

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

133. The 1<sup>st</sup> Defendant responded to the Plaintiff's claim through a statement of defence where it averred that:
  - a. Save as hereinafter specifically admitted, the 1<sup>st</sup> Defendant herein denied each and every averment in the plaint and put the Plaintiff to strict proof.
  - b. The 1<sup>st</sup> Defendant admitted the contents of Paragraphs 1, 2 and 3 of the Amended Plaint.
  - c. The Plaintiff expressed interest in purchasing the suit property from the 1<sup>st</sup> Defendant and they agreed that the 1<sup>st</sup> Defendant would first get rid of the squatters who were his relatives from the land and the Plaintiffs paid some money for that exercise to the 1<sup>st</sup> Defendant's then Advocates.
  - d. By the time of the said agreement, the property had already been sub-divided and was in eight (8) portions by the year 2006.
  - e. The 1<sup>st</sup> Defendants then Advocates informed him that the Plaintiffs wanted to secure their money and he therefore asked him to sign a blank transfer document which would be used to transfer one of the portions with commensurate value to them just in case the 1<sup>st</sup> Defendant was unable to get rid of the squatters.
  - f. The Plaintiffs and the 1<sup>st</sup> Defendant had not agreed on the particulars of the specific portion that would be used as compensation in case he was unable to give vacant possession.
  - g. The 1<sup>st</sup> Defendant talked to the squatters who agreed to vacate but demanded for more money than what he had and through his Advocates he requested for further funds from the intended purchasers and for close to four (4) years no response was forthcoming.
  - h. In the process the 1<sup>st</sup> Defendant fell out with his then Advocates and therefore requested for his file which was handed over to him, it had several correspondences, the mutation form and



his original title document to the property referred to as Kwale/Diani Beach Block/203 which he surrendered for the registration of the sub - divisions at the Kwale lands registry.

- i. Prior to the registration of the sub – divisions, the 1<sup>st</sup> Defendant wrote a letter to his then Advocates asking them to stop all dealings with the Plaintiffs.
- j. To the best of the 1<sup>st</sup> Defendant’s knowledge no transfer was ever effected in favour of the Plaintiffs and if there were suits pending and injunctive orders issued, he had no knowledge of them.
- k. The Plaintiff had not been in possession of the suit premises.
- l. The property was sub - divided into plot numbers Kwale/ Diani Beach Block/ 1536 – 1543 inclusive.
- m. The 1<sup>st</sup> Defendant had sold plot number Kwale/Diani Beach Block/1543 to the 2<sup>nd</sup> Defendant herein and a transfer in their favour registered and they had been in possession of the property for the last Four (4) months and they had developed it.
- n. In the year 2007 the 1<sup>st</sup> Defendant sold the property referred to as Kwale/ Diani Beach Block/ 1536 and 1537 to Alfons Josef Brinkmann and he constructed on them immediately. The 1<sup>st</sup> Defendant sold plot number Kwale/ Diani Beach Block/1542 to Khalfan Mlai who was in the process of relocating the squatters on his portion. He sold plot number Kwale/Diani Beach Block/1539 to Amana Abdalla Nganga.
- o. The 1<sup>st</sup> Defendant could not transfer the property without Presidential consent that was normally being issued by the Commissioner of Lands as at the time of the alleged transfer.
- p. The application for consent to transfer relied upon by the Plaintiff was never signed by 1<sup>st</sup> Defendant and that it was made to the Land Control Board that had no jurisdiction over land such as the suit premises.
- q. When the 1<sup>st</sup> Defendant’s former Advocates got information that he was in the process of selling some of the sub - divided portions they wrote to 1<sup>st</sup> Defendant’s current advocates demanding for payment for work done for him.
- r. As an officer of the court, his former Advocates Messrs. Stephen Oddiaga & Co Advocates had a duty to inform the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ advocate on record of any court orders within his knowledge or any other encumbrances within his knowledge that would have inhibited any transactions with regard to the suit property if at all there were any. But he never did that yet he was in touch with both Advocates acting for the parties in the transaction.
- s. When the 1<sup>st</sup> Defendant received monies from the proceeds of the sale of His Property he paid to his former advocates a refund of the monies received for the removal of the squatters plus his fees as agreed.
- t. As far as the 1<sup>st</sup> Defendant was concerned the Plaintiffs had no claims against him and that the Certificate of Lease they purport to be holding is with regard to a non-existent property and that the 1<sup>st</sup> Defendant did not participate in the transfer transaction.
- u. Vijay Lakhani had “no locus standi” in this matter.
- v. The suit was fatally defective, incompetent and an abuse of the court process and the 1<sup>st</sup> Defendant would at the first instance raise a preliminary objection to have the same dismissed



w. The 1<sup>st</sup> Defendant prayed for Judgment against the Plaintiffs' suit against the 1<sup>st</sup> Defendant be dismissed with costs.

134. On 24<sup>th</sup> February, 2021 the 1<sup>st</sup> Defendant called their 1<sup>st</sup> witness DW - 1 who told the court that: -

**A. Examination in Chief of DW - 1 by Mr. Kounah Advocate.**

135. DW 1 was sworn and he testified in Swahili language. He was called Hamadi Juma Mwakibibo, a citizen of Kenya and holding the national identity card bearing all the particulars as shown to Court during the hearing. He was the 1<sup>st</sup> Defendant herein. He stated that he lived in Ukunda and that he was a businessman. He explained that he was aware why he was before the court, namely that it was over a land case. DW - 1 confirmed that he remembered recording a witness statement dated 12<sup>th</sup> September, 2013, which had been filed on 13<sup>th</sup> September, 2013. He reiterated that he had also filed a list of documents dated 12<sup>th</sup> September, 2013, an Amended Defence dated 12<sup>th</sup> December, 2013, and a further list of documents dated 17<sup>th</sup> February, 2014.

136. DW - 1 testified that he wished to adopt his witness statement as his evidence-in-chief in the case. He further stated that he also wished to produce the list of documents and the further list of documents as exhibits in the case. DW - 1 testified that he wished to produce the documents as listed in the original list and the further list of documents. He stated that the original list of documents was to be produced as Defence Exhibit "A" numbers 1 to 41, and the further list of documents was to be produced as Defence Exhibit "B" numbers 1 to 18 respectively.

**B. Cross examination of DW - 1 by Mr. Ndambiri Advocate for the 2<sup>nd</sup> and 4<sup>th</sup> Defendants:-**

137. DW - 1 confirmed that he had been the owner of the land which he had sold to Venture Holdings Limited, the 2<sup>nd</sup> Defendant. He confirmed that it was true he had sold the land to the 2<sup>nd</sup> Defendant. DW - 1 explained that at the time he had sold the land, the title had been with an Advocate. He reiterated that after he had sold the land, there had never been any disagreement.

138. DW - 1 stated that the land never belonged to the Plaintiff at the time he had sold it to the 2<sup>nd</sup> Defendant.

**C. Cross examination of DW - 1 by Mr. Siminyu Advocate for the 6<sup>th</sup> Defendant.**

139. DW - 1 testified that he had been the owner of the land, Plot No. 203, which measured 12 acres. He stated that he had acquired the land in the year 2005. DW - 1 explained that after he had acquired it, he had sub - divided it into eight (8) portions. He explained that one portion had measured 5.5 acres, while others had measured 1 acre, 0.25 acres, and 0.5 acres.

140. DW - 1 confirmed that he had sold the 5.5-acre portion to Venture Holdings Limited, the 2<sup>nd</sup> Defendant. He stated that he did not know the other buyers by face, as he had used an advocate to handle the transactions. DW - 1 explained that he had not seen the 6<sup>th</sup> Defendant, but he was aware that he had sold him 1 acre and that the 6<sup>th</sup> Defendant had paid him.

**D. Cross examination of DW - 1 by Mr. Makuto Advocate for the 7<sup>th</sup> and 8<sup>th</sup> Defendants.**

141. DW - 1 testified that he had acquired the property in the year 2005. He stated that the Plaintiff had paid him some money through an advocate. He explained that they had agreed that he would sell the Plaintiff the land for a sum of Kenya Shillings Thirty Three Million (Kshs. 33, 000, 000/=). DW - 1 stated that he had produced the documents he had entered into with the Plaintiff. DW - 1 confirmed that in his list of documents there was no agreement that he had entered into with the Plaintiff. He



- explained that there had been a mutual agreement to cancel the transaction between himself and the Plaintiff, and that the document was at Page 22 of his original list of documents.
142. DW - 1 testified that at the time he had entered into an agreement with the Plaintiff, his Advocate had been Messrs. Stephen Oddiaga Advocates. He stated that he had not called him as a witness. He explained that he had not produced any letter showing how much money Mr. Stephen Oddiaga Advocate had received for the transaction. DW - 1 reiterated that he had sold the 2<sup>nd</sup> Defendant part of the land. He stated that in his statement he had noted the date he had sold the land to the 2<sup>nd</sup> Defendant.
143. DW - 1 confirmed that he was aware there had been another case over the same suit property, “HCCC No. 315 of 2008, between Vipin Maganlal Shah and Vijay Lakhani – Versus – Hamadi Juma Mwakibibo”. He explained that Vipin Maganlal Shah had been a Director of the Aniket Property & Investment Limited, the Plaintiff. He confirmed that he had filed his documents in court and that his advocate in that case had been Stephen Oddiaga.
144. DW - 1 refuted that he worked with any government department and that he was not the one who kept the lands register. He explained that he knew how to sign. (The witness was given a paper to sign on – Defence Exhibit “C.”) He reiterated that he did not have his other signature.
145. DW - 1 testified that his Advocate had signed the application for consent of the Land Control Board. He explained that he had been called by his advocate to sign documents and that he had signed. He reiterated that he had signed many documents. He stated that he had not personally go to the Land Control Board, but that his advocate had gone there on his behalf. He explained that everything had been done by the Advocate. DW - 1 concluded by stating that he could not remember the date he had signed agreements with the 2<sup>nd</sup> to 6<sup>th</sup> Defendants.
146. DW - 1 testified, still under oath, that he had been the registered owner of land reference Kwale/ Diani/203. He stated that he had sold it to three people after he had sub - divided it – namely Brickmann, Venture Holdings Ltd., and Mohamed Kale, the 9<sup>th</sup> Defendant. He explained that he could not remember when the sales had taken place. He reiterated that the land surveyor had been brought by Mr. Oddiaga Advocate, who had been his Advocate. DW - 1 confirmed that he had informed the court that he had sold to Mr. Vipin, and that he had sold to Venture Holdings Limited, Brickmann, and Mohamed Kale, the 9<sup>th</sup> Defendant.
147. DW - 1 stated that for now he did not have a title in his name, but that he had copies of titles in his name. From his knowledge, LR Nos. 1541, 1540, 1539, and 1567 were in his name, while parcel LR 1542 had been sold to Mohamed Kale, the 9<sup>th</sup> Defendant. He stated that he did not remember the existence of the sale agreement.
148. DW - 1 referred to documents at Page 1 filed by the 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Defendants on 2<sup>nd</sup> March, 2023. He explained that the transfer of lease had been on 12<sup>th</sup> February, 2026, and that he had been told in Kiswahili language what he had been signing – a sale agreement and transfer. He confirmed that the photographic signature and the ID No. 8420572 were his. He stated that he had been paid through a cheque.
149. DW - 1 testified that he had an account at Barclays Bank, Diani Branch, bearing account number 2033xxxxxx. He explained that he had been given one cheque for a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-) and that his advocate during that sale transaction had been Bachelie Advocate, acting for both the Vendor and the Purchaser. He reiterated that at the time he had not been aware that there had been a court injunction order.



150. DW - 1 stated that he had had a Certificate of Lease to demonstrate that he had been the owner of the land, but that for now he did not have it as his house had been burnt. He explained that Mr. Oddiaga Advocate had been his lawyer when the sub - division had taken place in the year 2016. He averred that he did not know whether he had had a court case against Mr. Oddiaga Advocate, though he may have signed documents to be filed in court. He confirmed that he had signed many documents.
151. DW - 1 testified that before, he had had a civil case with Seaview Investments Limited. He referred to Page 229 and a court order of 2<sup>nd</sup> April, 2009, where he had been represented by Mr. Oddiaga Advocate. He explained that at Page 114 of Civil Case No. 315 of 2008, the parties had been Vipin Maganlal Shah and Vijay Lakhani - Versus - Hamadi Juma Mwakibibo, and he had been represented by Mr. Oddiaga Advocate.
152. DW - 1 stated that he had sworn an affidavit and had signed the affidavit sworn on 16<sup>th</sup> November, 2020, at Page 47. It had been Civil Case No. 315 of 2008, entitled "Statement of Admission." He referred to paragraph 4 of that document, where the 1<sup>st</sup> Defendant had admitted that the money given to him had been a sum of Kenya Shillings One Million Five Hundred (Kshs. 1,500,000/-), though he did not remember whether it had been a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-). He confirmed having received money from Mr. Vipin.
153. DW - 1 explained that he had intention of selling him land but had not known the actual location. But he had never sold land to him as he had stopped and terminated the sale transaction. He testified that he remembered surrendering his Certificate of Lease for LR No. 203 to the Land Registrar, and that the surrender had been done by Mr. Stephen Oddiaga Advocate. He might not know the time this had happened nor the documents surrendered, as Mr. Oddiaga had never used to inform him.
154. DW - 1 referred to the Presentation Book entry of 18<sup>th</sup> October, 2007, which had his name. Entry No. 053 on the Presentation Book had referred to Entry No. 054 – Hamadi Juma Mwakibibo – surrender of lease on 18<sup>th</sup> October, 2007. He explained that on 3<sup>rd</sup> March, 2009 there had been a transfer from Juma Mwakibibo to Aniket Property Investment of property Kwale/Diani Beach Block/203 for a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-), but he refuted the transaction as he had never done it and had stopped it. His Advocate had been Mr. Oddiaga Advocate.
155. DW - 1 stated that he had never attended the Commissioner of Lands and that all communication had been through his advocate. He explained that he did not know the Land Surveyor who had undertaken the survey exercise, as it had been Mr. Oddiaga Advocate who had known him. He reiterated that he had had several parcels, but that he did not have copies of the leases, nor any of the letters from the Commissioner of Lands. He confirmed that he did not know their dates either, as they had all been with Mr. Oddiaga Advocate.

#### **E. Cross examination of DW - 1 by Mr. Karega Advocate.**

156. DW - 1 testified that he knew Title No. 1542. He stated that he had sold it to Mr. Mohamed Kale and that he had been paid the full purchase price. He confirmed that Mr. Mohamed Kale did not owe him anything. DW - 1 explained that he still passed by the area as it was his home area. He reiterated that on the plot there had been construction of a mosque, but that it had been stopped by a court order.
157. DW - 1 stated that he did not know the 6<sup>th</sup> Defendant, Mr. Ngare. He confirmed that he had never sold him any land as claimed.



## **F. Cross examination of DW - 1 by Mr. Khagram Advocate.**

158. DW - 1 testified that he knew the Plaintiff very well, having seen him in court severally and having come to his offices several times due to the land transaction with Aniket Property & Investments Limited. He stated that his ID No. 8420572 and date of birth 1965 were the same copy he had given when he had come to the office, and that it was in the Plaintiff's supplementary list of documents.
159. DW - 1 explained that he had come to court on 24<sup>th</sup> February, 2021, and remembered producing some documents in court. He referred to the 1<sup>st</sup> Defendant's list of documents dated 13<sup>th</sup> September, 2023 and the further supplementary list of documents, reiterating that the 1st documents were not his documents. He stated that from the documents he had produced in court, for instance the Certificate of Lease, the originals had been with Mr. Oddiaga Advocate, who had been the one making the copies.
160. DW - 1 referred to the Plaintiff's further supplementary list of documents filed on 9<sup>th</sup> January, 2019 at Page 27. He confirmed that he had signed the document and that an Advocate had witnessed him signing. He explained that the photographs were his on the transfer and that he had signed on 23<sup>rd</sup> February, 2009, witnessed by A.M. Mwaboza Advocate.
161. DW - 1 referred to the 1<sup>st</sup> Defendant's documents at Pages 18 to 34, titled "Sale Agreement" between himself and Vipin. He explained that the originals of those documents had been with Mr. Oddiaga Advocate, and that if the transaction had been completed, it would have been with Aniket Property & Investments Limited.
162. DW - 1 was shown the original Certificate of Lease for Kwale/Diani Beach/Block/203 in the name of Hamadi Juma Mwakibibo dated 1<sup>st</sup> August, 2006, which had been produced in court by Mr. Sanjiv Advocate, as seen at Pages 27 and 28 of the Plaintiff's supplementary list of documents. He confirmed that the original transfer had been produced in court, and that the transfer had been done on 3<sup>rd</sup> March, 2009. DW - 1 referred to the certificate of official search dated 3<sup>rd</sup> March, 2009, showing the property registered in the name of Aniket Property and Investments Limited, at Page 2 of the Plaintiff's further list of documents, signed by the Land Registrar.
163. DW - 1 referred to the 1<sup>st</sup> Defendant's list of documents, specifically a letter at Page 35 dated 19<sup>th</sup> January, 2021. Although he recognized the signature as being his but pleaded ignorance that he had not known what he had been signing. He explained that the letter had said he authorized his advocates to stop the sale transaction and that he had been ready to refund the money to Mr. Vipin as it had taken long, about four (4) years to complete the transaction.
164. DW - 1 referred to Page 8 of the Plaintiff's supplementary documents dated 19<sup>th</sup> September, 2018, Page 3, being a supporting affidavit sworn on 18<sup>th</sup> November, 2009, which he confirmed was his. At Page 14 he had produced a copy of the Certificate of Lease and pages in the sale agreement between Mr. Vipin and himself. At Page 33 there was a copy of the transfer, and at Page 91 he confirmed he had produced it in court in Civil Case No. 315 of 2008 and sworn on oath. At Page 39 was the official search.
165. DW - 1 stated that as far as he was concerned, he had stopped the sale transaction with the Plaintiff. He referred to Page 38 of the Plaintiff's further supplementary list of documents filed on 9<sup>th</sup> January, 2019, being HCCC No. 134 of 2009, a replying affidavit by Mr. Oddiaga Advocate. He referred to Page 38, paragraph 1, being a letter dated 14<sup>th</sup> June, 2012 to A.B. Patel & Patel. He explained that if parcel No. 1543 had been sold, how could it be sold again. He stated that the advocate had been alerting the purchasers to ensure preservation of Plot No. 203 from transactions at the land registry.



166. DW - 1 referred to Page 6 of the Plaintiff's supplementary application dated 19<sup>th</sup> September, 2018, paragraph 13, and denied the issues raised. He explained that what he knew was that he had caused the sub - division, though he might not remember when. He testified not having the plans for the sub - division as it had been done by Mr. Oddiaga Advocate. He remembered the sub - division had been done in the year 2006.
167. DW - 1 was put to the question that he could not have still been the registered owner of the land in the year 2007. He referred to the Plaintiff's supplementary list of documents of 9<sup>th</sup> January, 2019, Page 108, being a letter by Oddiaga Advocate dated 6<sup>th</sup> March, 2009 to A.B. Patel & Patel with attached documents, and a letter dated 4<sup>th</sup> February, 2008 at Page 114. He explained that after that the lease had been registered, as seen at Page 16 of the Plaintiff's supplementary list dated 19<sup>th</sup> September, 2018. He referred to the presentation book No. 053/07 dated 18<sup>th</sup> October, 2007, Receipt No. 042334, confirming that they were the same numbers as presented by the 1<sup>st</sup> Defendant's documents. He reiterated that all this had been done by Mr. Oddiaga and confirmed that those had been the numbers in the original.
168. DW - 1 was put to the question how the sub - division could have been done in year 2006 yet the lease had been registered in his name in the year 2007. He referred to Page 10 of the Plaintiff's supplementary documents of 19<sup>th</sup> September, 2018, being a Certificate of Lease in the name of Hamadi Juma Mwakibibo dated 3<sup>rd</sup> October, 2005. At Page 11 the lessee had been Johannes Theoddoram Aberthuima, whose lease would have expired in 2013. He explained that after the expiration of the lease he had been given an extension and issued with a lease on 18<sup>th</sup> October, 2007, as seen at Page 26.
169. DW - 1 referred to the 1<sup>st</sup> Defendant's document at Page 38, being the purported Green Card, noting that the last column was not signed and that it showed the sub - division had been done on 31<sup>st</sup> October, 2011. He reiterated that all this had been done by Mr. Oddiaga Advocate, that he had not been aware, and that he had never been informed. He explained that a lot of things had taken place without his involvement, as his advocate had handled them.
170. DW - 1 referred to the Plaintiff's supplementary list of documents of 9<sup>th</sup> November, 2018, Page 82, where his name appeared at Entry No. 1, showing he had been given on 18<sup>th</sup> October, 2007. He confirmed that it was agreed. At Pages 83, 84, and 85, Entry No. 9 showed Aniket Property and Investments Limited having been registered on 3<sup>rd</sup> March, 2009, signed by the Land Registrar. Entry No. 10 showed the title deed issued to the Plaintiff. He reiterated that they were going through all these issues yet he had stopped the sale transaction in January, 2011 through the letter. He explained that the copies of the Green Cards had been from the lands registry and had been given to him by Mr. Oddiaga Advocate.
171. DW - 1 referred to Page 106 of the Plaintiff's supplementary affidavit of 19<sup>th</sup> January, 2019, being a cheque No. 00978 for a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) issued to Mr. Oddiaga Advocate dated 6<sup>th</sup> March, 2009 by Messrs. A.B. Patel & Patel Advocates. He confirmed that the signature was his. He referred to Page 107, a letter dated 6<sup>th</sup> March, 2009, where the signature was his, instructing A.B. Patel & Patel Advocates to pay Mr. Oddiaga a sum of Kenya Shillings Ten Million Five Hundred Thousand (Kshs. 10, 500, 000.00/=) instead of a sum of Kenya Shillings Eight Million (Kshs. 8, 000, 000/=).
172. DW - 1 testified that he knew Mr. Said Chiri Wacho. He referred to Page 15, being payment to Said Mwinyikesi Thomas for a sum of Kenya Shillings One Million Two Hundred and Fifty Thousand (Kshs. 1,250,000/-), which he confirmed he knew very well. He referred to Page 116, confirming that he remembered the payment of a sum of Kenya Shillings Four Million Two Hundred and twelve



- Thousand (Kshs. 4,212,000/-), which had been made to him. He explained that he had decided to stop the transactions as he had not known that Vipin was taking the whole parcel, yet he had intended to sell to a Mgomba. He reiterated that he had done the sub - division but had left the record at home. DW - 1 referred to the 1<sup>st</sup> Defendant's list of documents prepared by Ms. Kounah & Advocates.
173. DW - 1 testified that at Page 118 there was a letter dated 5<sup>th</sup> March, 2009 which he had signed. He referred to Page 122, being a cheque for a sum of a sum of Kenya Shillings Nine Hundred and Fifty Thousand (Kshs. 950,000/=) dated 20<sup>th</sup> February, 2009.
174. DW - 1 stated that at Page 119 there was a letter dated 16<sup>th</sup> March, 2009, which he had signed. He explained that the letter had set out payments as follows: -
- a. Mother – Kshs. 600,000/=.
  - b. Brother – Kshs. 300,000/=.
  - c. Sister – Kshs. 250,000/=.
  - d. Sister – Kshs. 250,000/=.
175. DW - 1 confirmed that at Page 120 there was a letter dated 27<sup>th</sup> February, 2009, recording a payment of a sum of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/-), and that he had signed it. DW - 1 testified that at Page 121 there was a letter dated 26<sup>th</sup> February, 2009, in which he had agreed that a sum of Kenya Shillings Eight Million (Kshs. 8, 000, 000/=) to be released to Mr. Oddiaga Advocate by Messrs. A.B. Patel Advocate. He reiterated that he confirmed those were his signatures.
176. DW - 1 referred to Page 123, being a letter dated 20<sup>th</sup> February, 2009, and confirmed that it had also borne his signature. DW - 1 testified that at Page 106 and Page 124 there was a letter dated 20<sup>th</sup> February, 2009. He confirmed that the signature on the letter was his. DW - 1 explained that the letter related to a payment of a sum of Kenya Shillings One Million (Kshs. 1,000,000/-). He reiterated that he did not remember going to lodge a complaint with the Division of Criminal Investigation Division (DCIO) that Vipin had refused to make payment.
177. DW - 1 testified that when referred to Page 123, he confirmed that the signature there was his. He stated that he remembered Mr. Oddiaga had been his advocate, and reiterated that counsel for the Plaintiff had not been his advocate.
178. DW - 1 was referred to Page 122 and confirmed that the signature there was his. He was referred to Page 121 and confirmed that the signature on the letter was his. He explained that he knew Said Hassan Karani, who had been a neighbor, and that his uncle was Said Thomas Mwanyika. He stated that his uncle had been paid a sum of Kenya Shillings One Million Two Hundred Thousand (Kshs. 1,200,000/-), though the letter had talked of a sum of Kenya Shillings Two Hundred Thousand (Kshs. 2,000,000/-). DW - 1 explained that it had been Said Hassan Kabangi who had introduced him to the purchasers.
179. DW - 1 referred to Page 115 and confirmed that he had been paid a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-). He was referred to Page 119 and explained that the money was to be collected from Mr. Oddiaga after the case was over, but reiterated that Civil Case No. 134 of 2020 was still ongoing. He stated that counsel for the Plaintiff had never represented him, and confirmed that his lawyer had been Mr. Oddiaga Advocate, and currently Mr. Karina Advocate. He reiterated that he had not complained that counsel for the Plaintiff should not represent the Plaintiff in the case. He emphasized that it had been Mr. Oddiaga who had been his advocate, and that he had conducted the sub - division of the suit land through his advocate, Mr. Oddiaga.



180. DW - 1 testified that he had faith and believed that documents used for the sub - division existed, though all his documents had been burnt down. He explained that the sub - division had been done to accommodate Brickman, but reiterated that the sale of parcel No. 203 had been fraudulent and illegal, as the sale of Parcel No. 203 had been between Counsel for the Plaintiff and Mr. Khagram.
181. DW - 1 stated that he knew that after the sub - division of parcel No. 203 the parcels had disappeared, and when he had realized that, he had stopped the sale transaction. He was referred to his statement and confirmed that it was different from his testimony. He explained that he had done the sub - division in the year 2006, hence parcel No. 203 had been non - existent thereafter.
182. DW - 1 was referred to Paragraphs 6, 7, 8, and 9 of his statement, which indicated that he had sold parcel No. 203 to the Plaintiff. He explained that this had been caused by counsel for the Plaintiff and Mr. Oddiaga, and that was the reason he had stopped the sale transactions.
183. DW - 1 testified that there had been an agreement between himself and Vipin in the year 2007, and referred to Pages 32, 33, and 34 of the Defendant's documents. He confirmed that he knew those documents. He was referred to Page 34 and confirmed that it bore his signature and identity card.
184. DW - 1 was referred to Page 26, being an agreement between himself and Brickman dated 11<sup>th</sup> December, 2006. He explained that Brickman had been to pay for the sub - division derived from parcel No. 203, and that he had later done the sub - division. He reiterated that the subdivision had been done in the year 2006. DW - 1 was referred to the agreement with Vipin, specifically Clause 9, and stated that he did not remember what had been happening under that clause.

**G. Re - Examination of DW - 1 by Mr. Kounah Advocate.**

185. DW - 1 testified that he had started doing the sub - division on 26<sup>th</sup> June, 2006. He referred to the 1<sup>st</sup> Defendant's documents at Page 22, dated 24<sup>th</sup> May, 2006, and explained that Mr. Stephen Oddiaga Advocate had undertaken the sub - division of the land with his authority.
186. DW - 1 stated that the sub - division had been undertaken, resulting in eight (8) parcels namely: Nos. 1536, 1537, 1538, 1539, 1540, 1541, 1542, and 1543. He confirmed that he had sold four of those parcels, namely Nos. 1537, 1538, 1542, and 1543. He explained that parcels Nos. 1547 and 1548 had been with one person through sale, though the sale process had still been incomplete. DW - 1 reiterated that the remaining plots Nos. 1536, 1540, and 1541 had not been sold, as the documents had been burnt down.
187. DW - 1 testified that he remembered entering into a sale agreement with Vipin Maganlal Shah and C.J. Lakhani for the sale of Plot No. 203, dated 21<sup>st</sup> December, 2007, which had been prepared by his advocate, Mr. Oddiaga. He reiterated that he had agreed to sell the plot for a purchase price of a sum of Kenya Shilling Thirty Three Million (Kshs. 33,000,000/-), of which he had been paid a deposit of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-), leaving a sum of Kenya Shillings Thirty One Million Five Hundred Thousand (Kshs. 31,500,000/-) as the outstanding balance of the purchase price.
188. DW - 1 was referred to Page 139 of the Plaintiff's Bundle filed on 11<sup>th</sup> July, 2022. He stated that he was not aware of the payment of a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-). He confirmed that the signature was his, but explained that his Advocate would cause him to sign blank papers, as seen at Pages 138 and 139.
189. DW - 1 testified that he remembered a letter dated 6<sup>th</sup> March, 2009 and a cheque of a sum of Kenya Shillings One Million Two Hundred and Fifty Thousand (Kshs. 1,250,000/-). He referred to Page 137,



being a cheque of a sum Kenya Shillings Four Million Two Twelve Thousand (Kshs. 4,212,000/-), and confirmed that the signature was his and that he remembered it. He explained that the payments had been done in instalments, hence the total of a sum of Kenya Shillings One Million Two Hundred and Fifty Thousand (Kshs. 1,250,000/-) plus a sum of Kenya Shillings Four Million Two Hundred and Twelve Thousand (Kshs. 4,212,000/-).

190. DW - 1 was referred to Page 135, being a handwritten document which he had signed. He explained that it had been for payment of Kenya Shillings Two Million Five Hundred Thousand (Kshs. 2,500,000/-) to be paid to his uncle, Said Mwinjikai Thomas, as commission. He admitted that he had authorized the payment but reiterated that his uncle had never been actually paid as agreed.
191. DW - 1 was referred to a letter dated 26<sup>th</sup> February, 2009, allegedly by DW - 1 to Messrs. A.B. Patel (Page 134), for the release of a sum of Kenya Shillings Eight Million (Kshs. 8,000,000/=) to Mr. Oddiiga Advocate. He denied it. He stated that the signature on that letter was not his. DW - 1 reiterated that the sale agreement and transaction had not been completed, as he had stopped it. He explained that he had written a letter indicating that he had been ready for a refund. DW - 1 reiterated that, as far as he had been concerned, the balance had not been known to him due to the circumstances of the matter.
192. DW - 1 was referred to Page 35 of the 1<sup>st</sup> Defendant's documents dated 13<sup>th</sup> September, 2013, being a letter dated 19<sup>th</sup> January, 2011 by DW - 1. He confirmed that it was his letter. DW - 1 referred to a further supplementary document dated 8<sup>th</sup> January, 2019, being the Plaintiff's documents at Page 125. He explained that it was his letter dated 17<sup>th</sup> February, 2009, addressed to Messrs. A.B. Patel Advocates and copied to his advocate, Mr. Oddiiga Advocates.
193. DW - 1 was referred to the Plaintiff's supplementary list of documents at Page 8, dated 18<sup>th</sup> November, 2009. He denied the signature there, stating that it was not his.
194. DW - 1 explained that there had been two cases — the Seaview Patel case and the present one, Civil Case No. 134 of 2021. He referred to Page 9 and confirmed that he knew Mr. J.C. Chideipha Advocate, who used to come to the office of Mr. Stephen Oddiiga Advocate.
195. On 3<sup>rd</sup> April, 2024, the 1<sup>st</sup> Defendant called DW - 8 who testified as follows:-

#### **A. Examination in Chief of DW - 8 by Mr. Kounah Advocate.**

196. DW - 8 testified under oath and in English language. He was called EVANS NYATIGO MARWANGA. He worked as a State Counsel at the Attorney General's Chambers in Kisumu. He explained that he had formerly been a Land Registrar. He had been stationed at Kwale from February 2011 to March 2024. DW - 8 stated that he was in court because he had received summons issued by the court dated 26<sup>th</sup> February, 2014, requiring him to appear before the court on 2<sup>nd</sup> and 3<sup>rd</sup> April, 2024, as pertains to the subject matter. He confirmed that this was the reason he was present as a witness for the 1<sup>st</sup> Defendant.
197. DW - 8 was referred to the Replying Affidavit dated 21<sup>st</sup> August, 2012 and sworn by Evans Marwanga and the list of documents dated 12<sup>th</sup> March, 2019, by the Attorney General. He testified that they had been copies of the presentation book in ELC No. 211 of 2012 and Petition No. 57 of 2022, Seaview Limited case.
198. DW - 8 stated that he was familiar with the documents and the subject matter, namely LR No. Kwale/ Diani Beach/Plot 25, which had been sub - divided into two Plots 203 and 204 respectively. He explained that from the affidavit, Plot 203 had been allotted to Mr. Hamid Juma Mwakibibo, while



Plot 204 had been allocated for the Diani Beach road (paragraph 17). He confirmed that Plot No. 203 had later been further sub - divided into eight (8) portions (paragraph 13).

199. DW - 8 testified that he had participated in the matter for Seaview Ltd and had seen the affidavit. He explained that he was holding a list of documents by the 7<sup>th</sup> and 8<sup>th</sup> Defendants dated 26<sup>th</sup> February, 2014, filed by the Attorney General. He stated that the documents included certified copies of green cards for Plot No. 203, which had been further sub - divided into Nos. 1536 to 1543.
200. DW - 8 confirmed that there had been ten certified copies of the green card, namely:-
- a. Parcel No. 25, certified by him.
  - b. Parcel No. 203, certified extract by him, issued to Mr. Hamadi Juma Mwakibibo.
  - c. Parcel No. 203, which had been further sub - divided on 3<sup>rd</sup> October, 2011, creating Plots 1536 to 1543.
201. DW - 8 reiterated that these had been the records held at the Kwale Land Registry. He testified that he wished to have this evidence adduced in court. DW - 8 was referred to a letter dated 24<sup>th</sup> May, 2006, by the Ministry of Lands, authored by Mr. S. M. Osodo, District Land Officer Mombasa, and addressed to the Clerk of the Kwale County Council regarding the extension of Plot No. 203. DW - 8 testified that this had been the property which he had certified as a true copy of the green card.

#### **B. Cross Examination of DW - 8 by Mr. P.C Onduso Advocate.**

202. DW - 8 testified that he had been very familiar with the matter in the case having been the District Land Registrar at Kwale when the case had been filed. He explained that he had been one of the parties sued as the 7<sup>th</sup> and 8<sup>th</sup> Defendants. He stated that he had been served with the documents by the Attorney General.
203. DW - 8 explained that when his office had been sued, the documents had been served upon the Attorney General, who in turn had sought responses from their offices. He confirmed that he could not remember whether he had filed a response, but reiterated that they had been two officers and he had been the overall officer. He stated that he had sworn the affidavit.
204. DW - 8 testified that he had looked at the defence filed by the Attorney General and explained that he had filed the certified copies of the green cards in question. He confirmed that he had been the officer who had certified them. He stated that he had held a meeting with State Counsel Ms. Ruth Lutta and Mr. Oscar Ezen, who had been in charge, and that they had filed the documents. He reiterated that the list of documents filed by the 7<sup>th</sup> and 8<sup>th</sup> Defendants had been the ones he had furnished them, and explained that the source of those documents had been the Land Registry archives.
205. DW - 8 testified that the green cards had been prepared by the Land Registry and confirmed that they had not been fake, as there had been originals and even up to the present the originals remained available. He explained that according to the records, Parcel No. 203 had been owned by Mr. Hamidi Juma Mwakibibo.
206. DW - 8 was referred to the further list of documents by the 7<sup>th</sup> and 8<sup>th</sup> Defendants. He explained that it had been the green card that had taken precedence and not a presentation. He testified that he had never come across any record showing that Plot No. 203 had belonged to Aniket Properties & Investment Limited. He stated that what he had presented to Ms. Ruth Lutta had not included Aniket Property & Investment Limited.



207. DW - 8 explained that apart from the caution or caveat by Vijay Lakhan claiming land ownership on purchaser's interest, there had been nothing else. He reiterated that such a caution did not confer ownership of property. He testified that land reference numbers had been allocated by the Land Surveyor, namely the Director of Survey, and explained that he never issued numbers himself. He confirmed that they were registered accordingly and certificates were issued.
208. DW - 8 was referred to the green card dated 7<sup>th</sup> June, 2011. He testified that a lease certificate had been issued, transferring the property from Hamid Juma Mwakibibo to Venture Limited (the 2<sup>nd</sup> Defendant), and explained that a certificate of lease had been issued. He confirmed that he had been the Land Registrar at the time and that he had been the one who had issued the certificate of lease. He explained that one had to obtain consent from the Commissioner of Lands, pay stamp duty, and follow all procedures. He reiterated that he would consider on what basis his colleague could come back and dispute the position he had taken.
209. DW - 8 testified that he had been shocked that the Attorney General had abandoned him. He explained that the Land Registrar had no power to cancel a title under the provisions of Section 79 of the [Land Registration Act](#), No. 3 of 2012. He confirmed that he was an Advocate of the High Court, and reiterated that he had been a Land Registrar and had worked with the Attorney General's Chambers.

#### **C. Cross Examination of DW - 8 by Mr. Ondabu Advocate.**

210. DW - 8 testified that the allocation of new numbers had been by the Director of Survey and not the Land Registrar. He explained that the meaning of continuity of office was that the present officer owned the records of his predecessor, save where there were errors which he had to point out.
211. DW - 8 was referred to Plot No. 1536 and confirmed that the registered owner had been David K. Kandie at the time of certification as a true copy. He further explained that Plot No. 1539 had belonged to M/s. Amana Abdalla. He reiterated that he had certified those copies of the green card and confirmed that those were the documents he had presented to the Attorney General through the State Counsel.

#### **D. Cross Examination of DW - 8 by Mr. Karega Advocate.**

212. DW - 8 testified that for a member of the public who had wanted information on land, he would have applied for an official search. He explained that the official search contained the information from the green card, and if it had been contrary, then it would have been an anomaly. DW - 8 confirmed that Plot No. 203 had been sub - divided. He reiterated that once sub - division had taken place, the old parcel ceased to exist. He stated that he was aware that despite this, the Plaintiff had been claiming ownership of Plot No. 203, which he did not understand.
213. DW - 8 explained that once the mother title had been subdivided, dealings should only have been on the subdivided title deeds. He testified that one could not obtain a search for a plot that had already been subdivided, and confirmed that one could only obtain a certified copy of the same green card showing the regulating numbers after sub - division.

#### **E. Cross Examination of DW - 8 by Mr. Makuto Advocate.**

214. DW - 8 testified that he had reported to Kwale in February 2011, and from that time he had handled all matters relating to the subject property. He explained that if there had been any errors, he would have owned the entire process, but reiterated that he had done everything in accordance with the law. He confirmed that Plot No. 203 had been sub - divided on 3<sup>rd</sup> October, 2011. He stated that although the



property had initially been under the RTA legal regime, he wished to correct the position, clarifying that it had been under the RLA Cap 300.

215. DW - 8 explained that the completion documents for transfer had included:-
- i. a transfer form;
  - ii. a Letter of Consent from the LCB;
  - iii. Valuation Form;
  - iv. PIN and ID for both parties, and
  - v. evidence of stamp duty paid.
216. He testified that Mr. Hamidi Juma Mwakibibo had become the owner of Plot No. 203 on 18<sup>th</sup> October, 2007, referring to the certified green card and his affidavit in Petition No. 57 of 2012 (Seaview Ltd). He explained that a Certificate of Lease was issued upon registration once all documents had been presented for the transfer to be effected, and that one would require a lease from the Commissioner of Lands (now NLC).
217. DW - 8 confirmed that Plot No. 203 had been sub - divided, but explained that the mother title had never been surrendered to him. He stated that he had only dealt with the subdivisions. He explained that Plot No. 203 had been surrendered for extension and subdivision in Nairobi on 18<sup>th</sup> October, 2007, by Mr. Hamid Juma Mwakibibo, who had paid a sum of Kenya Shillings Two Thousand and Fifty (Kshs. 250/-). He testified that the extended lease had been registered in Kwale. He explained that the transfer to Aniket Property & Investments Limited by Hamadi Juma Mwakibibo for a sum of Kenya Shillings Three Million (Kshs. 3,000,000/-) had taken place in the year 2009, but by that time he had not yet arrived in Kwale. He stated that there had been a court order, though he did not know what it had been about.
218. DW - 8 was referred to the sub - divisions of Plot Nos. 1536 to 1543. He explained that there had been no letters from the Commissioner of Lands or the Director of Land Administration forwarding the leases, which ordinarily would have been filed in the correspondence file. He testified that he was not aware that the Land Administration had never issued such letters. He was referred to the letter dated 30<sup>th</sup> May, 2022, by the Director of Land Administration to the Attorney General, which held that the office had never received any consent for the subdivision of Plot No. 203 into portions Nos. 1536 to 1543. He explained that by the time he had been testifying, he had had no knowledge of the contents of that letter. He reiterated that ordinarily a letter forwarding the lease should have been received by the land offices before registration was effected.
219. DW - 8 confirmed that the 1<sup>st</sup> to 11<sup>th</sup> Defendants had never received any lease. Instead, the leases had been received by Mr. Hamadi Juma Mwakibibo. He testified that he was not aware that any original lease for Plot No. 203 had been presented in court. He explained that a Certificate of Lease for the mother title could not be presented after subdivision had been done. He confirmed that he had been the one who had signed the certificates of lease for Plots Nos. 1536 to 1543.
220. DW - 8 explained that he had relied on the leases from Nairobi and the sub - division by the Land Surveyor. He stated that he did not have the letter forwarding the leases, did not know the officer who had signed the letter, and had not stated anywhere in his affidavit that he had received any leases from Nairobi.
221. DW - 8 was referred to the green cards for Plot No. 203. He testified that Entry No. 1 had been signed by hand by a Land Registrar on 18<sup>th</sup> October, 2007, Entry No. 4 had been signed by hand, Entry No.



6 had been signed by hand, and Entry No. 9 had been signed by hand. He explained that the difference had been in the font used, which had been wider than his. He confirmed that the work had been his, and that he had had a number and stamp to show the exact Land Registrar who had done it. He reiterated that the record would have required his signature, number, and stamp, but that those entries had not had the number and stamp. He stated that what he had produced in court was not what was at the Land Registry.

222. DW - 8 confirmed that his personal number as Land Registrar had been No. 353. He explained that the lease had been surrendered to Nairobi for extension, and that he had only received the sub - division of the lease. He testified that the original lease for Plot No. 203 did not exist, as it had been surrendered, and should have been at Nairobi. He stated that he was not aware how many times Plot No. 203 had been surrendered, but confirmed that the last surrender of Plot No. 203 had been on 18<sup>th</sup> October, 2007. He reiterated that he had never seen the surrendered lease and had only dealt with the sub - division.

#### **F. Cross Examination of DW - 8 by Mr. Khagram Advocate.**

223. DW - 8 testified that he had been an advocate of the High Court for 19 years and had served as a Land Registrar for 7 years. He served at Kwale for sometimes. He explained that he had been the Senior State Counsel in charge of Administration at Kisumu. He was responsible for administration and accountability of public resources. He confirmed that he had been aware of the core values under Article 10 (2)(b) of *the Constitution* of Kenya, 2010, including integrity, among others. He reiterated that he had also been aware of the provisions of Article 40 of *the Constitution* on the right to private property, and that Land Registrars had been held personally liable for engaging in corrupt practices.

224. DW - 8 was referred to Entry No. 15, which he explained had been the registration of a lease. He confirmed that the transfer for registration had been under that entry. He was referred to the transfer form, which he testified bore the same number in the Day Book No. 163 and the signature of the Land Registrar, Mr. Mangale Nao. He was further referred to two official searches dated 25<sup>th</sup> February, 2009, which bore No. 570 of 2009. He explained that serialization had been intended to avoid fraud. He confirmed that the second search dated 3<sup>rd</sup> March, 2009, had shown the proprietor of the suit property as Aniket Properties & Investment Limited. It had been signed, stamped, and sealed. He stated that as at the year 2009, the owner of Plot No. 203 had been Aniket Properties & Investment Limited.

225. DW - 8 was referred to the original lease dated and registered on 18<sup>th</sup> October, 2008. He explained that the lease had been received and placed in the Presentation book on 18<sup>th</sup> October, 2007, and hence registered. He was referred to the Presentation book No. 054 of 2007, which bore the comment “Court order – rejected.” He was also referred to the Supreme Court decision of: “the Dina Management Case”, and explained that it was not the documents that mattered but the process.

226. DW - 8 testified that he had received the leases from the Chief Land Registrar, Nairobi and had had to certify that he had seen the owner of the documents sign. He explained that there had been documents for the sub - division at Kwale, though he had since left the place. He was referred to the lease for 50 years from 1<sup>st</sup> August, 2006 to 2056. He explained that for such a lease to be extended, it had to be surrendered for extension, and hence the interest was not terminated. He confirmed that it should have been in the name of Aniket Properties & Investment Limited, but had been closed for sub - division.

227. Mr. Marwanga testified that the property had been in the name of Hamid Juma Mwakibibo, but from the year 2009 it should have been in the name of Aniket Properties & Investment Ltd. In other words, after the year 2009, Hamidi Juma Mwakibibo had had no interest in the suit property anymore. He explained that even then, the sub - division ought to have been undertaken by Aniket Properties



- & Investment Limited. He reiterated that the Land Registrar could not make any entry without the consent of the landowners.
228. DW - 8 stated that as far as he was concerned, the transfer or Certificate of Lease for Aniket Properties & Investment Limited had not been in the green card. He was referred to the transfer dated 3<sup>rd</sup> March, 2009, which he confirmed had been signed by the Land Registrar and showed that it had been registered in the green card. He asserted that there had been a problem of fraud in all the land registries in Kwale and elsewhere in the county.
229. DW - 8 testified that the basis for closure of the sub - division had been that the property had been shown in the name of Hamidi Juma Mwakibibo and the sub - division. He was referred to the letter to the Attorney General dated 30<sup>th</sup> May, 2022, by the Director of Land Administration, and explained that he had not been aware of the reason the court orders had been rejected. He was referred to the court decree of 3<sup>rd</sup> March, 2009, and explained that all documents served from the Chief Land Registrar would ordinarily have been accompanied by a letter to that effect. He was also referred to the letter dated 1<sup>st</sup> August, 2006, from the Plaintiff's documents, which had been forwarded for lease registration purposes.
230. DW - 8 denied that he had closed Parcel No. 203 without basis. He refuted the claim that there had been no leases, and explained that the leases should have been with the persons concerned, namely Aniket Properties & Investment Limited. He reiterated that according to him, Aniket Properties & Investment Limited had not been on record in the green card, and stated that Mr. Mangale, the then Land Registrar, had failed to enter the information in the green card.
231. DW - 8 testified that it had been the Land Registrar who registered the transfer form to enter it in the green card, but explained that in this case it had never happened. He explained that official searches were issued from the green card.
232. DW - 8 was referred to the official search dated 5<sup>th</sup> March, 2009. He confirmed that it had shown the property as belonging to Aniket Properties & Investment Limited, and stated that he now saw the mischief. He was referred to the Plaintiff's further list of documents on pages 87 to 92, Entry No. 9. He explained that the property had been shown as belonging to Aniket Properties & Investment Limited as of 3<sup>rd</sup> March, 2009, and that this had tallied with the Certificate of Lease signed by Mr. Mwangale, the then Land Registrar. He testified that there had been two green cards bearing two different sets of information, and reiterated that the records had not tallied.
233. DW - 8 confirmed that the value on the green card had been a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-), which had been the same value appearing on the transfer. He explained that these had been the records he had found on file. He refuted the claim that there had been any plot to deprive Aniket Properties & Investment Limited of its property under the provision of Article 40 of *the Constitution* of Kenya, 2010.
234. It was the testimony by the DW - 8 that he had never seen the surrender of the lease for Plot No. 203 by Mr. Mwakibibo, and explained that it must have been done at Nairobi. He confirmed that he had received the leases from Nairobi and that there had been correspondence to that effect, which were in the Kwale archives. He reiterated that such correspondence should have appeared in the presentation book. He stated that if they did not appear, it would be safe to conclude that the leases had never been presented.
235. DW - 8 testified that he had closed the green card for sub - divisions from the documents he had received, pending the surrender of the leases for Parcel No. 203 and the Certificate of Title. He explained that the documents had been there at the time and could now be in the archives. He stated



- that he had received the documents for the sub - division and had closed the register in the year 2011, entering the information in the presentation book, though he could not now see it.
236. He confirmed that he had received the Deed of Surrender and Certificate of Lease on 3<sup>rd</sup> October, 2011. He stated that there had been no entries of any leases or certificates in the presentation book. He testified that he had had the original Certificate of Lease dated 3<sup>rd</sup> October, 2011, for Mr. Hamadi Juma Mwakibibo for Plot No. 1541. He explained that the documents in support of the title had been there but were not currently on record.
237. DW - 8 stated that the Presentation book had been in numerical and serial sequence from 3<sup>rd</sup> October, 2011, Entry Nos. 1 to 12, and 4<sup>th</sup> October, 2011, Entry Nos. 13 to 17. He confirmed that on 3<sup>rd</sup> October, 2011, there had been no entries on sub - division, though he had closed for sub - division on that date. He reiterated that the registry had been a registry of records, and that he would not have issued a Certificate of Search if the person had not been the registered owner. He explained that no Land Registrar would issue a search to anyone who was not the registered owner.
238. The witness held that documents for leases or sub - divisions would ordinarily have been served from the Commissioner of Lands or the Director of Survey. He explained that he could not comment on whether there had been no documents sent for the sub - division, as he had not seen the letter by the Director of Land Administration.
239. He was referred to page 81, certified as a true record of title by Land Registrar Mangale on 18<sup>th</sup> October, 2007, containing Entries Nos. 1 to 9. He explained that it had been for 3<sup>rd</sup> March, 2009, in the name of Aniket Properties. He was referred to the original Certificate of Lease, issued on 3<sup>rd</sup> March, 2009, and signed by the same Land Registrar. He was referred to the transfer form, registered and presented on 3<sup>rd</sup> March, 2009. He confirmed that the Presentation book, Entry No. 033, had been for the transfer of property by Mr. Hamadi Juma Mwakibibo to Aniket Property & Investment Limited, with stamp duty paid. He explained that Entry No. 034 had been rejected, being a court order, and referred to page 89, which showed cancellation with the note that the registered proprietor had not been a party to the suit.
240. According to DW - 8, when there was a cancellation, one went to the next line, and that it should have been cancellation of name. He explained that this had been done later, and that the signature did not seem to have been that of Mr. Mangale in comparison to the one on the transfer form. He was referred to the application for registration dated 4<sup>th</sup> March, 2009, and page 90, being a letter by the advocate complaining of rejection. He confirmed that the parties in page 87 had been Seaview Investments Limited, Hamadi Juma Mwakibibo, Stephen Oddiaga, and the Attorney General, and that Aniket Properties & Investment Limited had not been a party to the suit.
241. DW - 8 confirmed that the official search of 25<sup>th</sup> February, 2009, had indicated Mr. Hamadi Juma Mwakibibo as owner of Parcel No. 203. He explained that the second search of 3<sup>rd</sup> March, 2009, had shown Aniket Property & Investment Limited, and that the transfer had been effected on 3<sup>rd</sup> March, 2009, with Entries Nos. 9 and 10 and certificate issued. He confirmed that the third search dated 5<sup>th</sup> March, 2009, had also shown Entries Nos. 9 and 10 for Aniket Property & Investment Limited. He agreed that by 3<sup>rd</sup> March, 2009, the Certificate of Lease had been registered in the name of Aniket Property & Investment Limited.
242. DW - 8 explained that Entry No. 10 had been written as “title deed issued,” whereas the owners had held a Certificate of Lease, and that to him these had been two different registries with different procedures. He confirmed that the original lease and certificate of lease had been correct. He was referred to the 1<sup>st</sup> Defendant’s documents, page 38, and explained that Entry No. 9 had been different



from the original record, where Entry No. 9 had shown closure on sub - division on 3<sup>rd</sup> October, 2011, with new Nos. 1536 to 1543. He stated that he did not know and had been surprised that Entry No. 9 had been missing from the original and Aniket Property & Investment Limited had disappeared.

243. DW - 8 explained that he could not tell what had happened, as he had not been there at the time. He stated that he had been surprised that Mr. Mwanganda had certified the search when the records had not been on file. He referred to the original certified green card and confirmed that he had certified Entry No. 9 himself and had seen the documents at the time, though he did not know where they were now, being ten years later. He explained that when he had handed them over in the year 2014, the documents had been in the archives, and that omissions did happen when recording title deeds.
244. DW - 8 denied that he had been part of any collusion or acting in cohort with the Defendants to fraudulently swindle or dispossess the Plaintiff of their property. He was referred to a letter dated 30<sup>th</sup> November, 2022, by the Director of Land Administration, and explained that he wondered why the Director had denied, as he had received the documents. He reiterated that when he had received the original documents he had registered them, and that what he was saying was the truth.
245. He confirmed that he had been the one who had opened the green card upon the sub - division of Parcels Nos. 1542 to 1560. He explained that Parcel No. 1543 had been entered but not cancelled, and that Entry No. 7 had been a charge for Investment & Mortgage bank but had been cancelled due to a clerical error. He stated that all the sub - divisions had been opened on the same day. He explained that Parcel No. 1542 had been opened in year 2012, page 64 of the 1<sup>st</sup> Defendant's documents, dated 3<sup>rd</sup> October, 2012, and certified by him, though it may have been a clerical error. He confirmed that Parcel No. 1542 on the original document had had the date of 3<sup>rd</sup> October, 2011, and had been cancelled by Mr. Charles Ngetich, the then Land Registrar, Kwale.

#### **G. Cross - Examination of DW - 8 by Mr. Makuto Advocate.**

246. DW - 8 was referred to the Presentation book and testified that he had not had any entries for leases being received for Parcels Nos. 1542 to 1543. He explained that he had released the leases to the individual owners and had not been aware that they had indicated never having received them. He confirmed that from the presentation book he had not had the surrender of leases for Parcel No. 203, nor the surrender of Certificate of Lease. He stated that he had not produced a copy of Surrender of Lease for Parcel No. 203, nor a copy of Certificate of Lease for Mr. Mwakibibo. He explained that he had not produced copies of individual leases for Parcels Nos. 1536 to 1543, as they had been in the archives, and confirmed that he had not produced any certificate of lease for those parcels.

#### **H. Re - Examination of DW - 8 by Mr. Kounah Advocate.**

247. DW - 8 testified that he been at Kwale from year 2011 and had not generated documents, but had only registered the subdivisions. He referred to Parcel No. 1543, encumbrances section, and explained that it had not been cancelled. He stated that the fact that an advocate had been called to collect documents from the Land Registrar had not been the practice, as leases were generated from the Commissioner of Lands.
248. DW - 8 was referred to page 89 of the Plaintiff's documents and explained that a Land Registrar could not refuse to register a court order, as the practice had been to register and then raise questions or shortcomings later on. He was referred to the original Certificate of Title deed and explained that when registering a title, a search was retained thereof, and that official searches were not recorded in the presentation book but in the official search register.



249. DW - 8 explained that Parcel No. 203, Entry No. 9 on page 85, had not been seen by him in the original green card apart from the one produced. He reiterated that a search was extracted from the green card and not from the presentation book.
250. DW - 8 confirmed that all title deeds, including Parcel No. 203 and those after its sub - division, had been registered under the Registration of Land Act, Cap. 300 and not Registration of Title Act, Cap. 281 as leases. His testimony was that it had not been true that he had participated in acts, or acted in cohort or collusion with the Defendants to defraud and thereby dispossess the Plaintiff of its property. He explained that the title deed for Parcel No. 203 had been rejected under the Registered Land Act, Cap. 300, yet the suit property had been under leasehold and therefore meant to be governed by the Registration of Titles Act, Cap. 281.
251. The 1<sup>st</sup> Defendant marked their case closed through his advocate Mr. Kounah.

### C. The 2<sup>nd</sup> and 4<sup>th</sup> Defendant's case

252. The 2<sup>nd</sup> Defendant responded to the Plaintiff's claim through a Statement of Defence where it averred that:-
- a. Save as what was expressly admitted by the parties herein the 2<sup>nd</sup> Defendant denied all the averments made and contained in the Re - Amended Plaintiff and put the Plaintiff to strict proof thereof.
  - b. The 2<sup>nd</sup> Defendant averred that it was a stranger to the contents of Paragraphs 4, 5, 6 and 7 of the Re - Amended Plaintiff and made no admission to the said contents.
  - c. The 2<sup>nd</sup> Defendant denied the contents of Paragraph 8 of the Re-Amended Plaintiff and put the Plaintiff to very strict proof.
  - d. The 2<sup>nd</sup> Defendant stated and averred that the Plaintiff had never owned nor taken possession of the property known as Kwale/Diani Beach Block/1543 and further stated that it was the 2<sup>nd</sup> Defendant who was the registered owner of the said property and was in full possession and occupation of it.
  - e. The 2<sup>nd</sup> Defendant acquired the said property vide an Agreement for Sale dated 6<sup>th</sup> March 2012 between Hamadi Juma Mwakibibo the 1<sup>st</sup> Defendant herein and Venture Holdings Limited the 2<sup>nd</sup> Defendant herein where the 1<sup>st</sup> Defendant agreed to sell and the 2<sup>nd</sup> Defendant agreed to buy all that piece/parcel of land comprised in the title known as Kwale/Diani Beach Block/1543 at a purchase price of a sum of Kenya Shillings Sixty Three Million (Kshs. 63,000,000.00/=).
  - f. Prior to entering into the said sale agreement the 2<sup>nd</sup> Defendant conducted a search on ownership and possession of the said land and on 6<sup>th</sup> February 2012 the official search from Kwale Lands office revealed that the property belonged to and was registered in the name of Hamadi Juma Mwakibibo.
  - g. The 2<sup>nd</sup> Defendant also established that a Mr. Peter Mutangili was in occupation of the said land with the express authority and consent of Hamadi Juma Mwakibibo. The 2<sup>nd</sup> Defendant had it included as a condition in the sale and transfer transaction that upon execution of the sale agreement, the said Peter Mwangili and any other person staying in or occupying the land must vacate forthwith.



- h. The terms and conditions of the Sale Agreement included Clause 19 which provided inter alia, that:-
- (i) The Purchaser shall, pending the aforesaid Completion Date have reasonable access to the said property which access shall be taken to mean that the Purchaser shall have the authority:
    - a. To conduct a beacon and topographical survey of the property.
    - b. To conduct a geotechnical survey on the property (This would entail the use of a machine to dig trials pits and may take up to 4 days).
    - c. To conduct a borehole survey and apply for approval to dig a borehole.
    - d. To erect a boundary wall or fence on the frontal part of the said property facing Diani Beach Road.
    - e. To erect signboards for change of user approval on the property facing Diani Beach Road.
    - f. To erect sign/bill boards on the above road for purposes of marketing the proposed developments intended to be carried out on the said property by the purchaser.
    - g. To be permitted to quote the Land reference number of the property in the Purchasers applications for approval of change of user, NEMA and Kwale County Council approval of building plans for the intended development.
    - h. To allow the Purchasers to post two security guards to man the said property.
    - i. To allow the purchasers and all persons authorized by the Purchasers unrestricted access to the property pending completion of the sale.
    - j. To market and sell the intended development to be erected on the property.
  - i. Immediately after execution of the sale agreement on 6<sup>th</sup> March 2012 and as per the terms and conditions of the same the 2<sup>nd</sup> Defendant took possession of Kwale/Diani Beach Block/1543 and has been in such possession since then. The 2<sup>nd</sup> Defendant had:
    - i. Conducted a beacon and topographical survey of the property
    - ii. Conducted a geotechnical survey on the property
    - iii. Conducted a borehole survey applied for approval to dig the borehole
    - iv. Conducted a drilling exercise for the borehole
    - v. Erected signboards for change of user approval
    - vi. Erected sign/bill boards for purposes of the proposed developments
    - vii. Quoted the land reference number in all applications for approval of change of user to NEMA and Kwale County Council
    - viii. Started marketing and selling the intended development to be erected on the property.



- ix. Entered into a Guards Service Agreement with Radar Limited on 7<sup>th</sup> March 2012 with a view to man the property
- j. After execution of the Sale Agreement and taking possession of the land, the Defendant applied for the various consents and clearances for transfer of Kwale/Diani Beach Block/1543 which consents and clearances were given by the Ministry of Lands and by the County Council of Kwale.
- k. The 2<sup>nd</sup> Defendant was currently undertaking a massive development project and had already invested millions of shillings on the said development. The 2<sup>nd</sup> Defendant had also sought, and had been granted all the approvals and consents by the various authorities including the approval for change of user by the County Council of Kwale and the clearance by the National Environment Management Authority (NEMA).
- l. In applying for the NEMA clearance certificate the 2<sup>nd</sup> Defendant placed a notice to that effect in “the Daily Nation” newspaper edition of 18<sup>th</sup> March 2012. Several people responded to the notice and participated in the process by filing and returning the requisite questionnaires. The Plaintiff herein never opposed the said application for change of user or at all.
- m. In April 2012 the 2<sup>nd</sup> Defendant applied for and was granted a financial facility by “I & M Bank” with the property Kwale/Diani Beach Block/1543 as security.
- n. The 2<sup>nd</sup> Defendant denied the contents of Paragraph 12 of the Re - Amended Plaintiff and put the Plaintiff to strict proof. In particular, the 2<sup>nd</sup> Defendant deny that the 1<sup>st</sup> Defendant in connivance and collusion with the Land Registrar Kwale fraudulently and unlawfully caused alleged title deeds to be issued purporting that he was the registered proprietor of sub-divisions known as Kwale/Diani Beach Block/1536,1537, 1538, 1539, 1540, 1541, 1542 and 1543 and sought to purport to sell Kwale/Diani Beach Block/1536 to the 2<sup>nd</sup> Defendant pursuant to an alleged Agreement for Sale dated 6<sup>th</sup> March 2012 and put the Plaintiff to strict proof.
- o. The 2<sup>nd</sup> Defendant denied all the Particulars of Fraud (a) to (g) inclusive set and contained in paragraph 12 of the Re-Amended Plaintiff and put the Plaintiff to strict proof. The 2<sup>nd</sup> Defendant aver and states that the Certificate of Title in respect to the property known as Kwale/Diani Beach Block/1543 was lawfully issued and made to the 2<sup>nd</sup> Defendant and that the said Certificate of Lease conferred and continue conferring a right and a title of interest to the 2<sup>nd</sup> Defendant.
- p. The contents of Paragraph 13 of the Re-Amended Plaintiff were denied. The 2<sup>nd</sup> Defendant averred that the company, its employees and agents are in possession and occupation of the property known as Kwale/Diani Beach Block/1543 as of right and that they were neither trespassers nor in breach of any court order as alleged.
- q. The 2<sup>nd</sup> Defendant was a stranger to the contents of Paragraph 14 of the re - Amended Plaintiff and made no admission to the same.
- r. The 2<sup>nd</sup> Defendant stated that contrary to the averments made by the Plaintiff at paragraph 15 of the Plaintiff, the 2<sup>nd</sup> Defendant acquired its proprietorship rights in the parcel of land known as Kwale/Diani Beach Block/1543 from the 1<sup>st</sup> Defendant in a legal, innocent and regular manner and that the entries made and contained at the Kwale Lands Registry on the said property are legal and genuine and that the same cannot be nullified, varied or revoked.
- s. Paragraph 16 of the Re-Amended Plaintiff was denied and the Plaintiff put to strict proof.



- t. The 2<sup>nd</sup> Defendant averred and stated that the pleadings filed herein were fatally defective and shall at the most appropriate time raise a preliminary objection and/or apply to have this suit dismissed as against the 2<sup>nd</sup> Defendant.
  - u. The 2<sup>nd</sup> Defendant stated that there was no other suits pending in court between itself and the Plaintiff herein.
  - v. Paragraph 18 of the re-Amended Plaintiff was admitted
253. The 2<sup>nd</sup> Defendant prayed that this suit be dismissed with costs.

**D. The 4<sup>th</sup> Defendant Case.**

254. The 4<sup>th</sup> Defendant on the other hand responded to the Plaintiff's claim through a statement of defence where it averred that:-
- a. Save as what was expressly admitted by the parties herein the 4<sup>th</sup> Defendant denied all the averments made and contained in the Re-Amended Plaintiff and put the Plaintiff to strict proof thereof.
  - b. Paragraphs 1, 2, 3, 3A and 3B of the Re - Amended Plaintiff were admitted and the 4<sup>th</sup> Defendant.
  - c. The 4<sup>th</sup> Defendant denied the contents of Paragraph 8 of the Re -Amended Plaintiff and put the Plaintiff to very strict proof.
  - d. The 4<sup>th</sup> Defendant averred that the Plaintiff had never owned and had never been in possession of the property known as Kwale/Diani Beach Block/1538 and further stated that it was the 4<sup>th</sup> Defendant who was the registered owner of the said property and was in full possession and occupation of the same.
  - e. The 4<sup>th</sup> Defendant acquired the said property vide an Agreement for Sale between Hamadi Juma Mwakibibo the 1<sup>st</sup> Defendant herein and Friedrich Alfons Josef Brinkmann the 4<sup>th</sup> Defendant herein where the 1<sup>st</sup> Defendant agreed to sell and the 4<sup>th</sup> Defendant agreed to buy all that piece/parcel of land comprised in the title known as Kwale/Diani Beach Block/1538.
  - f. Prior to entering into the said sale agreement the 4<sup>th</sup> Defendant conducted a search on ownership and possession of the said land and the search established that the property belonged to and was registered in the name of Hamadi Juma Mwakibibo.
  - g. The 4<sup>th</sup> Defendant also established that a Mr. Peter Mutangili was in occupation of the said land at the time of sale and transfer with the express authority and consent of Hamadi Juma Mwakibibo.
  - h. After execution of the Sale Agreement, the 1<sup>st</sup> Defendant applied for the various consents and clearances for transfer of Kwale/Diani Beach Block/1538 which consents and clearances were given by the Ministry of Lands and by the County Council of Kwale.
  - i. The 4<sup>th</sup> Defendant was a stranger to the contents of Paragraphs 9, 10 and 11 of the Re - Amended Plaintiff and made no admissions to the said contents.
  - j. The 4<sup>th</sup> Defendant deny the contents of Paragraph 12 of the Re -Amended Plaintiff and put the Plaintiff to strict proof. In particular, the 4<sup>th</sup> Defendant deny that the 1<sup>st</sup> Defendant in connivance and collusion with the Land Registrar Kwale fraudulently and unlawfully caused alleged title deeds to be issued purporting that he was the registered proprietor of sub - divisions



known as Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 and sought to purport to sell Kwale/Diani Beach Block/1538 to the 4<sup>th</sup> Defendant pursuant to an alleged Agreement for Sale dated 6<sup>th</sup> March 2012 and put the Plaintiff to strict proof.

- k. The 4<sup>th</sup> Defendant denied all the Particulars of Fraud (a) to (g) inclusive set and contained in Paragraph 12 of the Re - Amended Plain and put the Plaintiff to strict proof. The 4<sup>th</sup> Defendant averred and stated that the Certificate of Title in respect to the property known as Kwale/Diani Beach Block/1538 was lawfully issued and made to the 4<sup>th</sup> Defendant and that the said Certificate of Lease conferred and continue conferring a right and a title of interest to the 4<sup>th</sup> Defendant.
  - l. The contents of Paragraph 13 of the Re - Amended Plaintiff were denied and the Plaintiff put to strict proof.
  - m. The 4<sup>th</sup> Defendant was a stranger to the contents of Paragraph 14 of the Re – Amended Plaintiff and made no admission to the same.
  - n. The 4<sup>th</sup> Defendant stated that contrary to the averments made by the Plaintiff at Paragraph 15 of the Re - Amended Plaintiff, the 4<sup>th</sup> Defendant acquired his proprietorship rights in the parcel of land known as Kwale/Diani Beach Block/1538 from the 1<sup>st</sup> Defendant in a legal, innocent and regular manner and that the entries made and contained at the Kwale Lands Registry on the said property was legal and genuine and that the same could not be nullified, varied or revoked.
  - o. Paragraph 16 of the Re - Amended Plaintiff was denied and the Plaintiff put to strict proof.
  - p. The 4<sup>th</sup> Defendant averred that the pleadings filed herein were fatally defective and should at the most appropriate time raise a preliminary objection and/or apply to had this suit dismissed as against the 4<sup>th</sup> Defendant.
  - q. The 4<sup>th</sup> Defendants stated that there were no other suits pending in court between itself and the Plaintiff herein.
  - r. Paragraph 18 of the Re - Amended Plaintiff was admitted.
255. The 4<sup>th</sup> Defendant prayed that the suit be dismissed with costs.
256. The 2<sup>nd</sup> Defendant called their first witness DW - 2 on 15<sup>th</sup> June, 2023 where the witness testified that:-

**A. Examination in Chief of DW - 2 (the 2<sup>nd</sup> Defendant) by Mr. Ndambiri Advocate.**

257. DW - 2 testified under oath and in English language. His name was Kwame Kariuki Mboku, a citizen of Kenya holding the national identity card bearing all the particulars as shown to Court during the hearing. He lived in Nairobi and that he was a businessman. DW - 2 explained that he was a Director of Venture Holdings Limited. He confirmed that the company had had two directors, himself and Mohammed Nurani. However, as fate would have it, Mr. Nurani had passed on about two and a half years ago.
258. DW - 2 reiterated that Venture Holdings Limited was the 2<sup>nd</sup> Defendant in the case. He testified that he had filed a statement of defence dated 7<sup>th</sup> August, 2012. He explained that he had prepared a witness statement dated 7<sup>th</sup> August, 2012, which had been filed on 8<sup>th</sup> August, 2022. He confirmed that he was aware of the contents of the statement and wished to have it adopted as part of his evidence in support of his case.



259. DW - 2 further testified that he had also filed a list of documents dated 7<sup>th</sup> August, 2022 and filed on 8<sup>th</sup> August, 2013, comprising thirty- six (36) documents produced as 2<sup>nd</sup> Defendant Exhibit Numbers 1 to 36 in that order. He reiterated that he wished to produce those documents as part of his evidence.

**B. Cross Examination of DW - 2 by Mr. Kounah Advocate.**

260. DW - 2 testified that he was the Director of the 2<sup>nd</sup> Defendants. He confirmed that he had purchased the suit property from the 1<sup>st</sup> Defendant in March, 2012 for a sum of Kenya Shillings Sixty Three Million (Kshs. 63,000,000/-). He explained that he had entered into a sale agreement dated 6<sup>th</sup> March, 2012 between Hamadi Juma Mwakibibo and Venture Holdings Limited. DW - 2 stated that payment had been made through a lawyer, Judy Thongori & Co. Advocates.
261. DW - 2 testified that upon the transfer he had been issued with a certificate of lease, as shown at Page 17, dated 3<sup>rd</sup> October, 2021. He explained that he had executed a transfer form on 7<sup>th</sup> June, 2012, and that both the purchaser and the vendor had executed the transfer. He confirmed that they had been given possession and were still in possession. DW - 2 reiterated that they had not done anything further because of the pending court case, though they had obtained approval for development and for sinking a borehole.
262. DW - 2 referred to Page 20, being a letter dated 16<sup>th</sup> March, 2012 by Earthcore Borehole Drilling, giving a quotation for drilling a borehole. He explained that the borehole had been sunk. He stated that they had put security on the site land, as shown at Page 12, being a contracted agreement between themselves and Guards Services dated 20<sup>th</sup> March, 2023.

**C. Cross Examination of DW - 2 by Mr. Makuto Advocate.**

263. DW - 2 testified that he had led John Thongori & Co. Advocates to assist in the conveyance. He stated that he had paid a sum of Kenya Shillings Sixty Three Million (Kshs. 63,000,000/-) for the suit property, and that the payment had been made in stages. He explained that he did not have the statement with him at the time, but reiterated that he had stated this in paragraph 3 of his witness statement and Paragraph 6 of the Statement of Defence.
264. DW - 2 confirmed that the money had been paid through Messrs. S.M. Otunga & Co. Advocates at Equity Bank. He explained that he would have to check the account number and confirm which had been his advocate's bank account. He testified that he had bought the property on 7<sup>th</sup> June, 2012. He stated that he had paid a sum of money for stamp duty, but reiterated that he would have to ask his advocate, as out of the thirty-six documents filed there was no evidence of a receipt for payment of stamp duty, though he could produce it later.
265. DW - 2 explained that he had bought the property on 6<sup>th</sup> March, 2012 and had been supplied with a Certificate of Lease. He confirmed that he did not have a lease from the Commissioner of Lands nor from the National Land Commission. He reiterated that he had never obtained consent to transfer the land to their company.
266. DW - 2 testified that before they had purchased the property, they had undertaken due diligence. He explained that the property had been curved out from a number which he could not remember at that time. He confirmed that he had not produced a certificate of lease by Mr. Mwakibibo or proof of ownership for the land that had been sold to him. He reiterated that he had not produced a lease for parcel No. 1543 in the name of Mr. Mwakibibo



#### **D. Cross Examination of DW - 2 - Mr. Kwame by Mr. Khagram Advocate.**

267. The witness produced the original Certificate of Lease to property Land Reference No. Kwale/Diani Branch/1543. He confirmed that it was registered in the name of a company trading in the names and style of Diani Dunes Limited. CPR/2012/76209, measuring 2.082 hectares.
268. DW - 2 testified that he had been tasked to put together all the evidence of payment for the purchase of Venture Limited. He explained that there had been no evidence of the said payment, and confirmed that he could not recollect the payment of stamp duty as it was not in the file. DW - 2 was referred to Page 2 of the 2<sup>nd</sup> Defendant's bundle, being the transfer of lease from Mr. Hamadi Juma Mwakibibo to Venture Holdings Limited. He stated that he had given the money for stamp duty to his advocate to make the payment.
269. DW - 2 was referred to Page 27, being the clearance certificate of rates, and explained that there had been no evidence of payment of land rates and rent official receipts. He was further referred to Page 28, being the consent to transfer for Kwale/Diani Beach Block/1543. He confirmed that he had not produced those documents in court and reiterated that he did not have them.
270. DW - 2 testified that he did not know how the property had been transferred from Mr. Mwakibibo to Venture Holdings Limited without any of the documents, and explained that this information was well known to his conveyancing lawyer. He confirmed that he did not have the lease for Block/1543. He stated that he had been in court when the original of LR No. 203 had been produced, and explained that he was learning that his Certificate of Lease had to be supported by a lease.
271. DW - 2 testified that the registration to Venture Holdings Limited had been done by his conveyancing lawyer. He explained that he had been involved in the proceedings since year 2012. He was referred to the court order of 11<sup>th</sup> July, 2015, when Justice Richard Mwongo had granted injunctive orders and directed service by advertisement. DW - 2 stated that he had not been aware of those orders, as he had had an advocate.
272. DW - 2 was referred to the order of 5<sup>th</sup> October, 2012, when Justice F. Tuiyott had ordered that Constitutional Petition No. 57 of 2012 be stayed without prejudice to the 2<sup>nd</sup> Defendant. He explained that only his conveyancing Advocate had known about those orders. He confirmed that he had only been aware of Constitutional Petition No. 57 of 2012, and reiterated that he wondered how all those orders had ever been registered at the Land Registry.
273. DW - 2 was referred to the application for registration of the orders and the affidavits dated 5<sup>th</sup> October, 2016, together with the official receipts. He explained that he was now aware that the order had been entered by consent. He stated that he was not in agreement that the transfer to Venture Holdings Limited had been done against the court consent, and reiterated that he did not agree that the transfer of property to Venture Holdings Limited or Diani Dunes Limited had been in breach of a court order.
274. DW - 2 testified that they had conducted due diligence before the purchase, and confirmed that he had paid a sum of Kenya Shillings Sixty Three Million (Kshs. 63,000,000/-) for the land. He explained that he was not aware whether his lawyer had gone to the root of the title to know the circumstances of LR No. 203 and its sub - division before purchasing the suit property.
275. DW - 2 was referred to Pages 2 to 5 of the 2<sup>nd</sup> Defendant's bundle, being the overleaf of the page, and explained that it did not have a serial number. He stated that this had been the title that was surrendered. He testified that on 15<sup>th</sup> June, 2023, he had had the original title and had offered to bring it. He explained that he had never informed the court of Diani Dunes Ltd., as the primary issue had been property LR No. 1543. He confirmed that he had indicated the property was under Venture



Holdings Limited, though by then it had been transferred to Diani Dunes Limited. He reiterated that he had had all the transfer documents duly executed with his late co-director.

276. DW - 2 was referred to Page 109, being the stamp duty receipts by Karanja Njenga Advocates, dated 23<sup>rd</sup> May, 2012, for a sum of Kenya Shillings Twenty Two Thousand (Kshs. 22,000/-), covering stamp duty dues and legal fees. He explained that, as a layman, they relied on advocates, and reiterated that according to him everything in conveyancing was for the advocate to know.
277. DW - 2 testified that he had asked his conveyancing lawyer, J. Thongori Advocate, to check on the sub - division of the land. He explained that he was not aware of the details, and confirmed that although he had a certificate of lease, he was aware that a lease had been issued to Hamadi Juma Mwakibibo.

#### **E. Re - Examination of DW - 2 by Mr. P.C. Onduso Advocate.**

278. DW - 2 confirmed that the whole of the conveyancing had been handled by his Advocate, Mr. John Thongori. He explained that Mr. Thongori Advocate had managed all his conveyancing work for him, even up to the present day. DW - 2 stated that his interest had always been in the end product, and stressed that he had known Mr. Thongori Advocate from childhood.
279. DW - 2 explained that when he had been asked about the history of the property, he had only been concerned with what had been offered. He confirmed that there had been no way the transaction could have been completed without the necessary approvals, consents, and payments of stamp duty, rates, and rents.
280. DW - 2 testified that he had never known the difference between a lease and a Certificate of Lease, and explained that he had only learnt about this distinction the last time he had been in court. DW - 2 stated that he had transferred the property from Venture Holdings Limited to Diani Dunes Limited. He explained that he had not been aware of any court order at the time, and reiterated that they had been undergoing dire financial difficulties and had therefore needed to be liquid.
281. The 2<sup>nd</sup> and 4<sup>th</sup> Defendants marked their cases closed on 26<sup>th</sup> October, 2023 through their counsel Mr. P.C. Onduso Advocate.

#### **E. The 3<sup>rd</sup> & 6<sup>th</sup> Defendants' case**

282. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants opposed the Plaintiff's claim through an Amended Statement of Defence and stated as follows: -
- a. Save what was stated in the defence expressly admitted the Defendants denied all the averments made and contained in the Re – Amended Plaintiff and put the Plaintiff to strict proof thereof.
  - b. Paragraphs 1, 2, 3, 3A and 3B of the Re – Amended Plaintiff were admitted and the 3<sup>rd</sup> and 6<sup>th</sup> Defendants.
  - c. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants denied the contents of Paragraph 8 of the Re – Amended Plaintiff and out the Plaintiff to very strict proof.
  - d. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants stated and averred that the Plaintiff had never owned and had never been in possession of the suit property known as Kwale/Diani Beach/Block/1536 and Kwale/Diani Beach/ Block/1542 and further stated that it was the 4<sup>th</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants who were the registered owners of the said property and was in full possession and occupation of the same.



- e. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants acquired the said property vide an agreement for sale between Hamadi Juma Mwakibibo the 1<sup>st</sup> Defendant herein and Amana Abdalla Nganga, the 5<sup>th</sup> Defendant herein where themselves the 1<sup>st</sup> Defendant agreed to sell and the 5<sup>th</sup> Defendant, 3<sup>rd</sup> and 6<sup>th</sup> Defendants agreed to buy all that piece/parcel of land comprises in the title known as Kwale/Diani Beach/Block/1536 and Kwale/Diani Beach/Block/1542 respectively.
- f. Prior to entering into he said sale agreement the 5<sup>th</sup> Defendant, 3<sup>rd</sup> and 6<sup>th</sup> Defendants conducted a search searches on ownership and possession of the said parcel of land and the search established that the properties belonged to and were registered in the name of Hamadi Juma Mwakibibo.
- g. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants also established that a Mr. Peter Mutangili was in occupation of the said land at the time of sale and transfer with the express authority and consent of Kwale.
- h. After execution of the sale agreement, the 1<sup>st</sup> Defendant applied for various consents and clearances for transfer of Kwale/ Diani Beach/ Block/ 1536 and Kwale/Diani Beach/ Block/1542 which consents and clearance were given by the Ministry of Lands and by the County Council of Kwale.
- i. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants were strangers to the contents of Paragraphs 9, 10 and 11 of the Re – Amended Plaintiff and made no admissions to the said contents.
- j. The 3<sup>rd</sup> and 6<sup>th</sup> Defendant denied the contents of Paragraph 12 of the Re – Amended Plaintiff and put the Plaintiff to strict proof. In particular, the 3<sup>rd</sup> and 6<sup>th</sup> Defendants denied that the 1<sup>st</sup> Defendant in connivance and collusion with the land registrar Kwale fraudulently and unlawfully caused alleged title deeds to be issued purporting that he was the registered proprietor of subdivisions known as Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 and sought to purport to sell Kwale/Diani Beach Block/1536 and Kwale/Diani Beach/Block/1542 to the 3<sup>rd</sup> and 6<sup>th</sup> Defendants pursuant to an alleged agreement for sale dated 6<sup>th</sup> March, 2012 and put the Plaintiff to strict proof.
- k. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants denied all the particulars of fraud (a) to (g) inclusive set and contained in Paragraph 12 of the Re – Amended Plaintiff and put the Plaintiff to strict proof. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred and stated that the certificate of title in respect to the properties known as Kwale/Diani Beach/Block/ 1536 and Kwale/ Diani Beach/Block/1542 was lawfully issued and made to the 4<sup>th</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants and that the said Certificate of Lease conferred and continue conferring a right and a title interest to the 3<sup>rd</sup> and 6<sup>th</sup> Defendants.
- l. The contents of Paragraph 13 of the re – Amended Plaintiff were denied and the Plaintiff put to strict proof.
- m. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants were strangers to the contents to the contents of paragraph 14 of the Re - Amended Plaintiff and make no admission to the same.
- n. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants stated that contrary to the averments made by the Plaintiff at Paragraph 15 of the Re - Amended Plaintiff, the 3<sup>rd</sup> & 6<sup>th</sup> Defendants acquired their proprietorship rights in the parcel of land known as Kwale/Diani Beach/Block/1536 and Kwale/Diani Beach/Block/1542 from the 1<sup>st</sup> Defendant in illegal a legal, innocent and regular manner and that the entries made and contained at the Kwale Registry on the said property was legal and genuine and that the same could not be nullified, varied or revoked.
- o. Paragraph 16 of the Re - Amended Plaintiff was denied and the Plaintiff put to strict proof.



- p. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants averred and stated that the pleadings filed herein are fatally defective and shall at the most appropriate time raise a preliminary objection and/or apply to have this suit dismissed as against the 3<sup>rd</sup> and 6<sup>th</sup> Defendants.
  - q. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants stated that there no other suits pending in court between itself and the Plaintiff herein.
  - r. Paragraph 18 of the re – amended Plaint was admitted.
283. The 3<sup>rd</sup> and 6<sup>th</sup> Defendants prayed that this suit be dismissed with costs.

#### **F. The 5<sup>th</sup> Defendant’s case**

284. The 5<sup>th</sup> Defendant opposed the Plaintiff’s claim through a Statement of Defence where it was deponed:
- a. Save what had been herein expressly admitted, the 5<sup>th</sup> Defendant had denied all the averments made and contained in the Re-Amended Plaint and had put the Plaintiff to strict proof thereof.
  - b. Paragraphs 1, 2, 3, 3A and 3B of the Re - Amended Plaint had been admitted and the 5<sup>th</sup> Defendant.
  - c. The 5<sup>th</sup> Defendant was a stranger to the contents of Paragraphs 4, 5, 6 and 7 of the Re - Amended Plaint and had made no admission to the said contents.
  - d. The 5<sup>th</sup> Defendant denied the contents of Paragraph 8 of the Re-Amended Plaint and had put the Plaintiff to very strict proof.
  - e. The 5<sup>th</sup> Defendant averred that the Plaintiff had never owned and had never been in possession of the property known as Kwale/Diani Beach Block/1539 and had further stated that it had been the 4<sup>th</sup> Defendant who had been the registered owner of the said property and had been in full possession and occupation of the same.
  - f. The 5<sup>th</sup> Defendant acquired the said property vide an Agreement for Sale between Hamadi Juma Mwakibibo, the 1<sup>st</sup> Defendant therein, and Amana Abdalla Nganga, the 5<sup>th</sup> Defendant therein, where the 1<sup>st</sup> Defendant had agreed to sell and the 5<sup>th</sup> Defendant had agreed to buy all that piece/parcel of land comprised in the title known as Kwale/Diani Beach Block/1539.
  - g. Prior to entering into the said sale agreement, the 5<sup>th</sup> Defendant conducted a search on ownership and possession of the said land and the search had established that the property had belonged to and had been registered in the name of Hamadi Juma Mwakibibo.
  - h. The 5<sup>th</sup> Defendant also established that a Mr. Peter Mutangili had been in occupation of the said land at the time of sale and transfer with the express authority and consent of Hamadi Juma Mwakibibo.
  - i. After execution of the Sale Agreement, the 1<sup>st</sup> Defendant had applied for the various consents and clearances for transfer of Kwale/Diani Beach Block/1539 which consents and clearances had been given by the Ministry of Lands and by the County Council of Kwale.
  - j. The 5<sup>th</sup> Defendant had been a stranger to the contents of paragraphs 9, 10 and 11 of the Re - Amended Plaint and had made no admissions to the said contents.
  - k. The 5<sup>th</sup> Defendant denied the contents of paragraph 12 of the Re-Amended Plaint and had put the Plaintiff to strict proof. In particular, the 5<sup>th</sup> Defendant denied that the 1<sup>st</sup> Defendant,



in connivance and collusion with the Land Registrar Kwale, had fraudulently and unlawfully caused alleged title deeds to be issued purporting that he had been the registered proprietor of sub-divisions known as Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 and had sought to purport to sell Kwale/Diani Beach Block/1538 to the 5<sup>th</sup> Defendant pursuant to an alleged Agreement for Sale dated 6<sup>th</sup> March 2012 and had put the Plaintiff to strict proof.

- l. The 5<sup>th</sup> Defendant had denied all the Particulars of Fraud (a) to (g) inclusive set and contained in paragraph 12 of the Re-Amended Plaintiff and had put the Plaintiff to strict proof. The 5<sup>th</sup> Defendant had averred and stated that the Certificate of Title in respect to the property known as Kwale/Diani Beach Block/1539 had been lawfully issued and made to the 4<sup>th</sup> Defendant and that the said Certificate of Lease had conferred and had continued conferring a right and a title of interest to the 5<sup>th</sup> Defendant.
  - m. The contents of Paragraph 13 of the Re-Amended Plaintiff had been denied and the Plaintiff had been put to strict proof.
  - n. The 5<sup>th</sup> Defendant was a stranger to the contents of Paragraph 14 of the Re - Amended Plaintiff and had made no admission to the same.
  - o. The 5<sup>th</sup> Defendant stated that contrary to the averments made by the Plaintiff at Paragraph 15 of the Re - Amended Plaintiff, the 5<sup>th</sup> Defendant had acquired his proprietorship rights in the parcel of land known as Kwale/Diani Beach Block/1539 from the 1<sup>st</sup> Defendant in a legal, innocent and regular manner and that the entries made and contained at the Kwale Lands Registry on the said property had been legal and genuine and that the same could not have been nullified, varied or revoked.
  - p. Paragraph 16 of the Re - Amended Plaintiff was denied and the Plaintiff had been put to strict proof.
  - q. The 5<sup>th</sup> Defendant averred and stated that the pleadings filed therein had been fatally defective and would at the most appropriate time have raised a preliminary objection and/or applied to have that suit dismissed as against the 5<sup>th</sup> Defendant.
  - r. The 5<sup>th</sup> Defendant stated that there had been no other suits pending in court between itself and the Plaintiff therein.
  - s. Paragraph 18 of the Re-Amended Plaintiff was admitted.
285. The 5<sup>th</sup> Defendant prayed that this suit be dismissed with costs.
286. The 5<sup>th</sup> Defendant called their first witness DW - 5 on 24<sup>th</sup> October, 2023 where she testified that:-

**A. Examination in Chief of DW - 5 by Mr. Ondabu Advocate.**

287. DW - 5 testified under oath and in Swahili language. She was called M/s. AMANA ABDALLA NGANGA, a citizen of Kenya and holder of the national card with all the particulars as shown to Court. She had been born at Msambweni. She was a business lady. She informed Court that she was the 5<sup>th</sup> Defendant in the case. She confirmed that she had filed her witness statement on 22<sup>nd</sup> November, 2022, together with a list of documents on the same date, and asserted that she wished to rely on them as her evidence-in-chief.
288. DW - 5 stated that she had the originals of the following documents:



- i. A certificate of lease dated 30<sup>th</sup> May, 2012 in respect of LR No. 1539.
  - ii. A transfer of land signed on 29<sup>th</sup> May, 2012.
  - iii. A letter of consent dated 17<sup>th</sup> May, 2012 from Mombasa.
  - iv. A payment of stamp duty form for a sum of Kenya Shillings Twenty Thousand One Hundred and Fourty Hundred (Kshs. 20,140/-) dated 30<sup>th</sup> May, 2012 for Kenya Commercial Bank (K.C.B).
  - v. Registration receipts dated 27<sup>th</sup> July, 2012 from the Ministry of Lands.
289. It was her testimony that the agreement for sale had been signed on 10<sup>th</sup> August, 2011. She explained that the witnesses to the agreement were Hassan Kabangi, Enock Matore Jackson, and Advocate Otieno. DW - 5 stated that her prayer was that she had bought the land and that she needed to have her land. She confirmed that she knew the vendor of the land. She explained that she had known him before, as he used to come to her home and had been a friend to her husband. DW - 5 reiterated that he had been the one who had signed the agreements.

#### **B. Cross examination of DW – 5 by Mr. Kounah Advocate**

290. DW - 5 testified that she had been the one who had signed the sale agreement, and that her names had been spelt as “Ng’ang’a.” and not “Nganga”. She explained that the names on the agreement had been “Hamisi Juma Mwakibibo” and not “Hamadi.” She stated that his address had not been included. DW - 5 testified that it was her evidence that they had been at the hotel when the agreement was signed. She explained that she had found Zaidi Kabangi there, and that she and her husband had signed the sale agreement. She reiterated that she had never noticed the spelling mistake in the names. She stated that when she had been at the hotel, Mr. Mwakibibo had been absent, though he had already signed the sale agreement.
291. DW - 5 explained that the purchase price had been a sum of Kenya Shillings One Million (Kshs. 1,000,000/-), and that it had been her husband who had dealt with the matter. She confirmed that she was not sure whether the sum had been paid or not. DW - 5 explained that she had only gone to see the land in year 2013. She confirmed that she had never taken possession of it nor utilized it in any way. She stated that her husband had told her that the value of the land by then had been a sum of Kenya Shillings Twenty Million (Kshs. 20, 000, 000/=) and above, and reiterated that it had been her husband who had been involved in the documentation.

#### **C. Cross Examination of 5<sup>th</sup> Defendant by Mr. P.C. Onduso Advocate: -**

292. DW - 5 testified that she had received the title in the year 2012, and that it had been her husband who had given it to her. She explained that after the agreement with Mr. Mwakibibo, she had left the whole affairs concerning the documents to be undertaken by her husband. She stated that her husband had later become ill. DW - 5 confirmed that she had never undertaken an official search and therefore would not have known who the owner of the property was. She stated that she had never followed up on the documents. DW - 5 testified that they had been told there was a court case and that she had been to participate at the opportune moment. She explained that her husband and Mr. Mwakibibo had been very close.



#### **D. Cross Examination of DW - 5 by Mr. Makuto Advocate.**

293. DW - 5 testified that her names were “Nganga” and not “Ng’ang’a.” She explained that by the time of the preparation of the sale agreement, they had held a long discussion. She stated that she had a Certificate of Marriage with her husband, though she had not carried it. DW - 5 confirmed that she had paid a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000/-) as stamp duty and had been issued with a receipt dated 14<sup>th</sup> December, 2012. She explained that she had never seen the lease in her names but had seen the one for Mr. Mwakibibo, and reiterated that up to that time she had never been given the lease.
294. DW - 5 testified that apart from signing the sale agreement, she had done nothing else, as it had been her husband who had been involved in the matter. She explained that from the Certificate of Lease she had not seen the serial number on it. She confirmed that she had been issued with the certificate on 30<sup>th</sup> May, 2012, and that the lease had been for 50 years from 1<sup>st</sup> August, 2006.
295. DW - 5 stated that she had seen the title deed in the name of Hamadi Juma Mwakibibo but did not remember its date. She explained that she had gone to the land in year 2013, at which time there had only been a few bushy shrubs. She asserted that by then she had already bought the property. DW - 5 testified that they had shifted from Mombasa to Msambweni, and during the ongoing court case she had found that someone had constructed on the land. She explained that she had reported the matter to the police as there had been a court order, namely an injunctive order.

#### **E. Cross Examination of DW - 5 by Mr. Karega Advocate.**

296. DW - 5 testified that during the negotiations she had been present, but during the payment she had not been present. She explained that the purchase price had been a sum of Kenya Shillings One Million (Kshs. 1,000,000/-), with a deposit of a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/-). She stated that the agreement had shown the balance as a sum of Kenya Sillings Eight Hundred Thousand (Kshs. 800,000/-), but she believed there had been an error as it ought to have been a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/-).
297. DW - 5 confirmed that the agreement had been drawn by Mr. Eric Otieno Advocate. She explained that they had met at Vijay Park Hotel, and stated that she had never seen him again thereafter. DW - 5 testified that she had signed the transfer form in front of Advocate Eric Otieno. She explained that she might have met him more than twice, though it had been a long time ago. She added that her husband had had land disputes elsewhere, which had been on charges of fraud.

#### **F. Cross Examination of DW - 5 by Mr. Khagram Advocate.**

298. DW - 5 testified that she did not know Zaidi, and explained that her husband was called Saidi Kabangi. She stated that she knew Mr. Mwakibibo had owned a large parcel of land which had been subjected to sub - division. She confirmed that she had never seen the papers relating to the sub - division. She explained that she had seen the lease given to Mr. Mwakibibo by the Government, but explained that she had not produced it in court as she had never thought it was needed.
299. DW - 5 was referred to the Plaintiff’s Supplementary Documents filed on 9<sup>th</sup> January, 2019, at Page 14, being a lease for Mr. Mwakibibo dated 1<sup>st</sup> August, 2006. She confirmed that she had never paid the annual land rent and stated that she did not know whether Mr. Mwakibibo had paid it.
300. DW - 5 testified that she did not know Said Munyikai Tomas or David Kandie. She explained that she had been told they had been arrested, but stated that she and her husband had bought land. DW -



5 confirmed that she knew the purchase price had been paid for, and stated that she had evidence of payment in court. DW - 5 testified that she knew Mr. Eric Otieno Advocate was an advocate.

#### **G. Re - Examination of DW - 5 by Mr. Ondabu Advocate.**

301. DW - 5 confirmed that her husband had died on 16<sup>th</sup> May, 2023. She explained that she had not been involved in that case, but that her husband had been. DW - 5 stated that from the sale agreement there had been identity card numbers included, and confirmed that the vendor had signed the agreement. She explained that the value of the land in the year 2018 would have been a sum of Kenya Shillings Twenty Million (Kshs. 20, 000, 000/=).
302. DW - 5 was referred to the 7<sup>th</sup> and 8<sup>th</sup> Defendants' documents at Page 21, being a lease for Hamadi Juma Mwakibibo dated 3<sup>rd</sup> October, 2011, and later on 30<sup>th</sup> May, 2022. She confirmed that she had seen those documents. DW - 5 testified that she was in court as she appeared to be the current registered owner of LR No. 1542 from the current official search. DW - 5 explained that the purchase price had been handled by her husband, while she had only been involved in the negotiations. She confirmed that she had signed the transfer herself.

#### **G. The 7<sup>th</sup> and 8<sup>th</sup> Defendant's claim**

303. The 7<sup>th</sup> and 8<sup>th</sup> Defendants opposed the Plaintiff's claim through a Statement of Defence where it was deponed: -
- a. Save for what had been herein expressly admitted, the 7<sup>th</sup> & 8<sup>th</sup> Defendants had denied the singular and several allegations of fact contained in the Re - Amended Plaint as if the same had been set out herein below and traversed seriatim.
  - b. The contents of paragraphs 1, 2, 3A and 3B of the Re - Amended Plaint were admitted in so far as the same had merely been descriptive of the parties to the suit save that the 7<sup>th</sup> & 8<sup>th</sup> Defendants' address for service for the purpose of that suit.
  - c. The contents of Paragraph 4 of the Re - Amended Plaint was denied, specifically that the Plaintiff was the registered owner of the property which had been the subject matter of that suit, and the 7<sup>th</sup> and 8<sup>th</sup> Defendants had put the Plaintiff to the strict proof thereof.
  - d. The 7<sup>th</sup> and 8<sup>th</sup> Defendants was not been privy to the particulars of paragraph 5, 6, and 7 of the Re - Amended Plaint, which had been vehemently denied, and the Plaintiff was put to the strictest proof thereof.
  - e. The 7<sup>th</sup> and 8<sup>th</sup> Defendants denied the contents of Paragraph 8 of the Re - Amended Plaint and the Plaintiff was put to strict proof thereof.
  - f. The 7<sup>th</sup> and 8<sup>th</sup> Defendants were strangers to Paragraphs 9, 10 and 11 of the Re - Amended Plaint and proof had therefore been invited in the allegations and specifically as against the 7<sup>th</sup> and 8<sup>th</sup> Defendants therein.
  - g. The 7<sup>th</sup> and 8<sup>th</sup> Defendants denied ever having taken part in any fraudulent exercise whatsoever, or at all. Further, the allegations against the 7<sup>th</sup> Defendant contained in Paragraph 12(a) to (g) of the Re - Amended Plaint had been frivolous, baseless and unfounded. The 7<sup>th</sup> and 8<sup>th</sup> Defendants further stated that they had had no knowledge whatsoever of the existence of fraud and the allegations of fraud attributed to the 7<sup>th</sup> Defendant had in the circumstances been misconceived.



- h. The 7<sup>th</sup> and 8<sup>th</sup> Defendants had not been aware of the contents of Paragraphs 13 and 15 of the Re-Amended Plaintiff and the same was denied.
  - i. The 7<sup>th</sup> and 8<sup>th</sup> Defendants admitted the contents of Paragraph 14 of the Re - Amended Plaintiff save that the Plaintiff had indicated his interest to have been a party to the said Petition but had chosen not to participate since the Plaintiff had never made the necessary procedure to become a party to the said suit being Petition 57 of 2012.
  - j. In reply to Paragraph 16 of the Re - Amended Plaintiff, the 7<sup>th</sup> and 8<sup>th</sup> Defendants stated that the Plaintiff had no claim whatsoever to the suit property and no loss whatsoever since the claim of ownership to the suit property had been unjustifiable.
  - k. The 7<sup>th</sup> and 8<sup>th</sup> Defendants averred that mandatory notice of intention to sue the Government prior to the institution of the suit therein had not been served on the on the Attorney General, hence the suit therein had been fatally and incurably defective and had not lain against the 10<sup>th</sup> Defendant. The 10<sup>th</sup> Defendant would accordingly have raised a preliminary objection and urged that Honourable Court to have struck out the suit against them.
  - l. Paragraphs 17 and 18 of the Re - Amended Plaintiff were admitted.
  - m. For the foregoing reasons, the 7<sup>th</sup> and 8<sup>th</sup> Defendants had stated that the reliefs sought by the Plaintiff had neither been available not merited.
  - n. The jurisdiction of the Honourable Court was admitted.
304. The 7<sup>th</sup> and 8<sup>th</sup> Defendants prayed that the Plaintiff's suit be dismissed with costs.
305. The 7<sup>th</sup> Defendant called their first witness on 26<sup>th</sup> October, 2023 who testified as follows:-

**A. Examination in Chief of DW - 6 by Mr. Makuto Advocate.**

306. DW - 6 was sworn and he testified in English language. He was called Mulusa Teddy Mudaka. He was a Senior Land Surveyor with the Director of Survey in Nairobi, under the Legal Section. He explained that he was in court to shed light on the land known as Kwale Diani Beach/203. He stated that he was a holder of a Bachelor of Science degree in Geospatial Engineering and a member of Institute of Surveys of Kenya (ISK). He confirmed that he had prepared a witness statement and relied on two ( 2 ) maps and records from the survey map, namely: -
- a. F/R No. 35.
  - b. F/R No. 147/3.
  - c. Sub-division scheme from Plot No. 203.
  - d. Registry Index Map (RIM) No. 2 for Diani Beach.
307. DW - 6 testified that they had filed a further list of documents dated 20<sup>th</sup> February, 2023. He explained that they had had four documents as authority for the sub - division, namely:
- a. Letter dated 13<sup>th</sup> June, 2006.
  - b. Letter dated 13<sup>th</sup> June, 2006.
  - c. Letter dated 24<sup>th</sup> May, 2006.
  - d. PPA - 2 by the County Government of Kwale.



308. DW - 6 stated that he wished to present those documents as part of the evidence to be relied upon and to be produced. They were marked as the 7<sup>th</sup> Defendant's Exhibits Numbers 1 to 5 from the further list of documents. DW - 6 explained that the process of sub - division would begin with the proprietor applying to the local authority, which would then pass the scheme for comments from the various departments. If the scheme was approved, it would be transmitted to the Land Administration under the Ministry of Lands, circulated for comments, and finally approved for sub - division before being sent to the applicant. The applicant would then appoint a licensed land surveyor to carry out the cadastral survey.
309. DW - 6 testified that the licensed surveyor would submit the approvals to the Survey of Kenya through the Director. He explained that the submission would contain the cadastral survey and approvals, which would then be numbered and taken through the cadastral checking process. If approved, the survey would be authenticated. He stated that if the property was under a RIM area, a Registry Index Map (RIM) would be generated, or if it was under a Deed Plan area, a Deed Plan would be prepared.
310. DW - 6 explained that these documents would then be submitted to the survey or authorized agent, and thereafter taken to the Land Administration under the Director of Administration. If all conditions were met, a new lease would be prepared and sent to the Land Registry, in this case Kwale. He reiterated that if there was a breach of any of these processes, the application would be returned and the survey would not be approved.
311. DW - 6 testified that the documents in the further list of documents had been forwarded by a Licensed Surveyor, Mr. Edward Kiguru. He referred to the further list of documents dated 12<sup>th</sup> July, 2022, and the letter dated 30<sup>th</sup> May, 2022, by Mr. R.J. Simiyu for the Director of Land Administration, particularly paragraph 3. He confirmed that consent for sub - division was a principle requirement.
312. DW - 6 explained that the application for sub - division had been made on 26<sup>th</sup> June, 2006, but there had been no authentication by the person receiving the application. He testified that the RIM had been amended on 29<sup>th</sup> August, 2006, for this particular sub - division under Entry No. 87.

#### **B. Cross Examination of 7<sup>th</sup> Defendant by Mr. Karega Advocate.**

313. DW - 6 testified that if certain documents had not been presented, the survey and sub - division would have been rejected. He explained that since Folio 458 had been registered, it meant that the sub - division had been completed. He reiterated that if any documents had been missing, there would have been no Folio 458. DW - 6 confirmed that one of the documents for the sub - division had indeed been presented.

#### **C. Cross Examination of DW – 6 by Mr. Kounah Advocate.**

314. DW - 6 testified that he graduated in the year 2011 from the University of Nairobi. He explained that the PPA-2 had been issued by the County Government, showing the notification. DW - 6 stated that from the local authority the matter would proceed to the Land Administration, after which the licensed surveyor would take over. He confirmed that it was only the Director of Survey in Nairobi who dealt with the cadastral, and reiterated that the authentication process had been very thorough.
315. DW - 6 explained that the owner would take the documents to the local authority for advertisement. He testified that the sub - division numbers would then be given by the Director of Survey. He stated that the owner would submit the title to the Land Administration offices.
316. DW - 6 confirmed that they did not receive original documents in the course of this process.



#### **D. Cross Examination of DW - 6 by Mr. P.C. Onduso Advocate.**

317. DW - 6 testified that in the year 2012 he had not been in Kwale and had not been the surveyor then. He explained that they had only had one file for Kwale No. 203. He stated that the exercise of the subdivision had taken place in year 2006. DW - 6 confirmed that the last document, the RIM, had been amended by the Director of Survey. He explained that the effect of the RIM by the Director had been to support the registration of the new parcels. He reiterated that the survey plan and the process had been completed.
318. DW - 6 testified that they had had the survey records for Plot No. 203, and that the RIM had been amended. He explained that LR No. 203 had changed to LR No. 1536 through LR No. 1543 after the sub - division. DW - 6 confirmed that by the time he had been dealing with the matter, all the requirements had been met. He explained that this had been by virtue of the fact that there had been authentication of the Survey Plan, as shown in paragraph 4.

#### **E. Cross Examination of DW - 6 by Mr. Ondabu Advocate.**

319. DW - 6 was referred to Paragraph 4 of his witness statement. He testified that it meant the survey work had been done in accordance with the law. He explained that he had not been on site during the exercise.

#### **F. Cross Examination of DW 6 by Mr. Khagram Advocate.**

320. DW - 6 testified that he had not been part of the team that had authenticated the sub - division. He explained that he had not participated in the authentication and did not know who had carried it out. He stated that he had come across documents suggesting fraudulent means in relation to the matter, and reiterated that his evidence was based on his knowledge and the information contained in the file.
321. DW - 6 was referred to the letter dated 24<sup>th</sup> May, 2006, by Mr. S.M. Osodo. He explained that it had been on the final approval for the sub - division of Plot No. 203. He stated that the Land Administration had given the consent to the owner of the land, and confirmed that the consent had been through the letter dated 24<sup>th</sup> May, 2006, issued by the Land Administration.
322. DW - 6 testified that the Land Administration was a department distinct from the Land Surveyor. He explained that once the RIM numbers were issued, the new numbers did not confer ownership. He stated that once the RIM was amended, the interest was never extinguished, meaning LR No. 203 still remained alongside the sub - divided parcels.
323. DW - 6 stated that the owner had to surrender the title for the remaining parcel No. 1, and explained that the parcels created through sub - division would only take effect after registration had been effected. He confirmed that up to that point LR No. 203 had remained. He explained that by the year 2006, if Mr. Mwakibibo had not been the registered owner, he would not have surrendered the title. He reiterated that presentation of the title had been a must for the registration process of the new subdivision to take place.
324. DW - 6 testified that nothing could happen merely on the basis of the RIM and summons, as they did not confer titles, rights, or interests in the land. He explained that if the owner had wanted to cancel the subdivision, he could have submitted himself to the Director of Survey for reversal. DW - 6 was referred to the authentication 458/35, which he stated had borne a faint signature dated 10<sup>th</sup> July. He explained that it had not been legible, though it had been certified on 28<sup>th</sup> July, 2022. He confirmed that the Director of Survey did not issue any notification once registration had been done.



### **G. Re - Examination of DW - 6 by Mr. Makuto Advocate.**

325. DW - 6 reiterated that the RIM nor the survey did not confer any interest, title, or right over land. He explained that he confirmed it was only upon registration that interest, title, and right were conferred.
326. The 7<sup>th</sup> Defendant called its second witness on 25<sup>th</sup> January, 2024 who testified as follows:-

### **A. Examination in Chief of DW - 7 by Mr. Makuto Advocate.**

327. DW - 7 was sworn and under oath he testified. He was called STEVE MOKAYA. He was a Land Registrar, Kwale. He had prepared a witness statement dated 24<sup>th</sup> January, 2024, and wished to have it adopted as part of his evidence. He explained that the suit property, Kwale No. 203, had been registered in the name of Hamadi Juma Mwakibibo. He stated that on 18<sup>th</sup> October, 2007, lease documents had been prepared in Nairobi and sent to the station for the Land Registrar, accompanied by a forwarding letter dated 9<sup>th</sup> November, 2006.
328. DW - 7 confirmed that he had carried the presentation book for the year 2009. He explained that Entry No. 003 of 3<sup>rd</sup> March, 2009, had been for the transfer from Hamadi Juma Mwakibibo to Aniket Property & Investment Limited for a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-). DW - 7 testified that in court there had been two sets of documents. He explained that he had never come across two entries numbered LR. No. 1536 and 1533, nor had he come across the letter. He stated that he had, however, seen letters dated 9<sup>th</sup> November, 2009, and 30<sup>th</sup> May, 2022, signed by Mr. Simiyu. He reiterated that he wished to have the presentation book and the letters produced in court.
329. DW - 7 explained that for leases without consent from Nairobi, and had it not been for the matters before the court, he would have expunged the leases from the record as they had been null ab initio under the provisions of Section 79 of the *Land Registration Act*, No. 3 of 2012. DW - 7 testified that he had not come across a surrender for the lease of No. 203 for purposes of sub - division. He explained that there ought to have been a surrender before the sub - division could be undertaken. He referred to the Defendants from the 1<sup>st</sup> to the 11<sup>th</sup>, stating that they had leases. He confirmed that the owners of the land had been issued with the instruments, which were registered and then forwarded to Nairobi.

### **B. Cross Examination of DW - 7 by Mr. Kounah Advocate.**

330. DW - 7 informed Court that he was the Land Registrar at Kwale since 3<sup>rd</sup> March, 2015, a period of eight ( 8 ) years. He explained that he had previously worked at Ewaso Ngishu as Deputy County Land Registrar, and thereafter at Kisii under the same title from the years 2016 to 2023. He stated that it was while at Kisii he had been promoted and given full charge.
331. DW - 7 confirmed that he was an Advocate of the High Court of Kenya, having been admitted in the year 2014. He reported to Kwale in the year 2022. He testified that he had reviewed all the records relating to Parcel No. 203. According to him, he would have revoked and/or expunged them from record had it not been for the present case. To him, they were all obtained through fraudulent means and/or forgeries.
332. DW - 7 explained that he had gone through the pleadings filed by his predecessors (the Land Registrars) and the parties, including affidavits sworn by Mr. Dick James Safari, Ms. Siema Mwanguni, Mr. Evans Marwanga, and Mr. Philip Makini. He confirmed that there had been three (3) witness statements filed in Court. These were namely by:-
- a. Mr. Philip Makini dated 4<sup>th</sup> November, 2016.



- b. Mr. Evans Marwanga dated 12<sup>th</sup> March, 2019.
  - c. Mr. Dick James Safari dated 7<sup>th</sup> March, 2019
  - d. Defence on behalf of the 7<sup>th</sup> and 8<sup>th</sup> Defendants dated 8<sup>th</sup> March, 2023
  - e. 2<sup>nd</sup> and 8<sup>th</sup> Defendants' bundle of documents dated 26<sup>th</sup> February, 2014
333. DW - 7 testified that as an experienced Land Registrar, he knew that documents changed particularly after sub - division, but explained that the original numbers always remained. DW - 7 testified that he would rely on his own witness statement, while his predecessors could be summoned to tender evidence on their own statements. He asserted that he would not at all associate himself with their statements.
334. DW - 7 testified that he had produced the presentation book, but explained that it did not indicate who had signed it. He confirmed that Mr. Safari, Mr. Makini and Mr. Marwanga had all been his seniors in terms of the experience. They possessed immense knowledge on their work. DW - 7 was referred to the witness statements by Mr. Makini and Mr. Safari, particularly at paragraph 2 and 3 respectively. He stated that he had considered those statements in the course of his review.
335. Mr. Mokaya was referred to his witness statement dated 24<sup>th</sup> January, 2024. At paragraph 2, he testified that the lease for Kwale/Diani Beach/203 had been processed in the name of Hamadi Juma Mwakibibo. He explained that the lease had been duly executed on 7<sup>th</sup> November, 2006, and forwarded to the Kwale Land Registry vide letter reference No. 465947C (19) dated 9<sup>th</sup> November, 2006. He confirmed that he had had those documents with him, though unfortunately they had not been in the parcel file.
336. At paragraph 5, DW - 7 stated that vide the presentation book No. 0033 of 3<sup>rd</sup> March, 2009, a transfer document had been lodged at the Land Registry by Mr. Hamadi Juma Mwakibibo to Aniket Property and Investments. He explained that they did not normally attach the consent, and emphasized that issue of consents had been removed or eradicated from the year 2009.
337. DW - 7 confirmed that he was aware of the Land Control Board and the Commissioner of Lands' consent. He explained that for this case the appropriate consent had been that of the Commissioner of Lands. He was referred to the Plaintiff's further supplementary bundle of documents dated 9<sup>th</sup> January, 2019, page 22. He testified that it had been a Letter of Consent, but explained that it could not be used in this case as the suit land had been leasehold and not freehold. However, still being leasehold, he reiterated that there had been no consent from the Commissioner of Lands.
338. DW - 7 was referred to the presentation book. He explained that there had been a remark for rejection at Entry No. 034. He testified that it had been for the change of name from Habil to Kitumbua, and that the cancellation had been pursuant to a court order involving Hamadi Juma Mwakibibo and Steve Oddiaga Advocate. He explained that the next entry had been No. 033, and reiterated that ordinarily once a cancellation was done one moved to the next number and not to superimpose an entry on an already cancelled number.
339. DW - 7 was further referred to the bundle of documents filed by the Attorney General. DW - 7 was referred to the documents in custody of the Land Registrar. He testified that he had only carried the parcel file for Plot No. 203, and not the earlier files or the purported sub - division. He explained that he had not carried the mother title.
340. DW - 7 referred to the green card and stated that the first entry had been typed, while the subsequent ones had been handwritten. He confirmed that the first entry dated 18<sup>th</sup> October, 2007, had been in the name of Hamid Juma Mwakibibo, P.O. Box 305, Ukunda. The second entry dated 18<sup>th</sup> October,



2007, had been for the issuance of a Certificate of Lease. He explained that the first sub - division had been Parcel No. 1536, Entry No. 1, showed the sub - division of Plot No. 203 on 3<sup>rd</sup> October, 2011, for Hamid Juma Mwakibibo, followed by a second entry for issuance of a Certificate of Lease.

341. DW - 7 referred to the parcel file and testified that there had been a surrender of the certificate of lease for Masudi dated 21<sup>st</sup> October, 2016. He explained that the third entry had been a surrender to Rosemary Ali Abdul Mwakiduo, and that there had been a transfer dated 28<sup>th</sup> February, 2018, to Peter Ethorn, with a document dated 18<sup>th</sup> December, 2018. He confirmed that there had been receipts for the transfer.
342. DW - 7 explained that there had been an application for sub - division, evidenced by a booking form, which had noted that there had been a pending court case. He confirmed that stamp duty of a sum of Kenya Shillings One Hundred and Sixty Thousand and Forty (Kshs. 160,040/-) had been paid. He referred to an affidavit by Rosemary, a spousal affidavit dated 25<sup>th</sup> January, 2019, and consent to transfer by the Land Officer, equivalent to the Commissioner of Lands' consent. He testified that there had been KRA records for stamp duty payment dated 12<sup>th</sup> February, 2019, and a transaction slip from the National Bank of Kenya for the same amount. He confirmed that the file contained identity documents for Rosemary Abdul, her KRA PIN, and a copy of a Dutch passport for Mr. Ethan Frank Peter. He explained that there had been a Certificate of Lease and surrender of certificate of lease, with parcel numbers indicated by cancellation or crossing.
343. DW - 7 further testified that:
- i. For Hamadi Juma Mwakibibo, the surrender had been dated 21<sup>st</sup> January, 2015, signed by Land Registrar Mr. Charles Ngetich.
  - ii. For Masudi Swaleh Mwaranjira Juma Swaleh Mwamgula and Mwanarusi Hamadi, the surrender had been dated 21<sup>st</sup> October, 2016, signed by Land Registrar Mr. A. N. Njoroge.
  - iii. For Rosemary Ali Abdul, the surrender had been dated 22<sup>nd</sup> December, 2016, signed by Land Registrar Mr. A. N. Njoroge.
344. DW - 7 confirmed that what he had in the green card corresponded to what was in the parcel file. He explained that the presentation book he had carried had been for the years 2009 to 2012, and that he had not carried the presentation book for the years 2015 and 2016, which had been for the purported sub - division, as that exercise had never taken place.
345. DW - 7 was referred to Parcel No. 1543 and testified that the parcel file contained:
- a. A green card with entries beginning on 3<sup>rd</sup> October, 2011, in the name of Hamadi Juma Mwakibibo, followed by issuance of a Certificate of Lease.
  - b. A caution registered by Venture Holding Limited dated 13<sup>th</sup> March, 2012, claiming purchaser's interest. But it was later on withdrawn.
  - c. Transfer to Venture Holding Limited, followed by issuance of a Certificate of Lease on 7<sup>th</sup> June, 2012.
  - d. A restriction registered against dealings until conclusion of a court case. But it was later on withdrawn by court order.
  - e. Entry No. 9 dated 9<sup>th</sup> January, 2015, cancelled in red ink. There was another Entry No. 9 dated 28<sup>th</sup> July, 2021, for transfer to Diani Dunes Limited.



- f. Entry No. 10 dated 28<sup>th</sup> July, 2021, showing issuance of a Certificate of Lease to Diani Dunes Limited.
- g. Entry No. 11, undated, for an injunctive order in HCCC No. 134 of 2012.
346. DW - 7 explained that on the encumbrance side, there had been charges registered: one for a sum of Kenya Shillings One Million (Kshs. 1,000,000/-) dated 26<sup>th</sup> November, 2021, by Diani Dunes Limited, and another for a sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) with I & M Bank. He confirmed that there had been a Discharge of Charge registered on 28<sup>th</sup> July, 2021. The parcel file contained all related documents, including the charge and discharge by I & M Bank. He testified that the file also contained incorporation documents for Diani Dunes Limited, KRA PINs for both Diani Dunes Limited and Venture Holdings Limited, witness statements, court orders, affidavits, receipts, applications, transfer forms, banking slips, CR - 12 forms, and Certificates of Lease.
347. DW - 7 was referred to Parcel No. 203 and testified that the parcel file contained:
- A green card with entries beginning on 18<sup>th</sup> October, 2007, showing G.O.K., and a surrender of lease dated 18<sup>th</sup> October, 2006.
  - Nine entries on the white card, including restrictions, cautions, prohibitory orders, and court orders between the years 2008 and 2009.
  - Entry No. 10 dated 3<sup>rd</sup> November, 2009, showing closure for sub - division.
348. DW - 7 explained that the file contained a copy of search for Parcel No. 203 signed by the Court Registrar and Messrs. A.B. Patel & Co. Advocates, a transfer form from Hamadi Juma Mwakibibo for a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-), and copies of official searches. He testified that Entry No. 10 dated 16<sup>th</sup> October, 2010, related to Civil Case No. 88 of 2012, ordering transfer of two acres to the Plaintiff. He explained that the mother file had been Plot No. 25, which upon sub – division had given birth to Parcels No. 203 and 204, and reiterated that it had been irregular for a closed file to be hanging onto a newly sub - divided parcel.
349. DW - 7 confirmed that there had been no completion documents in Parcel No. 203. He explained that many documents had been missing, and apart from what he had read, there had been no other documents in the file. He reiterated that there had been no consents in Parcel No. 203, and explained that the Land Control Board applied to freehold and not leasehold. DW - 7 was referred to a letter dated 30<sup>th</sup> May, 2012, by the Ministry of Lands to the Attorney General.
350. DW - 7 testified that it was to confirm that Lease No. 203 had been processed. He explained that from their end, the office had never received any consent to surrender or sub - division from Mr. Simiyu of the office of the Land Administration. He stated that he had not made any inquiry from the Land Administration.
351. DW - 7 was referred to a letter dated 11<sup>th</sup> April, 2024, by Makuto Advocate to the office of Land Administration, seeking to find out whether the land had been sub - divided and what consent had been given over the land. He testified that Parcel No. 203 neither had the lease documents nor consents.
352. DW - 7 was referred to paragraph 5 of his statement. He explained that he had been relying on the presentation book, though it had been missing, because the information had been plucked out from the record. He confirmed that Entry No. 9 of 2013 had indicated that the title had been closed for sub - division into new numbers.



### **C. Cross examination of DW - 7 by Mr. P.C. Onduso Advocate.**

353. DW - 7 confirmed that Parcel No. 203 had been closed for sub - division on 3<sup>rd</sup> October, 2011, by Mr. Marwanga, a Land Registrar. He explained that he had referred to them as purported sub – divisions as he never recognized them.
354. DW - 7 testified that they had worked closely with the Land Surveyor, Mr. Teddy Mulusa. He stated that he had heard about him and had seen his statement at paragraph 4, which indicated that the sub - division of Parcel No. 203 had been carried out. He explained that he had seen some maps but doubted the sub - division, as at the district level they had had many limitations when dealing with leasehold land. They had no powers on sub – divisions of land. He reiterated that such matters were normally handled by Land Administration, the County Government, and the National Land Commission.
355. DW - 7 explained that according to the record, Parcel No. 203 had been closed for sub - division by Mr. Marwanga, who had had powers to do so depending on the documents in his possession. He confirmed that the same powers extended to opening green cards, and that the new green card had been opened by Mr. Marwanga. He reiterated that he had had powers to do so.
356. DW - 7 testified that if a person had applied for an official search for the sub – divided properties, he would have been given the information in their custody, and if the person had been interested in purchasing, he would have been asked to produce title. He explained that there had been several Land Registrars between himself and Mr. Maruanga, all numbering to four (4). He stated that he did not know whether those Land Registrars had raised any questions over Parcel No. 203.
357. DW - 7 explained that once a document had been plucked out, as a Land Registrar he would ordinarily have caused the matter to be gazetted, but he could not do so as the matter had been alive in court. He stated that perhaps the Land Registrars had never had the matter brought to their attention.
358. DW - 7 testified that from the records he had been holding, Aniket Properties & Investments Limited had been mentioned or referred to. He explained that the documents for registration of Aniket Properties & Investments Limited had been presented by Mr. Oddiaga Advocate, from the presentation book and transfer form. He reiterated that the information in the green card on that transaction had been plucked out deliberately by Land brokers. He confirmed that there had been no consent to support the transfer to Aniket Properties & Investments Limited.
359. DW - 7 explained that when he had been requested to record the statement, he could not remember whether he had consulted the pleadings. He was referred to the statement of defence by the 7<sup>th</sup> and 8<sup>th</sup> Defendants, and testified that he had never seen it nor been aware of it. He stated that he was not surprised that it denied that the Plaintiff owned the property. He explained that he was there to assist the court on the land matter, and reiterated that while the Plaintiff may have purchased the property genuinely, but the person who had sold it to them was the one who had swindled them.
360. DW - 7 confirmed that the registered owner of Parcel No. 203 had been Hamadi Juma Mwakibibo. He explained that according to the records, which were disputed, Parcel No. 203 had led to the purported sub - division. He stated that there had been a page missing from the green card, but that it had been captured in the presentation book and transfer form. He explained that the map by the Land Survey may have come from anywhere, and that amendments may have been made but not registered. He reiterated that Mr. Maruanga may have been right depending on the documents he had had in his possession.



#### **D. Cross examination of DW - 7 by Mr. Karega Advocate.**

361. Mr. Mokaya testified that upon the sub - division there had been an entry for closure of the title. He confirmed having brought the records to that effect. He explained that he had produced the records for Parcels Nos. 1536 to 1542, which he had obtained from the Land Registry.
362. DW - 7 was referred to Parcel No. 1542 and stated that the green card had been opened by Mr. Maruanga, a Land Registrar well known to him. He explained that there had been entries on the green card dated 12<sup>th</sup> February, 2016, in the name of Mohammud Abule and others as trustees. He confirmed that if one had carried out a search before, it would have given this information.
363. DW - 7 testified that in his view Parcels Nos. 1536 to 1542 were not valid title deeds, as he had not seen any leases for those parcels. He confirmed that a page from the white card had been plucked out, and explained that this used to happen frequently and would likely have been the case with those leases.
364. DW - 7 reiterated that he would always look at the register before embarking on a transaction. He explained that the presentation book was not part of the land register, but rather formed part of the supporting documents. He confirmed that the genesis of Parcel No. 203 had been the presentation book.

#### **E. Cross-Examination of DW - 7 by Mr. Khagram Advocate.**

365. DW - 7 testified that the Land Registry, Kwale had been a registry of record. He was referred to the Plaintiff's supplementary bundle dated 9<sup>th</sup> January, 2019, at page 82, which contained a copy of the green card. He confirmed that he had had the original copy of the said green card for LR No. 203.
366. DW - 7 compared the two documents and showed the original Green Card to the court. He confirmed that the records had been the same. He stated that the original documents had been in his custody as the Land Registrar, Kwale, and that they were to be produced by consent of all the parties, as the court would need and rely on them in its decision.
367. DW - 7 was referred to page 2 of the record, which bore a handwritten inscription "Continuation" on pages 83 and 84 but not on page 85. He testified that on page 85, Entry No. 9 had been marked "Closed on sub - division" and crossed, and that there had been another entry by the Land Registry for transfer to Aniket Property & Investment Limited for a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-). He explained that he had not been able to tell which Land Registrar had signed that green card.
368. DW - 7 stated that there was no way a Land Registrar could issue an official search to a property if it had not been registered. He was referred to the original transfer, which had been registered on 3<sup>rd</sup> March, 2009, under presentation book No. 033/3/2009, with stamp duty paid. He confirmed that Entry No. 033/3/2009 in the presentation book tallied, and that it had been registered on 3<sup>rd</sup> March, 2009, by Mr. Wamugada, a Land Registrar, whose signature on the green card also tallied.
369. DW - 7 testified that from the green card, Mr. Mwakibibo had been registered as the owner of Plot No. 203 on 18<sup>th</sup> October, 2007. He explained that the official search dated 25<sup>th</sup> February, 2009, had also shown Mr. Mwakibibo as owner from 18<sup>th</sup> October, 2007, and that this had tallied with the records at the Land Registry. He was referred to the original certificate of lease, which had been issued to Aniket Investment & Investment Limited on 3<sup>rd</sup> March, 2009, signed by Mr. Mwamugada, the Land Registrar, and registered on 18<sup>th</sup> October, 2007, for LR Kwale/Diani Beach/203. He confirmed that this had tallied with the entry in the presentation book.



370. DW - 7 was referred to the official search issued on 5<sup>th</sup> March, 2009, by Land Registrar Mwamugada, No. 163, Entry No. 9 of 3<sup>rd</sup> March, 2009, showing title deed issued on the same date. He was also referred to another search issued on 3<sup>rd</sup> March, 2009, by Mr. Mwamugada to Aniket Properties & Investment Limited, showing Entry No. 10. He confirmed that all this information tallied with page 85.
371. DW - 7 testified that as at 3<sup>rd</sup> March, 2009, the registered owner of LR No. Kwale/Diani Beach/203 had been Aniket Property & Investment Limited. He explained that strangely, from the original record, a page had been missing. There had been no inscription “Continuation” at the top. Entry No. 9 had been repeated twice and Entry No. 11 had not been there. He confirmed that according to the original presentation book and search by the year 2011, the owner had been Aniket Property & Investment Limited.
372. DW - 7 stated that from his own assessment there had been interference with the pages of the green card. He explained that it had been the owner who should have presented or initiated the sub - division of the property. In this case it ought to have been Aniket Property & Investment Ltd. He testified that Entry No. 9 of 3<sup>rd</sup> October, 2011, had been the closure of title on sub - division, leading to new Nos. 1536 to 1543 by Mr. Maruanga. He explained that in order to effect sub - division, the lease and Certificate of Lease had to be surrendered, and a document signed by the registered owner, in this case Aniket Property & Investment Limited. He reiterated that those came as original documents and hence the issuance of new leases from the sub - division transaction.
373. DW - 7 was referred to the presentation book of 3<sup>rd</sup> October, 2011, and explained that there had been no entry on the sub - divisions. He testified that ordinarily at the district level they did not deal with sub - division of leases, but only received Leases and Certificates of Lease from Nairobi after sub - division had already taken place. He reiterated that all registration transactions had to be entered in the presentation book. He was referred to page 113 of the Plaintiff’s documents, being a letter dated 9<sup>th</sup> November, 2006, on surrender of leases, and explained that if not registered at the Land Registry it would cause havoc. He was referred to page 89, being an application for registration dated 2<sup>nd</sup> March, 2009, presenting a court order of 034/3/2009 on 4<sup>th</sup> March, 2009. He explained that from the presentation book on 4<sup>th</sup> March, 2009, the court order had been rejected, as shown at page 89, with the reason: “Unable to register it because the registered proprietor is not a party to the suit” — Aniket Property & Investment Limited had not been a party in the Seaview civil case.
374. Mr. Mokaya referred court to the entry of January, 2009 of the presentation book, and explained that cancellations Nos. 1 and 2 had been made, though the serial number had remained the same for serialization purposes. He confirmed that Entry No. 033 had been dated 3<sup>rd</sup> March, 2009, for transfer from Mwakibibo to Aniket Property & Investment Limited, and Entry No. 034 of 4<sup>th</sup> March, 2009, had been the court order but cancelled. He referred to page 90, being a letter dated 14<sup>th</sup> March, 2009, by the advocate to the Land Registrar on rejection of the court order.
375. DW - 7 testified that he had not had any documents for the sub - division of Parcel No. 203 from Nairobi. He explained that Entry No. 11 in the green card, in his view, had been planted, and reiterated that it had not been supported by any instrument or document of surrender from Nairobi. He stated that in law one could not make any document if it was not supported by the requirements of law, and that a Registrar would only make documents based on the provisions of the law.
376. DW - 7 explained that Mr. Mwakibibo had alleged to have undertaken the sub - divisions. He was referred to the 1<sup>st</sup> Defendant’s documents, page 63, Parcel No. 1543, Entry Nos. 1 to 7, with signatures by Mr. Maruanga. He was referred to Parcel No. 1537, page 64, Entry No. 1 of 3<sup>rd</sup> July, 2011, and



subsequent entries. He was referred to Parcel No. 1542, page 64, opened on 3<sup>rd</sup> October, 2012, and explained that from his record it had been for the year 2011. He testified that Entry No. 3 of 29<sup>th</sup> December, 2023, had not tallied, as what he had had been for 14<sup>th</sup> June, 2012, showing a restriction on dealings until Petition No. 57 of 2012 was heard, later cancelled.

377. DW - 7 stated that when certifying a document he would make a photocopy and certify on it. That was all.

#### **F. Re - Examination of DW - 7 by Mr. Makuto Advocate.**

378. DW - 7 was referred to letters by the Director of Land Administration dated 9<sup>th</sup> November, 2009, and 30<sup>th</sup> May, 2022. He testified that the position taken by the Director of Land Administration had been that Parcel No. 203 had never been sub - divided at all.

379. DW - 7 explained that he had never seen any letter forwarding any surrender of lease nor sub - division of Parcel No. 203. He reiterated that in his own view there had been a page missing from the green card, which meant that there had been interference with the record.

#### **H. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants' case**

380. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants opposed the Plaintiff's claim through a statement of defence where it was deponed: -

- a. Save for what was herein expressly admitted, the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants denied each and every allegation contained in the Further Re - Amended Plaintiff dated 19<sup>th</sup> May 2022 (Further Re - Amended Plaintiff) as if the same was set down herein and traversed seriatim.
- b. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants herein admitted the contents of Paragraphs 1, 2, 3, 3A, 3B and 4 of the Further Re-Amended Plaintiff in so far as they were merely descriptive of the parties to this suit, save that the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants were the Trustees of the Ahfat Trust, a trust set up for charitable purposes.
- c. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants were strangers to the contents of Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 15 and 17 of the Further Re - Amended Plaintiff but nonetheless denied the same in toto and put the Plaintiff to strict proof of the content thereof.
- d. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants denied the allegations of fraud contained in Paragraph 13 of the Further Re-Amended Plaintiff and put the Plaintiff to strict proof thereof.
- e. In further response to Paragraph 13 of the Further Re-Amended Plaintiff, the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants stated that in respect to Title No. Kwale/Diani Beach Block/1542 (Subdivision 1542), they were innocent purchasers of the said property for valuable consideration and without notice of the alleged fraudulent conduct of the 1<sup>st</sup> Defendant and the 7<sup>th</sup> Defendant as pleaded by the Plaintiff, and they provided the following particulars.
- f. The 9<sup>th</sup> to 11<sup>th</sup> Defendants and/or their employees or agents visited Sub - division 1542 prior to purchasing the same and established that the said parcel was vacant and that the beacons were in situ.
- g. The 9<sup>th</sup> to 11<sup>th</sup> Defendants were availed a copy of the Certificate of Title for Sub - division of Plot No. 1542 and they applied for an official search which was duly issued by the 7<sup>th</sup> Defendant, confirming that the 1<sup>st</sup> Defendant was the lawful and registered proprietor of Sub



- division of Plot No. 1542 and that there were no encumbrances of any nature, including any court orders, on the register for Sub - division of Plot No. 1542.

- h. The 9<sup>th</sup> to 11<sup>th</sup> Defendants paid valuable consideration to the 1<sup>st</sup> Defendant, who was the registered owner of Sub - division of Plot No. 1542 as ascertained by the 7<sup>th</sup> Defendant, and then presented to the 7<sup>th</sup> Defendant for registration an instrument of transfer from the 1<sup>st</sup> Defendant to inter alia the 9<sup>th</sup> to 11<sup>th</sup> Defendants.
- i. The 7<sup>th</sup> Defendant, upon receipt of the instrument of transfer along with the requisite accompanying supporting documents, registered the names of inter alia the 9<sup>th</sup> to 11<sup>th</sup> Defendants as the registered owners of Sub - division of Plot No. 1542, issued them with a Certificate of Title and also issued another official search confirming that the 9<sup>th</sup> to 11<sup>th</sup> Defendants were so registered.
- j. The 9<sup>th</sup> to 11<sup>th</sup> Defendants then proceeded to take lawful possession of Sub - division of Plot No. 1542 without any challenge or opposition from any person including the Plaintiff, set about putting up a stone perimeter wall on Sub - division of Plot 1542's boundaries and constructed thereon a mosque which was 80% complete prior to the 9<sup>th</sup> to 11<sup>th</sup> Defendants' discovery of these proceedings.
- k. The 9<sup>th</sup> to 11<sup>th</sup> Defendants' actions as set out in paragraph 5.5 above were carried out in good faith, for charitable purposes, in the open and during daytime within the full view of members of the public.
- l. In the alternative and on a Strictly Without Prejudice basis, the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants stated that if at all the Plaintiff's allegations of fraud perpetrated by the 1<sup>st</sup> and 7<sup>th</sup> Defendants were true, which was in any event denied, then the Plaintiff was guilty of laches and indolence, having sat on its laurels and in doing so contributed to the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants' belief that Sub - division of Plot No. 1542 was free from any claim by any person and leading the 9<sup>th</sup> to 11<sup>th</sup> Defendants to expend funds in the purchase and development of the same. The 9<sup>th</sup> to 11<sup>th</sup> Defendants pleaded the following particulars of laches and indolence on the part of the Plaintiff.
- m. The Title for Sub - division of Plot No. 1542 was issued to the 1<sup>st</sup> Defendant way before the 9<sup>th</sup> to 11<sup>th</sup> Defendants acquired the same in February 2016.
- n. As at 10<sup>th</sup> July 2012 when it filed this Suit, the Plaintiff was aware of the issuance of the title for Sub - division of Plot No. 1542 because in the original plaint dated evenly, the Plaintiff pleaded the allegation of illegal subdivision of Kwale/Diani Beach Block/203 into inter alia Kwale/Diani Beach Block/1542.
- o. The Plaintiff, despite urging its own case in court, did not take any steps to protect members of the public from dealing with the sub - divisions of Kwale/Diani Beach Block/203 by placing a Caveat Emptor notice or sign board physically on the property or by placing a caution on the registers for the sub - divisions or by having its employees or agents physically on the ground to warn off prospective purchasers or developers such as the 9<sup>th</sup> to 11<sup>th</sup> Defendants.
- p. The 9<sup>th</sup> to 11<sup>th</sup> Defendants therefore stated that the Plaintiff, by its own actions as set out above, was estopped from alleging that Sub - division Plot No. 1542 was acquired by the 9<sup>th</sup> to 11<sup>th</sup> Defendants illegally or fraudulently, yet the Plaintiff sat back and allowed such alleged illegality and fraud to occur. In this regard, the 9<sup>th</sup> to 11<sup>th</sup> Defendants would in their defence invoke the



equitable maxim “vigilantibus non dormientibus aequitas subvenit”, that is to say, equity aids the vigilant not the indolent.

- q. The contents of Paragraph 14 of the Further Re - Amended Plaintiff were denied in so far as the allegations contained therein might be inferred against the 9<sup>th</sup> to 11<sup>th</sup> Defendants.
  - r. The 9<sup>th</sup> to 11<sup>th</sup> Defendants denied the contents of Paragraph 16 of the Further Re - Amended Plaintiff and stated that by virtue of the matters pleaded in this defence, their title to Sub - division Plot No. 1542 was sacrosanct and could not be defeated on the basis of purported fraudulent actions carried out by persons other than the 9<sup>th</sup> to 11<sup>th</sup> Defendants and without the 9<sup>th</sup> to 11<sup>th</sup> Defendants' knowledge.
  - s. Paragraphs 18 and 19 of the Further Re-Amended Plaintiff were admitted.
381. The 9<sup>th</sup> to 11<sup>th</sup> Defendants prayed that the Plaintiff's suit herein be struck out and/or dismissed as against them with costs.
382. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants called their first witness DW - 3 on 28<sup>th</sup> July, 2023 wherein the witness testified that:-

**A. Examination in Chief of DW - 3 by Mr. Karega Advocate.**

383. DW - 3 was sworn and he testified in English language. He identified himself as Joseph Mwaura Kamau, a citizen of Kenya holding all the particulars as indicated in the national identity card. He lived in Nairobi and that he was a contractor. He stated that he was a Civil Engineer holding a higher diploma. DW - 3 explained that he recalled signing a witness statement on 28<sup>th</sup> February, 2023, which had been filed on 2<sup>nd</sup> March, 2023. He confirmed that he wished to rely on that statement as his evidence-in-chief in the case.
384. DW - 3 further testified that he had undertaken to build a mosque at Kwale. He reiterated that the construction had been stopped.

**B. Cross Examination of DW - 3 by Mr. Kounah Advocate.**

385. DW - 3 confirmed that he had done a diploma from Rift Valley Science and Technology and a higher diploma from the Kenya Polytechnic in Nairobi. He stated that he recalled they had started constructing a mosque in February, 2021. He explained that the construction had proceeded without any interruption until August, 2021, when it had been stopped by a court order. DW - 3 confirmed that he had been present during the site visit conducted by Court.
386. DW - 3 testified that before one undertook construction, approval drawings, architectural drawings, NCA approvals, NEMA licences, housing licences from the county, and safety licences were required and ought to have been obtained by the proprietor of the land. He explained that physical planning approval [PPA-2] was also needed. They fully complied. DW - 3 confirmed that among the many things they had, there had been architectural drawings, a site board, and all the necessary approvals.
387. DW - 3 referred to the documents filed by the 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Defendants. He reiterated that the documents he had referred to above were not part of those documents. He stated that he would expect other documents to be produced in court.



**C. There was Cross – Examination of DW – 3 by the other Counsels.**

**C. Re - Examination of DW - 3 by Mr. Karega Advocate.**

388. DW - 3 testified that he had referred to Item 8, which contained some of the documents he had mentioned earlier. He explained that it was the employer's responsibility to obtain the improvements. DW 3 reiterated that those documents related to the approvals and requirements necessary for the construction project.

389. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants called DW 4 who testified as follows: -

**A. Examination in Chief of DW - 4 by Mr. Karega Advocate.**

390. DW - 4 testified under oath and in English language. He was called MOHAMED AHMED ABDULLE, a citizen of Kenya and holding the national identity card bearing all the particulars as shown to Court during the hearing of the suit. He was one of the Trustees of AHFAT Trust. He stated that the other Trustees were:

- a. M/s. Fardosa Ahmed Abdulle
- b. Mr. Ahmed Abdulle Noor
- c. Counsel Mohamed Salim Balala

391. DW - 4 explained that he was the 10<sup>th</sup> Defendant in the suit. He confirmed that he had signed a witness statement on 28<sup>th</sup> February, 2023, which had been filed on 2<sup>nd</sup> March, 2023, and reiterated that he wished to adopt it as his evidence-in-chief.

392. DW - 4 testified that he had filed a list of documents dated 28<sup>th</sup> February, 2023, and filed on 2<sup>nd</sup> March, 2023. He stated that he wished to produce the eight (8) documents produced as Defendant's Exhibits 1 to 8. DW - 4 explained that the Trust had purchased the property, and that their counsel had conducted the due diligence through an official search, as shown at Pages 33 and 34. He confirmed that the property had been owned by the Trustees after the sale.

393. DW - 4 referred to Page 40, being an official search dated 14<sup>th</sup> May, 2015, which had shown the property as owned by Hamadi Juma Mwakibibo. He reiterated that the Trust had acquired the property through a transfer of lease, as shown at Pages 1 to 3 of their bundle.

**B. Cross Examination of 10<sup>th</sup> Defendant by Mr. P.C. Onduso Advocate: -**

394. DW - 4 testified that the transaction had been conducted by Counsel Balala. He explained that he knew why they had needed the services of an advocate — for the provision of legal advice. DW - 4 confirmed that there had been no encumbrances on the property from the official search. He reiterated that they had known the history of the matter. DW - 4 stated that they had relied on this information, as his late father had interacted with Mr. Mwakibibo. He explained that he had seen Mr. Mwakibibo for the first time in court that day.

395. DW - 4 testified that the property in question was Diani Beach/1542. He confirmed that he did not live there. He stated that he did not know Venture Holdings Limited. He informed Court that he had no idea there had been any dispute regarding the land. DW - 4 explained that the Trust had bought the property in the year 2016.



### **C. Cross Examination of DW - 4 by Mr. Ondabu Advocate.**

396. DW - 4 testified that they had not done anything else apart from conducting the official search. He explained that he had just come to know that this case had been filed in the year 2012. DW - 4 was referred to the 7<sup>th</sup> and 8<sup>th</sup> Defendants' documents, namely those of the Attorney General. He stated that from the Green Card filed on 28<sup>th</sup> February, 2014, he did not know what a Green Card was.
397. DW - 4 was referred to Page 28, Entry No. 3, which was for Khalfan Mlai dated 29<sup>th</sup> December, 2011, in respect of LR No. 1542. He confirmed that he had seen the entry but reiterated that he had not been aware of it before.
398. DW - 4 testified that he did not know his neighbors on the right, where they had been building a mosque. He explained that the mosque had not been completed.
399. DW - 4 stated that they never would bought property if it had dispute or when it had been owned by another person. He reiterated that there had been no collusion with the Land Registry in the transaction.

### **D. Cross Examination of DW - 4 by Mr. Makuto Advocate.**

400. DW - 4 averred that amongst the Trustees had been Mr. Balala Advocate, and that he had interacted with the documents. He explained that the Trust had been incorporated on 10<sup>th</sup> February, 2016 and registered on 19<sup>th</sup> February, 2016, as shown at Page 28 of the Trust Deed.
401. DW - 4 stated that they had undertaken the first official search on 12<sup>th</sup> February, 2016, which had been before the registration of the Trust. He explained that the search had been conducted after the purchase of the property. DW - 4 confirmed that they had not produced the sale agreement, but only the transfer forms of the property.
402. DW - 4 reiterated that they had undertaken a search before the purchase of the property, on 14<sup>th</sup> May, 2015, as shown at Page 40. He explained that the transfer of lease had been dated 10<sup>th</sup> February, 2016, as shown at Page 1. He stated that the Trust Deed had been presented to the District Land Registry on a date which his document did not bear.
403. DW - 4 testified that he did not know what a Certificate of Lease was, though theirs was at Page 29 dated 12<sup>th</sup> February, 2016. He confirmed that he had not produced a letter by the President and had not seen a lease for the land from Mr. Mwakibibo. He reiterated that he had interacted with the documents of transfer in the matter.
404. DW - 4 explained that the Certificate of Lease had been issued on 12<sup>th</sup> February, 2016, as shown at Page 29. He was referred to Pages 38 and 39, being a Certificate of Lease dated 21<sup>st</sup> January, 2015 by Hamadi Juma Mwakibibo. He confirmed that they had taken possession of the property in the year 2016.

### **E. Cross Examination of DW - 4 by Mr. Khagram Advocate.**

405. DW - 4 informed Court that he was a graduate with a Bachelor in Commerce and an MBA from United States International University (USIU). He explained that he could show his transcript which indicated the modules he undertook. He referred to the certificate of official search issued on 14<sup>th</sup> May, 2015, and confirmed that a Certificate of Lease had been issued on 3<sup>rd</sup> October, 2011.



406. DW - 4 was referred to Page 38, being a Certificate of Lease issued to Hamadi Juma Mwakibibo dated 21<sup>st</sup> January, 2015. He stated that he did not agree that this implied there had been many Certificates of Lease floating. He reiterated that he was insisting there had been enough due diligence done.
407. DW - 4 explained that the Lessor had been the Government of Kenya. He confirmed that he had not been involved in the transfer of the property. He stated that he did not know whether the original lease had been received and would be surprised to hear about the original lease documents. He explained that the person who had been dealing with the property had been his late father.
408. DW - 4 reiterated that he stood by his position that due diligence had been done to his knowledge. He stated that he did not know how Mr. Hamadi Juma Mwakibibo had come to be the owner of the property.
409. DW - 4 testified that he could not ascertain whether the amount of rates had been paid. He stated that he did not know how parcel No. 1542 had come into being. He explained that he had no idea but believed the documents had been legitimate.
410. DW - 4 confirmed that he had not been aware of the court order dated 16<sup>th</sup> October, 2012 restraining any transaction from taking place. He reiterated that he had never been informed by his father that there had been a civil case ongoing at that time. He stated that if someone had been honest, they would have told him that. DW - 4 explained that he had no background in the sub - division of land.
411. DW - 4 testified that the property LR 203 had been transferred to him on 3<sup>rd</sup> March, 2009, as shown at Page 142, being the Certificate of Lease. He explained that he did not know that the property would have had to be surrendered to the Government. He reiterated that, according to him, their title was valid. DW - 1 was referred to the 1<sup>st</sup> Defendant's documents at Page 23, being a Notification of Approval dated 13<sup>th</sup> June, 2006. He stated that he had not come across those documents.
412. DW - 4 confirmed that they had paid stamp duty using PIN No. A002369644B, as shown at Page 36 of the list of documents.

**F. Re - Examination of DW – 4 by Mr. Karega Advocate.**

413. DW - 4 testified that they had a perimeter wall and construction of a mosque building which was about 80% complete. He explained that none of the neighbors had come to introduce themselves to them.
414. DW - 4 stated that the Trust Deed had been dated 10<sup>th</sup> February, 2016, and that the registration of the Trust Deed had been on 19<sup>th</sup> February, 2016, as shown at Page 28. He referred to Page 1, being the transfer dated 10<sup>th</sup> February, 2016, and explained that due diligence had been done through the official search conducted by Counsel Balala, as shown at Page 40.
415. DW - 4 was referred to a court order and explained that he had never seen any such order, and that it did not appear anywhere on the official search. He stated that the other documents they had received from the Government included a consent dated 19<sup>th</sup> October, 2015, at Page 35, in respect of their property Kwale/Diani Beach/1542. He reiterated that he did not know what had happened prior to the issuance of that consent.
416. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants marked their case closed through their Legal Counsel Mr. Karega Advocate on 24<sup>th</sup> October, 2023.
417. Testimony from Mr. Stephen Oddiaga Okwemba Advocate: -



418. To understand the genesis of the suit better, the Leaned Counsel who was in conduct of the conveyancing of the suit property on behalf of the 1<sup>st</sup> Defendant and having features extensively in this proceedings was summoned by Court at the behest of the current Counsel for the 1<sup>st</sup> Defendant and wherein he testified as follows: -

**A. Examination in Chief of Mr. Stephen Oddiaga Okwemba by Mr. Kounah Advocate.**

419. The witness testified pursuant to the provision of Order 16 of the Civil Procedure Rules, 2010. He had been summoned to court curtesy of the Learned Counsel for the 1<sup>st</sup> Defendant. For abundance of Caution and good order, he filed and swore an Affidavit. He explained that he had not been paid for his attendance in court on 20<sup>th</sup> and 21<sup>st</sup> June, 2024. He stated that as a result, he had not been able to undertake any activity in Mombasa during those days.
420. The witness testified that he practiced law in a private Law firm trading in the names and style of Messrs. Stephen Oddiaga & Company Advocates situated at Mombasa. He was very conversant with the suit property, which had been Plot No. 203 and later sub - divided into eight (8) Parcels Nos. 1536 to 1542 respectively. He explained that he was aware the Plaintiffs in this suit had been claiming ownership of Plot No. 203.
421. As a background, Mr. Oddiaga stated that he had acted for Mr. Hamadi Juma Mwakibibo in a conveyancing pertaining to all that parcel of land known as Plot no. 203. Mr. Mwakibibo had walked into his office without a title and left with one. He testified that he had been instructed to sub - divide the said parcel Plot No. 203 into Parcels Nos. 1536 to 1542. He explained that he had never lodged the sub - division for follow-up, but confirmed that he had been the one who had paid the processing fees for the leasehold title. He reiterated that the lease process had been very involving and that he had travelled to Nairobi several times over the said transaction.
422. The witness testified that this had been in the year 2006, though he had met Mr. Mwakibibo before 2001. He explained that the process had taken close to seven (7) years, around 2001 or thereabout. He stated that he had never received the lease himself, as it had been released directly to the Kwale Land Registry from Nairobi. He explained that he had been called by Mr. ...., who had informed him that the lease and Certificate of Lease for the sub – divisions had been received at the Kwale Land Registry, and asked them to go for them. He testified that he had been occupied and could not go, so he called Mr. Mwakibibo to collect the documents from the Land Registry and bring them to his office. He later learnt that Mr. Mwakibibo had collected the documents but had never brought them to him, and that he had been intercepted by security officers who had taken the documents away.
423. The witness testified that he had learnt that Mr. Mwakibibo had sold the land to several people, who had bought it and, using the police, had taken the title deeds. He explained that there had been an advocate called Mwamboza who acted for him. He further testified that he had learnt that Mr. Mwakibibo had sold the property to Aniket Property & Investment Limited, who had filed a case for specific performance. He explained that there had also been other suits before Court, including Civil Cases No. 315 of 2008 and No. 134 of 2012. He stated that Okanga Advocate had gone to court, taxed the bill, and retained the title deed.
424. The witness reiterated that in all the purchases by Mr. Mwakibibo he had never been involved. He explained that he had only been involved in the civil suit between Aniket Property & Investments Limited and Mr. Mwakibibo, on the consent recording, and that he had advised Mr. Mwakibibo that he could not run away from the terms and conditions of the sale agreement. He confirmed that the transfer of the property had been drawn in his name by A.B. Patel & Co. Advocates, and that he had been aware of it.



425. He testified that to procure the lease he had charged a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) for the four (4) civil suits. He explained that he had taxed his bills and confirmed that the matter was included in one of them. He referred to Plaintiffs' Exhibit 2, page 96 being ("Misc. Application No. 457 of 2008 (Stephen Oddiaga – Versus - Hamid Juma Mwakibibo"), and explained that paragraph 2 of the letter had urged for the title deed to be released to him from Okanga Advocate. He stated that he did not know whether the money had been paid, but confirmed that the title deed had been released to him, and that the money had been paid by A.B. Patel & Co. Advocates.
426. The witness testified that he had been the one who had carried out the sub - division of Plot No. 203 into Parcels Nos. 1536 to 1542 after he had received the lease in the year 2006. He explained that he had instructed a land surveyor to undertake the sub - division, and that they had obtained the F/R map and RIM under the Registration of *Land Act* Cap. 300 (now repealed). He reiterated that the mother title had to be surrendered after the sub - division, and that the process was done through the Land Registrar. He explained that the F/R map had been prepared by the Director of Survey for land with a Deed Plan, requiring the consent of the Director of Survey, but if no deed plan existed, it could be done by the Land Registrar and the Land Surveyor. He confirmed that as early as the year 2006 the sub - division had been done, and that he had been brought the sub - divided titles by the surveyor.
427. He referred to the title deed for Parcel No. 203 and confirmed that he had been the one who had initiated the sub - division, and that he had had a copy of the title. He explained that the RIMs had been prepared and taken either to the Land Registrar or the Director of Survey, though he did not know from where they had come. He reiterated that he had surrendered the mother title, and stated that he thought the purchasers had procured the consent for the transfer of the land. He referred to the further supplementary list of documents, page 20, and confirmed that the signature on page 21 had been his. He explained that page 20 had been an application to the Land Control Board, which he had prepared, by which time the title deed had already been released by Okanga Advocate.
428. He testified that Mr. Mwakibibo had come to him to assist with the transfer of the land, and that he had assisted him in obtaining consent. He explained that in the course of time, Mr. Mwakibibo would be collecting money from different purchasers without his knowledge. He reiterated that he had never prepared any sale agreements, and that the proceeds from Aniket Property & Investment Limited had never been paid through him, though he had produced them in his bill of costs.
429. The witness explained that under the provision of Section 48 of the *Land Act*, No. 6 of 2012 a Commissioner of Lands' consent was required for leases, but that he had procured the Land Control Board consent instead. He testified that the purchase price for the land had been pursuant to a decree in the Civil Case HCCC No. 315 of 2008, and that the money as the outstanding purchase price being a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000/-) was deposited in an Escrow joint bank account, held by his law firm and that of Messrs. A.B. Patel & Co. Advocates, in an interest-earning account. He referred to page 97 of the Plaintiffs' further supplementary documents, which had been a consent dated 17<sup>th</sup> November, 2010, by the Advocates for deposit of monies. He explained that it had been A.B. Patel & Co. Advocates who had caused the transfer of the property, Block 203, from Mr. Mwakibibo to Aniket Property & Investment Limited.
430. He referred to page 98, a letter dated 6<sup>th</sup> March, 2009, stating as follows:-
- “We are writing to inform you that we are holding the original title in the Aniket Investments Ltd. until I would be paid my balance, pursuant to the Court Decree in HCCC No. 315 of 2008.”



Additionally, he made reference to the Decree at page 109 of the Plaintiffs' supplementary list of documents, page 110 being the consent, which had been converted to a Judgment at pages 111 to 116. He confirmed that he had released the documents on 26<sup>th</sup> February, 2009. He explained that the 1<sup>st</sup> Defendant had been ordered to pay Advocates' fees of a sum of Kenya Shillings Three Million Five Hundred Thousand (Kshs. 3,500,000/-). He confirmed that the purchase price had been a sum of Kenya Shillings Thirty Three Million Nine Sixty two Thousand (Kshs. 33,962,000/-).

431. The witness referred to the presentation book in the 7<sup>th</sup> and 8<sup>th</sup> Defendants' documents, showing the entry of 3<sup>rd</sup> March, 2009, for Aniket Property & Investment Limited and Mr. Mwakibibo, with a cancellation and a court order in between. He explained that there had been a civil suit in which Mr. Mwakibibo had been sued by Seaview Ltd. He referred to page 84, which contained a court order and cancellations on the green card, followed by the next entry in the name of Aniket Property & Investment Limited and Mr. Mwakibibo.
432. He referred to page 31 of the Plaintiffs' bundle of documents and explained that by that time he had already sub - divided the parcel. However, by then, said the sub - divisions had not been registered, and that was how the land had been transferred as a whole. He testified that Mr. Mwakibibo could communicate in Kiswahili, could sign well, and could write letters. He explained that he had forwarded the title and completion documents to the Law firm of from A.B. Patel & Co. Advocates although Mr. Mwakibibo had not yet been fully paid the total purchase price. By then, Mr. Mwakibibo had been collecting money directly fro the law firm of Messrs. A.B Patel & Company Advocates. He confirmed that Mr. Mwakibibo had received a sum of Kenya Shillings Two Hundred Thousand (Kshs. 200,000/-) and other sums as shown at page 106.
433. Mr. Odiagga testified that he had obtained the title from Mwamboza Advocate and had released it to A.B. Patel & Co. Advocates. He was referred to his affidavit at pages 38 to 43 of the Plaintiff's further supplementary list of documents. He explained that in paragraphs 5, 6, 7, and 8 he had not mentioned that he had forwarded the transfer and release of title dated 26<sup>th</sup> February, 2009, as set out in paragraph 15. He confirmed that in paragraph 11 he had stated that he had not requested for the lifting of the order.
434. The witness was referred to page 93, being the court order in "HCCC No. 211 of 2006 - Seaview Investments Limited – Versus – Hamadi" by Justice Sergon. He explained that the sub - division had already been in existence, and reiterated that he had applied for the lifting of the order.

#### **B. Clarifications from Mr. Odiagga – by Mr. PC Onduso Advocate.**

435. The witness testified that he had not been fully involved in the conveyancing exercise on the transfer of the Plot No. 2023 nor the sub – divided parcels. Primarily, he dealt on the sub – division of Plot no. 203 though as far as he was concerned they had not been registered. He only became involved in the conveyancing exercise pursuant to the court order in HCCC No. 315 of 2008. He stated that he had never known the name of the advocate from A.B. Patel & Co. Advocates who had prepared the documents. He testified that he had made the application for the Land Control Board, though any other party might have made applications for other consents. He explained that he had executed the application for the Land Control Board on behalf of Mr. Mwakibibo as his representative.
436. The witness stated that when the lease had been released from Mwaboza and Okanga Advocates, he had interacted with it. He referred to the Plaintiff's further supplementary documents, page 2, clause 6 of the lease, and explained that it had been the consent from the Commissioner of Lands. He confirmed that he had forwarded it to Messrs. A.B. Patel & Co. Advocates together with the Land Control Board



consent from Msambweni Land Control Board. He reiterated that he had only obtained the consent from the Land Control Board, while other consents had to be obtained from other bodies.

437. The witness testified that the purchasers had been given the sub - divided parcels Nos. 1536 to 1542. He explained that on the question of whether the sub - divisions had been purported or wrong, the sub - divisions had been genuine. He confirmed that they had been carried out by a surveyor whom he had hired and paid in the year 2006. He stated that he had since requested the green card for Parcel No. 203 and had interacted with it. He explained that if a witness had stated that he had acted for Mr. Mwakibibo in relation to the sale transaction to Aniket Property & Investment Limited, that would have been correct, but reiterated that he had only become involved through the court decree in HCCC No. 315 of 2008.

### **C. Clarification from Mr. Odiagga by Mr. Makuto Advocate.**

438. The witness was referred to the Plaintiff's further supplementary documents dated 19<sup>th</sup> January, 2019. He testified that at page 38 there had been "Misc. Application No. 134 of 2009 (Seaview Investment Limited – Versus - Mwakibibo and Attorney General)". He explained that at page 87 there had also been "Misc. Application No. 134 of 2009 (Seaview Investments Limited – Versus - Mwakibibo), and confirmed that the two had been the same case.
439. He was referred to page 89, being an application for registration of a court order in "Misc. Application No. 134 of 2009". He explained that there had been a note made by the Land Registrar stating: "I am unable to register as the applicant is not party to the suit." He was referred to page 87, the affidavit of Aaron Nzao, under paragraph 3, and testified that he had attached a return rejected of a sum of Kenya Shillings Three (Kshs. 3,000,000/-).
440. The witness referred to the presentation book, Entry No. 003 of 3<sup>rd</sup> March, 2009, which had been a transfer by Hamadi Juma Mwakibibo to Aniket Properties & Investment Limited for a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-). He explained that Entry No. 034 of 4<sup>th</sup> March, 2009, had been a court order in the Civil Suit of "Seaview Limited – Versus - Hamadi", and confirmed that the entry had been marked "REJECTED," as shown at page 89, with the rejection stamp dated 4<sup>th</sup> March, 2009
441. He was referred to page 90, a letter dated 14<sup>th</sup> March, 2009, to the Land Registrar, Kwale, from M/s K.A. Kassaman & Co. Advocates, concerning Parcels Nos. 203 and 204. He explained that paragraphs 1 and 2 of the letter had referred to the court order and to the Land Registrar's rejection of the documents on the basis that the applicant had not been a party to the suit. He reiterated that the parties had been Seaview Limited and Mwakibibo, and that the court order had been rejected because the registered owner had not been a party to the suit.
442. The witness was referred to the letter dated 26<sup>th</sup> February, 2009, which he confirmed he had used to forward completion documents to M/s A.B. Patel & Co. Advocates. He explained that the documents had included:-
- a. Area Map F/R – Plot No. 203.
  - b. Application for Land Control Board.
  - c. Letter of consent.
  - d. Rent slip.
  - e. Letter from the land office.



- f. Court order HCCC.
  - g. RIM map.
443. He testified that the search certificate for Plot No. 203 had also been included. He referred to the area map and explained that he had not registered the subdivisions, as that required presentation of the Certificate of Lease, RIM, and leases of the specific titles for registration, which he had not had because he had not had the mother title. He reiterated that by the time he had forwarded those documents to A.B Patel Advocates he had not received the leases for the sub - divisions LR Nos. 1536 to 1542.
444. The witness confirmed that he had never surrendered the leases for Plot No. 203 for purposes of sub - division into LR. Nos. 1536 to 1542. He explained that he had come into the matter of Hamadi Mwakibibo Juma after it had already been filed, and that it was from there that he had learnt that there had been conveyancing tasks to be undertaken by him.
445. He testified that he had obtained the extended lease referred to at page 14 of the Plaintiff's further supplementary list of documents dated 9<sup>th</sup> January, 2009, and confirmed that it had been received on 18<sup>th</sup> October, 2007.

**D. Clarification from Mr. Odiagga by Kariga Advocate.**

446. The witness testified that the chronology of the transaction had begun when he had received instructions to obtain a title and extension of lease. He explained that the property had originally been Plot No. 25, and that the culmination of the process had been the issuance of a lease for 50 years from 1<sup>st</sup> August, 2006, dated 18<sup>th</sup> October, 2007, and 18<sup>th</sup> November, 2006, as shown at pages 14 to 17 of the Plaintiff's supplementary documents.
447. He stated that he had then received instructions to cause the sub - division of the land, as there had already been people on it. He explained that the sub - division had been completed and RIM numbers had been issued. He testified that he had sent Mr. Mwakibibo to Kwale to collect the leases, but that Mr. Mwakibibo had never returned to him with the documents. He explained that it had been from there that the drama had started, as Mr. Mwakibibo had been arrested and sued by Aniket Investment Ltd.
448. The witness testified that Mr. Mwakibibo had brought him the court order and the sale agreement he had entered into for the sale of the land. He referred to page 30 of the Plaintiff's supplementary list of documents, being the agreement executed on 21<sup>st</sup> December, 2007. He explained that he had advised Mr. Mwakibibo to have the matter settled amicably, as it had been a case of specific performance.
449. He testified that he had obtained the Land Control Board consent, as it had been necessary for the transfer of the land. He referred to pages 113 to 116 of the Plaintiff's supplementary documents, being the decree issued on 19<sup>th</sup> December, 2008. He explained that he had applied for the Land Control Board consent, and that he had started getting involved in the matter pursuant to the court decree.
450. The witness referred to page 21 of the Land Control Board application and explained that it had not been dated. He referred to page 22, being the Land Control Board letter of consent, and testified that even the Board had noted that the application had not been dated, though Mr. Mwakibibo must have paid. He explained that the receipt for the Land Control Board had not been one of the documents he had forwarded to A.B. Patel & Co. Advocates through his letter of 26<sup>th</sup> February, 2009, but confirmed that the consent from the Commissioner of Lands had been part of it.



### **E. Clarification from Mr. Odiagga by Mr. Khagram Advocate.**

451. The witness testified that there had been an affidavit of V.J. Lakhan dated and sworn on 5<sup>th</sup> November, 2008, and filed in HCCC No. 315 of 2009. He explained that the affidavit had been filed but that the annexures, specifically Annexure 5, had been left out. He stated that he wished to have those annexures produced. The said documents were specifically as follows: A copy of the Sale Agreement dated 5<sup>th</sup> November 2008. A copy of a letter dated 4<sup>th</sup> February 2008. A copy of a letter dated 4<sup>th</sup> September, 2008 by the District Land Officer. A copy of the Certificate of lease dated 18<sup>th</sup> October 2007 and A copy of the caution dated 27<sup>th</sup> October, 2018 by Mr. V.J. Lakhan and a copy of an official receipt No. 186060 for the said caution dated 27<sup>th</sup> October, 2018.

### **F. Clarification from Mr. Oddiaga, Advocate, by Mr. Kounah, Advocate.**

452. Mr. Oddiaga testified that he remembered there were some finances kept in a fixed escrow account held between Mr. Khagram and himself. He explained that he did not seem to recall receiving any notice to produce the bank statement. He stated that he had been away from the office.

453. The witness affirmed that the 1<sup>st</sup> Defendant had not received the outstanding balance of the purchase price for the sale of the suit property pursuant to the court order in HCCC No. 315 of 2008 and the subsequent order directing that the money be deposited in a joint escrow account. He was referred to the Plaintiffs' supplementary list of documents, pages 109 to 111, dated 18<sup>th</sup> September, 2018, and filed on 19<sup>th</sup> August, 2018. He explained that the gratia sum of Kenya Shillings Five Million (Kshs. 5,000,000/-) had never been paid. He stated that at the time he had been acting for the 1<sup>st</sup> Defendant.

### **G. Clarification from Mr. Oddiaga by M/s. Essajee Advocate.**

454. Mr. Oddiaga confirmed that all the documents relating to the sale of the land had been forwarded to Messrs. A.B. Patel & Co. Advocates. He explained that by then there had been no sub - division of the land, though there may have been a sub - division that had never been registered. He confirmed that it had been true that the balance of the purchase price of a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000/-) had been deposited in the escrow account at the Bank of India. He reiterated that the consent had been pursuant to a court order, and that the balances had been as a result of the court order.

455. The witness testified that he had been pursuing his professional fees but had subsequently been sued. He explained that he had never prepared any sale agreement in his offices.

456. The witness testified that he would be sending the bank and financial statements for the escrow joint bank account directly to Mr. Kouna Advocate, through correspondence, noting that he had not been a party to the suit and had only been a witness.

457. He further requested that during the deliberations on the contents and proceeds of the bank account he be present and involved, as he had had a professional interest in the said proceeds. He explained that his legal fees for professional services rendered had been pegged on the said proceeds, amounting to approximately a sum of Kenya Shillings Ten Million (Kshs. 10,000,000/-).

### **III. Submissions**

458. On 20<sup>th</sup> September, 2024, having come to the final conclusion of the Plaintiff's and the Defendant's case after close to twelve (12) years in litigation, the Honourable Court expressed its sincere appreciation to all Counsels on record. The Court acknowledged and thanks them for the professional



manner in which they have executed their mandate with devotion, diligence and dedication throughout the proceedings.

459. The 7<sup>th</sup> and 8<sup>th</sup> Defendants were granted an extension of 7 days to file and serve Defence to the 3<sup>rd</sup> Party Notice on Liability for compensation filed by the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants. All these pleadings to be part of the proceedings to be considered wholesome by court as it makes its final determination of the matter. There be a virtual mention of the matter on 4<sup>th</sup> October 2024 to ascertain the position taken by the Plaintiff with regard to the filed Notice to Produce the bank statement in the ESCROW account filed by the 1<sup>st</sup> Defendant pursuant to the provisions of Section 69 of the *Evidence Act* Cap 80 of Laws of Kenya and further directions.
460. Further the Court in view of the ongoing proceedings and the overwhelming tasks ahead there be a variation and/or adjustment of the earlier on granted time frame as follows:-
- a. The Plaintiff be granted an extension to have filed and served written submissions on or before 10<sup>th</sup> October, 2024;
  - b. Thereafter, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, and 11<sup>th</sup> Defendants granted an extension to have filed and served their written submissions on or before 20<sup>th</sup> October, 2024;
  - c. There be 5 minutes by each party to highlight their submissions on 18<sup>th</sup> November, 2024; and
  - d. That the Honorable Court to vary the delivery of Judgment from 18<sup>th</sup> November, 2024 to 18<sup>th</sup> December, 2024 all facts remaining constant.
461. Subsequently, by the time of penning down the Judgement, the Honourable Court only managed to access the submissions from the following parties:-
- a. The Plaintiff's dated 19<sup>th</sup> June, 2025;
  - b. The 1<sup>st</sup> Defendant's dated 14<sup>th</sup> July, 2025.
  - c. The 9<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> Defendants dated 1<sup>st</sup> October, 2025.
462. Unfortunately, the Honourable Court could not benefit from submissions by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> & 8<sup>th</sup> Defendants from neither the Judiciary CTS Portal nor the ELC Registry. Hence, it reserved and issued a notice for the delivery of the Judgement on 30<sup>th</sup> January, 2026 accordingly.

#### **A. The Written Submissions by the Plaintiff**

463. The Plaintiff through the Law firm of Messrs. A.B. Patel & Patel Advocates filed their written submissions dated 19<sup>th</sup> June, 2025. Mr. Khagram Advocate commenced his submissions by providing a brief background of the mater. The Learned Counsel stated that this suit arose out of a dispute relating to the property compromised in the Title known and registered at the Kwale Lands Registry as Kwale/ Diani Beach Block/ 203 (hereinafter referred to as 'the suit property') belonging to the Plaintiff, Aniket Property & Investment Limited which it bought from Mr. Hamadi Juma Mwakibibo, the 1<sup>st</sup> Defendant. Subsequently, the 1<sup>st</sup> Defendant, fraudulently purported to sub - divide into eight (8) parcels – LR. Nos. Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 and thus purported to transfer to some of the Defendants herein.
464. By an Agreement made in writing between Vipin Maganlal Shah and Vijay Lakhani and the 1<sup>st</sup> Defendant on 21<sup>st</sup> December 2007, the 1<sup>st</sup> Defendant agreed to sell to the said Vipin Maganlal Shah and Vijay Lakhani jointly all that land compromised in the Title known and registered at the Kwale Lands Registry as Kwale/Diani Beach Block/203, the Suit Property, at the price of Kenya Shillings Thirty



Three Million (Kshs. 33,000,000.00). Notwithstanding payment of the requisite deposit and further monies under the aforesated Agreement and despite repeated requests so to do, the 1<sup>st</sup> Defendant herein failed, neglected and/or refused to take any steps towards completion of the said Agreement for Sale as provided therein. Consequently, the said Vipin Maganlal Shah and Vijay Lakhani jointly filed a suit namely:- “Mombasa HCCC No. 315 of 2008 [Vipin Maganlal Shah & Vijay Lakhani – Versus - Hamadi Juma Mwakibibo]” seeking inter alia, specific performance of the said Agreement for Sale and obtained a Decree therein against the 1<sup>st</sup> Defendant compelling him to specifically perform the Agreement for Sale entered into as aforesated. Following this, the said Vipin Maganlal Shah and Vijay Lakhani transferred their rights in and to the said Property to the Plaintiff herein, Aniket Property & Investments Limited, in whose name the said Property was registered.

465. All the original Title documents pertaining to the suit Property were handed over by the 1<sup>st</sup> Defendant's Advocates to the Advocates acting for and on behalf of the Plaintiff herein in whose possession they continue to remain. The 1<sup>st</sup> Defendant herein, ceased to have any right, title or interest in the said Property as of 3<sup>rd</sup> March 2009 and could not purport to create the alleged Sub - divisions thereof which, in any event, were incapable of being sold and/or transferred as the Suit Property had not been lawfully sub-divided nor the Title and Lease thereto surrendered.
466. At no time has the Plaintiff parted with possession of or surrendered, the original Title Deed and Lease in respect of the Suit Property nor parted with possession of the said property. Prior to completion of the transfer of the Suit Property to the Plaintiff as aforesated pursuant to the Decree issued in the civil suit “MSA HCCC No. 315 of 2008 [Vipin Maganlal Shah & Vijay Lakhani – Versus - Hamadi Juma Mwakibibo]” the attention of Vipin Maganlal Shah and Vijay Lakhani was drawn to a civil suit “Mombasa HCCC No.211 of 2006 [Seaview Investments Limited – Versus - Hamadi Juma Mwakibibo & The Attorney General]” concerning the Suit Property. In the premises, the said Vipin Maganlal Shah and Vijay Lakhani insisted on the said civil suit Mombasa HCCC No. 211 of 2006 being determined before the final payment of the purchase price due was released to the 1<sup>st</sup> Defendant.
467. The Learned Counsel submitted that the Plaintiff in the said Mombasa HCCC No.211 of 2006 obtained relief restraining the Plaintiff herein from transferring selling, sub - letting leasing, charging, alienating or dealing in any manner whatsoever with the Property known as Kwale/Diani Beach Block 203 and/or the alleged Sub - divisions thereof being Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 which at the time had not been effected or registered.
468. In view of this development and pending further orders of this Honourable Court in Mombasa HCCC No. 315 of 2008, a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs.13,500,000.00) was placed in a joint interest earning account between the Plaintiff's said Advocates and the 1<sup>st</sup> Defendant's aforesated Advocates. The 1<sup>st</sup> Defendant's Advocates in that suit, Messrs. Stephen Oddiaga & Company, Advocates subsequently forwarded to the Plaintiff's Advocates, Messrs. A. B. Patel & Patel, Advocates a Notice of Withdrawal of Suit filed in Court and an Order issued by the Court in respect of the Mombasa HCCC No.211 of 2006.
469. However, in the interim, Mwakibibo, in connivance with and collusion of the Land Registrar, Kwale fraudulently and unlawfully caused alleged Title Deeds-Certificates of Lease-to be issued purporting that he was the registered proprietor of the aforesated alleged Sub - divisions namely, Kwale/Diani Beach Block/1536, 1537,1538, 1539, 1540, 1541, 1542 and 1543. The 1<sup>st</sup> Defendant sought to purportedly sell Kwale/Diani Beach Block/1543 to the 2<sup>nd</sup> Defendant, Venture Holdings Limited; Kwale/Diani Beach Block/1536 to the 3<sup>rd</sup> Defendant, David Kandie; Kwale/Diani Beach Block/1538 to the 4<sup>th</sup> Defendant, Driedrick Alfons Josey Brinkman; Kwale/Diani Beach Block/1539 to the 5<sup>th</sup> Defendant, Amana Abdalla and Kwale/Diani Beach Block/1542 to the 9<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> Defendants,



Fardosa Ahmed Abdulle, Mohamed Ahmed Abdulle and Mohamed Salim Balala; Kwale/Diani Beach Block/1542 was also allegedly sold to the 6<sup>th</sup> Defendant, Khalfan Mlai whereas he retained the purported Kwale/Diani Beach Block/1537, 1540, 1541 himself pursuant to an alleged Agreement for Sale dated 6<sup>th</sup> March 2012.

470. The Learned Counsel submitted that the 2<sup>nd</sup> Defendant purported to transfer Kwale/Diani Beach Block/1543 to Diani Dunes Limited during the pendency of this suit and the existence of the Court Orders restraining any dealings in the purported sub - divisions. Even Kwale/Diani Beach Block/1542 was purportedly transferred to the 9<sup>th</sup>, 10<sup>th</sup> & 11<sup>th</sup> Defendants herein by the 1<sup>st</sup> Defendant during the pendency of this suit and existence of the Court Orders restraining any dealings in the purported sub - divisions.
471. The Orders restraining any dealings with the land were made herein on the 11<sup>th</sup> July 2012 and subsequently extended on 5<sup>th</sup> October 2012, 16<sup>th</sup> October 2012, 29<sup>th</sup> October 2012, 14<sup>th</sup> October 2021, a fact this Honourable Court acknowledged and confirmed that the Orders had neither been set aside nor reviewed on the 20<sup>th</sup> January 2022. The Plaintiff asserts that the 1<sup>st</sup> Defendant connived and colluded with the 7<sup>th</sup> Defendant, the Land Registrar, Kwale fraudulently, deceitfully and unlawfully and:
- a. In wrongfully and unlawfully obtaining and, purporting to issue respectively purported Certificates of Lease in respect of the purported and alleged Sub-divisions despite 1<sup>st</sup> Defendant having disposed of his right, title and interest in the Suit Property to the Plaintiff who was duly registered as proprietor on 3<sup>rd</sup> March 2009;
  - b. The 1<sup>st</sup> Defendant had no right, title or interest in the Suit Property to enable the Kwale Registrar close the cards relating to this and in respect of which the Plaintiff was registered as proprietor and, purport to register any alleged sub-divisions of the same on the application of the 1<sup>st</sup> Defendant;
  - c. no entries were capable of being made in respect of the register relating to the Suit property or the alleged Sub - divisions thereof referred to above by reason of the various Orders of the Court issued herein;
  - d. no lawful sub - division of the Suit Property could be effected or registered and Certificates of Lease were issued in respect thereof without due process of the law or first surrendering the Original Title which was and remains in the custody of the Plaintiff in spite of which the 1<sup>st</sup> Defendant was fraudulently able to obtain alleged Certificates of Titles purportedly issued by the Kwale Registrar;
  - e. any entries made in respect of the Suit Property and the alleged Sub-divisions thereof and alleged Certificates of Lease issued for the purported Sub - divisions without following due process and the law was a nullity in law and of no consequence whatsoever;
  - f. in spite of the Plaintiff's proprietary interests being protected under *The Constitution*, alleged Certificates of Lease of the purported Sub-divisions of the Suit Property appear to have been obtained by 1<sup>st</sup> Defendant from the Kwale Registrar without first surrendering the Certificate of Title and Lease relating to the Suit property;
  - g. the alleged Certificates of Lease in respect of the purported Sub-divisions of the Suit Property was a nullity and incapable of, in the circumstances, conferring any right or title or interest to the 1<sup>st</sup> to the 6<sup>th</sup> Defendants and the 8<sup>th</sup>, 9<sup>th</sup>, & 10<sup>th</sup> Defendants whether in the Suit Property itself or the alleged Sub - divisions thereof; and



- h. in purporting to sell and transfer to the 9<sup>th</sup> to 11<sup>th</sup> Defendants Kwale/Diani Beach Block/1542 when there were Court Orders in force restraining him doing so.
472. According to the Learned Counsel, it was consequent upon such deceitful, unlawful and fraudulent conduct that this suit was filed. The 1<sup>st</sup> to 6<sup>th</sup> Defendants and the 8<sup>th</sup>, 9<sup>th</sup> & 10<sup>th</sup> Defendants all deny the foregoing facts and allege that they were bona fide purchasers for value of the respective purported sub - divisions specified in Paragraph 11 above. It was noteworthy that none of the Defendants claimed, in their pleadings, that the Plaintiff's Title was invalid or sought relief that it be invalidated and, this could not be an issue now before this Honourable Court.
473. In any event according to the Learned Counsel, the Honourable Court would note that orders were issued by this Honourable Court on the 11<sup>th</sup> July 2012, 15<sup>th</sup> October 2012, 16<sup>th</sup> October 2012 and 29<sup>th</sup> October 2012 and this Honourable Court verified on 20<sup>th</sup> January 2022 - Pages 142 and 143 of the Proceedings-and confirmed that these were subsisting in the matter and that none of these orders had been set aside. In this regard, it was imperative that this Honourable Court notes the demeanor of both the 1<sup>st</sup> Defendant as well as the 2<sup>nd</sup> Defendant given that neither of them had any regard for the authority and integrity of this Honourable Court, sanctity of Court Orders or the rule of law as they both wantonly and deliberately had disregarded the specific Orders of this Honourable Court. This was regardless of the fact that the applications for contempt filed were disallowed in order not to distract the main hearing of the suit.
474. On the pleadings, the Learned Counsel averred that there had been several pleadings filed, including amended pleadings. In these submissions therefore, only the latest applicable pleading was listed as being the applicable one to be considered by this Honourable Court. The Plaintiff had filed the following pleadings and documents:
- a. Further Re-Amended Plaintiff dated 19<sup>th</sup> May 2022 filed on the same day;
  - b. Affidavit of Service of Sanjeev Khagram sworn on the 29<sup>th</sup> October 2012 and exhibiting the advertisement showing substituted service;
  - c. Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012;
  - d. Plaintiff's List and Bundle of Documents dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012;
  - e. Plaintiff's List and Bundle of Documents dated 12<sup>th</sup> September 2013 and filed on 13<sup>th</sup> September 2013.
  - f. Plaintiff's Supplementary List and Bundle of Documents dated 18<sup>th</sup> September 2018 and filed on 19<sup>th</sup> September 2018.
  - g. Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
  - h. Plaintiff's Further Further Supplementary List and Bundle of Documents dated 28<sup>th</sup> June 2024 and filed on 28<sup>th</sup> June 2024.
  - i. Witness Statement of Vijay Lakhani dated and filed on 11<sup>th</sup> July 2012.
  - j. All the Bundles of Documents were produced as the Plaintiff's Exhibits in the matter
475. The 1<sup>st</sup> Defendant had filed the following pleadings and documents: The 1<sup>st</sup> Defendant's Amended Defence dated 12<sup>th</sup> September 2013 and filed on 13<sup>th</sup> September 2013. The 1<sup>st</sup> Defendant's List and Bundle of Documents dated 12<sup>th</sup> September 2013 and filed on 13<sup>th</sup> September 2013. The 1<sup>st</sup>



- Defendant's Further List and Bundle of Documents dated 17<sup>th</sup> February 2014 and filed on 18<sup>th</sup> February 2014. The 1<sup>st</sup> Defendant's Further List and Bundle of Documents dated 13<sup>th</sup> March 2019 and filed on 14<sup>th</sup> February 2019. Witness Statement of Hamadi Juma Mwakibibo dated 12<sup>th</sup> September 2013 and filed on 13<sup>th</sup> September 2013. The 2<sup>nd</sup> Defendant had filed the following pleadings and documents: The 2<sup>nd</sup> Defendant's Defence dated 7<sup>th</sup> August 2012 and filed on 8<sup>th</sup> August 2012. The 2<sup>nd</sup> Defendant's List and Bundle of Documents dated 7<sup>th</sup> August 2012 and filed on 8<sup>th</sup> August 2012. Witness Statement of Kwame Kariuki dated 7<sup>th</sup> August 2012 and filed on 8<sup>th</sup> August 2012.
476. The 3<sup>rd</sup> & 6<sup>th</sup> Defendants had filed the following pleadings and documents:
- a. The 3<sup>rd</sup> & 6<sup>th</sup> Defendants' Amended Defence dated and filed on 7<sup>th</sup> December 2012.
  - b. Witness Statement of the 3<sup>rd</sup> Defendant dated 20<sup>th</sup> September 2019 and filed on 7<sup>th</sup> October 2019.
  - c. The 4<sup>th</sup> Defendant had filed the following pleadings and documents:
  - d. The 4<sup>th</sup> Defendant's Defence dated 22<sup>nd</sup> November 2012 and filed on 23<sup>rd</sup> November 2012.
  - e. The 4<sup>th</sup> Defendant's List of Documents dated 22<sup>nd</sup> November 2012 and filed on 23<sup>rd</sup> November 2012.
  - f. Witness Statement of Driedrick Alfons Josey Brinkman dated 22<sup>nd</sup> November 2012 and filed on 23<sup>rd</sup> November 2012.
477. The 5<sup>th</sup> Defendant had filed the following pleadings and documents: The 5<sup>th</sup> Defendant's Defence dated 22<sup>nd</sup> November 2012 and filed on 23<sup>rd</sup> November 2012. The 5<sup>th</sup> Defendant's List of Documents dated 22<sup>nd</sup> November 2012 and filed on 23<sup>rd</sup> November 2012. Witness Statement of Amana Abdalla dated 22<sup>nd</sup> November 2012 and filed on 23<sup>rd</sup> November 2012. The 5<sup>th</sup> Defendant's Further List and Bundle of Documents dated 23<sup>rd</sup> January 2024.
478. Khalfan had filed the following pleadings and documents for the 3<sup>rd</sup> and 6<sup>th</sup> Defendant's Amended Defence dated and filed on 7<sup>th</sup> December, 2012.
479. For Kwale Land Registrar and Attorney General had filed the following pleadings and documents; 7<sup>th</sup> and 8<sup>th</sup> Defendant's defence dated 8<sup>th</sup> March, 2013 and filed on 12<sup>th</sup> March, 2013, 7<sup>th</sup> and 8<sup>th</sup> Defendant's Further List of Documents dated 12<sup>th</sup> July 2022 and filed on 20<sup>th</sup> February 2023. 7<sup>th</sup> and 8<sup>th</sup> Defendant's Further Further List of Documents dated 20<sup>th</sup> February 2023 and filed on 20<sup>th</sup> February 2023, Witness Statement of Teddy Mulusa dated 12<sup>th</sup> July 2022 and filed on 24<sup>th</sup> February 2023, witness statement of Steve Mokaya dated 24<sup>th</sup> February, 2024 and filed on 20<sup>th</sup> February, 2023 and the 7<sup>th</sup> and 8<sup>th</sup> Defendant's replying to the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants' Notice of Claim for Indemnity and Contribution dated 20<sup>th</sup> September, 2024.
480. On the part of the Abdulle Trustees they had filed the following pleadings and documents: -
- a. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendant's Written Statement of Defence dated 15<sup>th</sup> June 2022 and filed on 16<sup>th</sup> June 2022;
  - b. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendant's List & Bundle of Documents dated 28<sup>th</sup> February 2023 and filed on 2<sup>nd</sup> March 2023;
  - c. Witness Statement of Joseph Kamau Mwaura dated 28<sup>th</sup> February 2023 and filed on 2<sup>nd</sup> March 2023;



- d. Witness Statement of Mohamed Ahmed Abdulle dated 28<sup>th</sup> February 2023 and filed on 2<sup>nd</sup> March 2023;
  - e. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendant's Notice to Co – Defendant dated 28<sup>th</sup> June 2024 filed on 29<sup>th</sup> June, 2024;
481. On the evidence adduced and the analysis, it was the contention of the Learned Counsel that Vijay Lakhani, a manager of the Plaintiff testified on its behalf. His evidence appears at Pages 37 to 41, 45 to 47, 60 to 65, 69 to 87, 90 to 95 and 98 of the Proceedings. Vijay's, evidence was that he together with his Partner, Vipin Maganlal Shah ('Vipin'), purchased the Suit Property for a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000.00/=) and entered into a Sale Agreement with the 1<sup>st</sup> Defendant on 21<sup>st</sup> December 2007 - Page 130 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July, 2012. He confirmed that the deposit amount was paid to the 1<sup>st</sup> Defendant directly by them and that upon the 1<sup>st</sup> Defendant's failure to complete the sale, Vijay and Vipin were compelled to file MSA HCCC No. 315 of 2008 - the Plaintiff appeared at Pages 13 to 15 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012. It was his evidence that in that suit, they were seeking specific performance of the Agreement for Sale dated 21<sup>st</sup> December 2007 which claim was admitted by the 1<sup>st</sup> Defendant in his Statement of Admission filed in the said suit-Pages 47 to 48 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012. The High Court issued a restraining Order in that Suit on 7<sup>th</sup> November 2008 - Pages 27 to 29 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012 which culminated then in the issuance of a Decree in the matter premised on a consent agreed upon between the parties - Pages 82 to 85 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012. The Judgment issued by the High Court in the said suit was at Page 112 of the Plaintiff's Supplementary List and Bundle of Documents dated 18<sup>th</sup> September 2018 and filed on 19<sup>th</sup> September 2018 whereas the Consent Letter was at Pages 109 to 111 of the Plaintiff's Supplementary List and Bundle of Documents dated 18<sup>th</sup> September 2018 and filed on 19<sup>th</sup> September 2018.
482. The Learned Counsel asserted that the Honourable Court would note that the question of the payments to be made to the Third Party advocates contained in the Decree for MSA HCCC No. 315 of 2008 release of the Title relating to the Suit Property arose as a result of Court Orders too-Pages 96 to 99 of the Plaintiff's Supplementary List and Bundle of Documents dated 18<sup>th</sup> September 2018 and filed on 19<sup>th</sup> September 2018 and the Title documents were only released by them following payment of the sum of Kenya Shillings Seven Million (Kshs. 7,000,000.00/=) to the Third Party advocates as stated in the Orders to facilitate and enable the transfer to the Plaintiff to be effected. Again, this was common ground and there could be no dispute on this. There was also no dispute that Vijay & Vipin made the payments as decreed save for a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000.00/=), which amount was agreed to be deposited into a joint account between the parties' advocates, a fact that the 1<sup>st</sup> Defendant accepted on oath in the said suit-Paragraph 2 of his Replying Affidavit at Page 111 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012.
483. The Consent for an extension of time to deposit the sum of a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000.00/=) appeared at Page 97 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filled on 9<sup>th</sup> January 2019 with the original consent for deposit appearing at Pages 146 to 147 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019. The reason for the deposit of the finds into the joint account could be found at Paragraph 7 of Vijay's



Affidavit at Page 137 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.

484. There was no dispute that the sum of a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000.00/=) was deposited into an interest earning joint account between the parties' advocates at the Bank of India-a fact confirmed by Mr. Oddiaga Advocate who was summoned to testify before this Honourable Court by the 1<sup>st</sup> Defendant -Page 291 of the Proceedings. It was Vijay's evidence that the money was held in the joint account to date-Page 71 of the Proceedings. Indeed, Mr. Oddiaga Advocate had supplied documents to the Court which this Honourable Court should also consider pursuant to Messrs. Kounah & Co. Advocates' Notices to Produce dated 29<sup>th</sup> & 30<sup>th</sup> July 2024.
485. Consequently, the 1<sup>st</sup> Defendant had signed a Transfer dated the 26<sup>th</sup> February 2009 and the Suit Property was duly transferred and registered in the name of Aniket Property & Investments Limited on the 3<sup>rd</sup> March 2009 following a nomination by Vipin & Vijay to it-Page 91 of the Proceedings. A copy of the signed Transfer is at Page 27 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
486. The Learned Counsel submitted that the Honourable Court would note that on 6<sup>th</sup> March 2009, Stephen Oddiaga & Company, Advocates wrote to the Plaintiff's advocates confirming they were holding the Original Title registered in the Plaintiff's name-Page 98 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019. The enclosed certified copy and of the Certificate of Lease and the search referred to in the letter are at Pages 99 to 104 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019. Consequently, and given the Order of Specific Performance contained in the Decree (Paragraph 1)-Page 82 to 85 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012, the Suit Property was transferred to the Plaintiff. The documents pertaining to the property were as under:-
- a. Agreement for Sale of the Suit Property dated 21<sup>st</sup> December 2007 made in writing between Vipin Maganlal Shah and Vijay Lakhani and the 1<sup>st</sup> Defendant.
  - b. Original Transfer of Lease dated 26<sup>th</sup> February 2009 from the 1<sup>st</sup> Defendant to the Plaintiff which was duly registered on the 3<sup>rd</sup> March 2009 - Page 27 & 28 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
  - c. The 1<sup>st</sup> Defendant's Copy ID Card provided at the time of the Transfer-Page 29 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
  - d. Original Certificate of Lease dated 3<sup>rd</sup> March 2009 which issued to Aniket - Pages 5 to 8 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
  - e. Original Lease issued by the Government to the 1<sup>st</sup> Defendant dated 7<sup>th</sup> November 2008 - Pages 14 to 17 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
  - f. Searches carried out and the Certificates of Official Search dated 3<sup>rd</sup> March 2009 and 5<sup>th</sup> March 2009 issued by the Land Registrar and the attendant receipt for the search fees showing Aniket



as the Proprietors - Pages 9 to 13 and 104 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.

- g. Prior Search carried out and the Certificate of Official Search issued dated 25<sup>th</sup> February 2009 showing the 1<sup>st</sup> Defendant as the Proprietor.
  - h. The Land Control Board Consent issued dated 4<sup>th</sup> February 2009 and the application made- Pages 20 to 22 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
  - i. Consent from the Ministry of Lands for Transfer of the Suit Property issued to the 1<sup>st</sup> Defendant - Page 13 of the Plaintiff's Further Further Supplementary List & Bundle of Documents.
  - j. Valuation requisition for Stamp duty dated 26<sup>th</sup> February 2009 and the Stamp Duty declaration Pay-in slip dated 26<sup>th</sup> February 2009 and the payment receipts relating thereto and copy cheque in respect thereof- Pages 23 to 26 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
  - k. Land rent demand dated 23<sup>rd</sup> February 2009 and Pay-in slip dated 24<sup>th</sup> February 2009 and receipts for payment thereof- Pages 30 to 33 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019; and
  - l. Certified Green Card copy in respect of the Suit Property showing that the Plaintiff was registered as proprietor of the Suit Property on 3<sup>rd</sup> March 2009 when the Certificate of Lease was issued to it - Pages 81 to 85 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
487. The Plaintiff had also filed and produced in evidence all the documents listed at Paragraph 20 hereinabove above. It relied on all these documents and humbly submitted that there was a clear trail of how it acquired the Suit Property. Indeed, the 1<sup>st</sup> Defendant's own evidence produced in Court – 1<sup>st</sup> Defendant's Further List and Bundle of Documents dated 13<sup>th</sup> March 2019 and filed on 14<sup>th</sup> February 2019. This showed a copy of the Presentation Book maintained by the Land Registrar at Kwale (the original Presentation Book was availed to the Court). The entries in the Presentation Book clearly correspond to the top entry on the Transfer of Lease document - Pages 27 & 28 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019 - Presentation Book Number 033/3/09.
488. There could therefore be no doubt, in the circumstances, that the suit property was lawfully transferred to the Plaintiff on the 3<sup>rd</sup> March 2009 and that as of this date the 1<sup>st</sup> Defendant ceased to have any proprietary interest therein. Indeed, the Honourable Court would recollect that the Plaintiff produced all the original documents pertaining to the Suit Property listed above and more particularly the Certificate of Lease, Transfer of Lease and Lease documents which it continued to hold in its possession to date. Essentially, the Plaintiff had been able to establish a proper and valid root to the Title to the Suit Property which it held.
489. The Learned Counsel opined that the Honourable Court would have noted from the pleadings in respect of "MSA HCCC No.315 of 2008 [Vipin Maganlal Shah & Vijay Lakhani – Versus - Hamadi Juma Mwakibibo]" - Pages 13 to 48 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012. According to the Learned Counsel, the court would see from the contents of the Plaintiff at Pages 13 to 15 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012 that the suit was necessitated by the 1<sup>st</sup> Defendant's apparent intent to renege on his



obligations to complete the sale of the Suit Property as he had received a better offer (Paragraph 7). The 1<sup>st</sup> Defendant admitted the claim in his Statement of Admission Pages 47 to 48 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012 which resulted in a Decree being issued by the Court on 19<sup>th</sup> December 2008 following entry of Judgment on 11<sup>th</sup> December, 2008 - Pages 82 to 85 and 146 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012. The Decree and all Orders in the said Civil Suit “MSA HCCC No.315 of 2008 [Vipin Maganlal Shah & Vijay Lakhani – Versus - Hamadi Juma Mwakibibo]” had neither been appealed from nor set aside and continue to remain binding on the 1<sup>st</sup> Defendant under the provisions of Section 44 of The Evidence Act - Authority ‘1’. The 1<sup>st</sup> Defendant could not resale away from the Decree of the High Court that ordered the Transfer of the Suit Property to the Plaintiffs or their nominees.

490. Immediately thereafter, it came to light that there was another suit pending before the Court Civil Suit “Mombasa HCCC No. 211 of 2006 [Seaview Investments Limited – Versus - Hamadi Juma Mwakibibo & The Attorney General] pertaining to the Suit Property and the background that led to the deposit of the balance amounts into a joint account was set out in the Affidavit of Vijay Lakhani, PW - 1 - Pages 35 to 61 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012. In his subsequent Affidavit - Pages 77 to 79 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012 - Mr. Oddiaga Advocate confirmed that that suit was withdrawn.
491. This resulted in the deposit of the Joint Account funds - Pages 122 to 128 of the Certificate of Urgency Bundle dated 10<sup>th</sup> July 2012 and filed on 11<sup>th</sup> July 2012 and Mr. Oddiaga, in his testimony - Page 291 of the Proceedings - confirmed that the amount was duly deposited and remained in the Escrow account. The reason for its continued retention was the 1<sup>st</sup> Defendant's fraudulent unlawful and illegal attempt to purportedly sub - divide the Suit Property into Kwale/Diani Beach Block/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 dispose of some of this purported sub - divisions to the Defendants as set out above.
492. The Learned Counsel opined that the Honourable Court would see that this suit was precipitated by Mr. Oddiaga's letter of the 14<sup>th</sup> June 2012 - Pages 44 to 45 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019. This later was pertinent and spoke for itself as to the fact that the joint account escrow funds still being held in a joint account and the attempted disposal of a purported sub - division being fraudulent and collusive. An Agreement for Sale for one of the purported sub-divisions Kwale/Diani Beach Block/1543 was forwarded under cover of the letter too - Pages 46 to 53 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
493. The Learned Counsel further submitted that the Honourable Court would also note that from the letter that Mr. Oddiaga confirmed that he forwarded the original Title for the Suit Property together with the sub - division plans which had not been registered. In this regard, the 1<sup>st</sup> Defendant's evidence and testimony before the Court was pertinent. His evidence in chief and cross-examination was at Pages 106 to 115 and 171 to 180 as well as 194 to 195 of the Proceedings. Neither in this nor in his witness statement did the 1<sup>st</sup> Defendant give any evidence as to how he purported to sub - divide the Suit Property when he had no interest in it or did not have the original Certificate of lease or Lease Document to surrender. It was also imperative to note that the Defendants insisted that the Plaintiff availed to court the original documents pertaining to the suit property for verification which the Plaintiff did. The 1<sup>st</sup> Defendant, in particular, had failed to avail to this Honourable Court, any original document for verification.
494. Be that as it may, on the question of sub-divisions. It was the 1<sup>st</sup> Defendant's testimony that Mr. Oddiaga was his advocate and that it was Mwakibibo who conducted the sub - divisions through him



- and that he believed that there exist documents used for the sub-division-Page 194 of the Proceedings. As had already been seen, Mr. Oddiaga, in his letter of the 14<sup>th</sup> June 2012 - Pages 44 to 45 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019 confirmed that that he forwarded the original Title for the Suit Property together with the Sub - division Plans which had not been registered and in his examination in – Chief, by Mr. Kounah, at Page 262 of the Proceedings, he stated that although the sub - division plans were done, the sub-divisions were never registered and that was how the land was transferred as a whole-the Suit Property whose Title he forwarded to Aniket through its advocates.
495. In his cross-examination by Mr. Makuto-Pages 264 to 266 of the Proceedings, Mr. Oddiaga confirmed that the Land Registrar, on 4<sup>th</sup> March 2009, had rejected a Court Order presented for registration as the registered proprietor was not party to the suit Mombasa HCCC No. 211 of 2006 - Page 89 of Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019.
496. This position was consistent with the transfer registered in favour of the Plaintiff. The certified Green Card copy showed the Plaintiff registered as Proprietor on 3<sup>rd</sup> March 2009-Pages 81 to 85 of the Plaintiff's Further Supplementary List and Bundle of Documents dated 8<sup>th</sup> January 2019 and filed on 9<sup>th</sup> January 2019, an excerpt of which was annexed to the Affidavit of Aaron Nzau marked Exhibit 'A 3'.
497. In the cross-examination by Mr. Makuto-Pages 264 to 266 of the Proceedings, Mr. Oddiaga also confirmed that in his letter of the 26<sup>th</sup> February 2009, he forwarded the Area Map F/R 203, Application For Land Control Board Consent, Consent, Rent Slip, Letter from the Land Office, Court Order HCCC and the RIM MAP as well as Search Certificate for Plot 203 and he was categorical that he did not register the sub - divisions by presenting the Certificate of Titles, RIM and leases of the specific titles for registration and that by the time he was forwarding the documents he had received the leases for the sub-divisions No.1536 to 1542. He confirmed that had never surrendered the Lease for the Suit Property for purposes of Sub-Division - Page 266 of the Proceedings.
498. According to the Learned Counsel, the Court would recall that Mr. Oddiaga was summoned as the 1<sup>st</sup> Defendant's witness. Given all the evidence presented by the Plaintiff, and taking into account both the 1<sup>st</sup> Defendant's and Mr. Oddiaga's evidence, it was apparent that no sub - division was actually lawfully undertaken nor was the Original Certificate of Lease nor the Lease instrument surrendered to enable a Sub - Division exercise to be lawfully undertaken and the Sub-Divided Plots registered under freshly issued Sub-Leases and the Certificates of Title issued therefore. Mr. Maruanga, a former Land Registrar at Kwale, who was called by the 1<sup>st</sup> Defendant was also at pains to explain the basis on which he purportedly closed the Register for the Suit Property and opened purported Registers for the alleged sub - divisions in the year 2011 without any Sub - Lease copies being presented for registration or any entries showing they were actually presented for registration in the Presentation Book.
499. According to the Learned Counsel, the claims as the Court was aware made by the other Defendants predicated upon the alleged. Thus, the purported sub - division titles could only be lawfully valid if it was shown to this Honourable Court that the sub-division exercise was lawfully carried out and the registers were validly opened upon a proper and lawful closure of that relating to the Suit Property. The onus to show this lies with the Defendants-Sections 107 to 109 of The *Evidence Act* -Authority '1'. Have the Defendants claiming interest in the various sub-divisions discharged this burden?
500. In the Plaintiff's humble submission, they had failed to do so. Not only was there a complete paucity as to evidence of the process by which each one of them purportedly was registered as proprietor of the respective sub-divisions claimed, but there was also no evidence of payment of the purchase price or,



indeed, other requisite statutory payments. Most importantly, none of them had been able to produce to the Court the Sub-Lease/Lease from the Government in respect of the respective sub - divisions which would be the foundational document to be registered premised upon which a Certificate of Lease could be issued. It was simply not enough for the Defendants to flash a purported Certificate of Lease in order to assert Title.

501. The 1<sup>st</sup> Defendant never filed any suit to challenge or impeach the Plaintiff's Title. Neither had he nor any of the other Defendants filed any Counter - Claim to do so. To the contrary, it was the Plaintiff that had filed this claim seeking to nullify the purported sub-divisions and alleged Certificates of Lease which it alleged were illegally, fraudulently and unlawfully created without due process. Yet the 1<sup>st</sup> Defendant attempts to advance a narrative of fraud against the Plaintiff without pleading this or providing any or any proper particulars of fraud. To buttress on this point, the Learned Counsel referred Court to the case of:- "Quiver Development Kenya Limited - Versus - Tapatalya & 3 others (Environment & Land Case 583 of 2017) [2024] KEELC 439 (KLR)" -Authority '2', this Honourable Court set out the provisions of Sections 107 and 108 of The *Evidence Act*, Cap. 80:

107

- (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.

108 The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

502. The Learned Counsel humbly submitted that the 1<sup>st</sup> Defendant had not discharged the burden of proof as he was required to do under these provisions. The Plaintiff's proprietorship was predicated upon Court Orders and decisions against the 1<sup>st</sup> Defendant which had neither been appealed nor set aside and which were and continue remain binding upon him pursuant to the provisions of Section 44 of The *Evidence Act*-Authority "1". Having established that it legally and procedurally acquired good title to the Suit Property, the burden then shifts to the 1<sup>st</sup> Defendant to show that the purported sub - division titles were lawfully and procedurally acquired and to the other Defendants that they were bona fide purchasers for value of properties whose titles were lawful and procedural. This Honourable Court, in the above case, quoted with approval from the Court of Appeal in the case of:- "Munyu Maina – Versus - Hiram Gathiha Maina[2013] eKLR" where it was stated:

".....We state that when a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register. It is our considered view that the respondent did not go this extra mile that is required of him and no evidence was led to rebut the appellant's testimony..."

503. In this regard, the Learned Counsel also referred this Honourable Court to the decision of the Supreme Court in the case of:- "Dina Management Limited – Versus - County Government of Mombasa & 5 others [2021]eKLR" -Authority '3'. Simply flashing a Certificate of Lease never granted the Defendants good title nor indefeasibility of Title without showing not only that the purported sub - divisions were procedurally and lawfully acquired by the 1<sup>st</sup> Defendant and themselves particularly



that no lease in respect of the purported sub -divisions was said to have been issued by the Government of Kenya or forwarded to the Land Registrar for registration. In so far as the process was concerned, the Learned Counsel referred this Honourable Court to the testimony of the Land Registrar, Mr. Mokaya, which was at Pages to of the Proceedings. In fact, both Mr. Mokaya and Mr. Marwanga (called as a Witness by the 1<sup>st</sup> Defendant and not the Honourable Attorney General) accepted that the searches issued in favour of the Plaintiff relating to the Suit Property were genuine and it was clear from the documentation that at the point in time these searches were issued, the Plaintiff was the registered proprietor of the Suit Property.

504. In the case of:- “Mas Construction Limited – Versus - Abdul Waheed Sheikh & 6 Others-Civil Appeal No. E 789 of 2023(Unreported)”- Authority ‘4’, the Court of Appeal, at the outset, stated: -

“Fraudulent land dealings in this country, often facilitated by a few unscrupulous officers at various land registries, who facilitate unlawful alteration of land documents; issuance of fake or unauthorized documents, or cause loss’ of vital land records, among other malfeasances, have substantially contributed to long drawn-out cases in our courts. Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right, and no person should be deprived of their property, except in accordance with the provisions of *the Constitution* or Statute. See the decision of this Court in Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018]eKLR”.

505. This quote was clearly apt to this case given the state of Land Registry records presented to this Honourable Court in evidence. There was little doubt that the vital records have been interfered with in order to lend credence to the unlawful alteration of the entries relating to the Suit Property and facilitate issuance of purported sub - division Certificates of lease when no leases capable of registration had been issued nor registered. Indeed, the Presentation Book had no entries pertaining to the purported lease upon which a Certificate of Lease could have been issued by Mr. Maruwanga, the then Land Registrar in Kwale. The Learned Counsel submitted that the Honourable Court would recollect that Mr. Maruwanga’s demeanour and, the fact that he was at great pains to explain how, in the year 2011(when the Plaintiff was registered proprietor of the Suit Property), he wrongfully and unlawfully interfered with the land registry records by purporting to close the register relating to Suit Property and issued Certificate of Leases for the purported sub - divisions to the 1<sup>st</sup> Defendant without any foundational lease documents capable of being registered having been presented for registration following a lawful and procedural process of sub - division and, more importantly, the original Lease and corresponding Certificate of Lease held by the Plaintiff having been surrendered.

506. The Learned Counsel further relied upon the following cases which it would seek leave to refer to in detail at the highlighting of these submissions: -“Mohamed Kassam Mohamed & 3 others – Versus - Hamisi Mohamed Mwawasaa & 4others [2017]eKLR” – Authority ‘5’.“Said – Versus - Shume & 2 others[2024] KECA 866 (KLR)” -Authority ‘6’.“Arthi Highway Developers Limited - Versus - West End Butchery Limited [2015]eKLR” - Authority ‘7’.

507. The Learned Counsel submitted that the Honourable Court would note that during the pendency of this suit and the Conservatory Orders granted herein, both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants engaged in contemptuous conduct without any regard whatsoever for the integrity of this Honourable Court’s Orders. The Learned Counsel humbly submitted that such conduct was not only intended as a ‘red herring’ to deflect the Court’s attention but was also aimed at actually deliberately remove the property from the ownership of individuals when there were Orders in existence prohibiting this. In the Learned Counsel’s humble contention, this attempted transfer to place the purported sub-divisions out of reach



were and remain a nullity. In this regard, the Learned Counsel referred this Honourable Court to the record of proceedings.

508. In conclusion, the Learned Counsel averred that from all the evidence adduced before this Honourable Court, there was little doubt that the Plaintiff's title was properly, lawfully and procedurally acquired- and after the Court having issued Decrees and Orders (none of which had been set aside or appealed from) compelling the 1<sup>st</sup> Defendant to transfer the Suit Property to it in specific performance of the Agreement for Sale which he did. Thereafter, he fraudulently colluded with Mr. Maruwanga, when he saw an opportunity to unjustly enrich himself again in unlawfully and illegally interfering with the Land Registry records by purporting to close the register pertaining to the Suit Property and thereafter issuing purported Certificates of Lease for the purported sub - divisions without and lawful basis when, in fact, the Lease and the original Certificate of Lease for the Suit Property held by the Plaintiff were not surrendered to facilitate any sub-division exercise.
509. As was held by the Court in the "Mohamed Kassam Case" -Authority 5, the Land Registrar was the custodian of the land records and was under a duty to maintain their integrity. Regrettably, Mr. Marwanga, the then Land Registrar Kwale, did quite the opposite and, instead, interfered with the records fraudulently and unlawfully, conduct which he was at pains to explain. Given that the alleged Certificates of Lease to the purported sub-divisions were fraudulently, unlawfully and unprocedurally issued, they did not confer any valid title on the 1<sup>st</sup> Defendant capable of being transferred or passed on. Consequently, none of the other Defendants acquired any valid title to the purported sub - divisions and no claim could be made as against the Plaintiff in this regard.
510. The Learned Counsel therefore humbly prayed that the reliefs ought by it in the Further Re-Amended Plaint dated 19<sup>th</sup> May 2022 be allowed as prayed. The Learned Counsel so prayed that this Honourable Court make a consequential order that the 1<sup>st</sup> Defendant was only entitled to a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13,500,000.00/=) from the escrow account funds given his fraudulent conduct and the fact that since the year 2012. The Plaintiff had been unable to use or develop the Suit Property as it intended to on account of this suit. The Learned Counsel also submitted that the Plaintiff also sought an award of costs in its favour against the Defendants.

## **B. The Written Submissions by the 1<sup>st</sup> Defendant**

511. The 1<sup>st</sup> Defendant through the Law firm of Messrs. Kounah & Company Advocates filed their written submissions dated 14<sup>th</sup> July, 2025 wherein. Mr. Kounah Advocate stated that the submissions were filed as a rejoinder to the Plaintiff's main submissions dated 19<sup>th</sup> June 2025 and was made on behalf of the 1<sup>st</sup> Defendant. The Plaintiff alleged that it was the lawful owner of land parcel Kwale/Diani Beach Block/203 and sought for the cancellation of sub - divisions Kwale/Diani Beach Block/1536 to 1543, claiming they were unlawfully or fraudulently effected.
512. The 1<sup>st</sup> Defendant had, through the evidence adduced at trial and submissions already filed, demonstrated that the Plaintiff was never the registered proprietor of the suit property. The 1<sup>st</sup> Defendant had further shown that the suit property was lawfully sub - divided in the year 2006 in accordance with the applicable legal and procedural requirements. Notably, the Plaintiff failed to pay the full purchase price and had not adduced any credible evidence to support its allegations of fraud. In a further attempt to bolster its untenable claim, the Plaintiff had continued to assert ownership of the property yet had deliberately withheld the alleged title from inspection or safe custody before this Honourable Court, citing vague and unsubstantiated concerns of insecurity.
513. In its submission, the Learned Counsel relied on the following four (4) issues for determination in rejoinder:-Firstly, on whether the Plaintiff had demonstrated valid title to Kwale/Diani Beach



Block/203. The Learned Counsel submitted that despite anchoring its entire claim on ownership of Kwale/Diani Beach Block/203, the Plaintiff had never produced the original Certificate of title for safekeeping or inspection by the Court. While the Plaintiff did present a title purporting to relate to Kwale/Diani Beach Block/203. It was worth emphasizing that the same was never formally surrendered or lodged into the custody of the Court.

514. Consequently, the title remained exclusively in the Plaintiff's possession, thereby placing it beyond the Court's reach for proper scrutiny or verification. This deliberate withholding further undermined the credibility of the Plaintiff's claim, casts serious doubt on the authenticity of the alleged title, and prejudices the Court's ability to interrogate its validity in the face of the 1<sup>st</sup> Defendant's substantive challenge.

515. On this point, the Learned Counsel relied on the case of "Munyu Maina (Supra)" the Court of Appeal held that a party who relies on a Certificate of Title must go beyond its mere production and demonstrate the root of the title, particularly where the title is under challenge the Court of Appeal expressed itself thus:-

"We have stated that when a registered proprietor's root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

516. A similar principle was reaffirmed by the Supreme Court in the case of:- "Dina Management Ltd (Supra)", which stated that a Certificate of Title was not absolute where it was shown that it was procured unprocedural or through fraud. In addition, in the case of:- "Funzi Island Development Limited & 2 Others – Versus - County Council of Kwale & 2 Others [2014] eKLR", the Court of Appeal (per Maraga, JA, as he then was) held that:-

".....a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot on the basis of indefeasibility of title sanction an illegality or give its seal of approval to an illegal or irregularly obtained title."

517. In contrast, the 1<sup>st</sup> Defendant had produced certified green cards and supporting documentation, corroborated by Mr. Marwanga (former Land Registrar), confirming that Kwale/Diani Beach Block/203 was sub - divided in the year 2006, and the resultant parcels were lawfully created.

518. Further, in the case of- "Benja Properties Limited – Versus - Syedna Mohammed Burhannudin Sahed & 4 Others [2015] eKLR", the Court held: -

'In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach.' Emphasis added



519. This decision directly supported the 1<sup>st</sup> Defendant’s position, the Plaintiff could not validly purchase or be transferred Kwale/Diani Beach Block/203 in 2007 when that parcel had ceased to exist after the legal sub - division in the year 2006.

520. Secondly, on whether the Plaintiff’s claim of fraud had met the requisite standard of proof. The Learned Counsel averred that the Plaintiff’s submissions make generalized accusations of fraud against the 1<sup>st</sup> Defendant and various registrars, without specific pleadings or strict proof as required by law. The Plaintiff’s submissions make generalized accusations of fraud against the 1<sup>st</sup> Defendant and various Registrars, without specific pleadings or strict proof as required by law.

“.....Allegations of fraud must be specifically pleaded and strictly proved. The standard of proof is higher than that of a balance of probabilities..... To succeed in the claim for fraud, the appellant needed to not only plead and particularize it, but also lay a basis by way of evidence, upon which the court would make a finding.” Emphasis added.

521. Further, the standard for pleading and proving fraud is well-articulated in Bullen & Leake & Jacob’s Precedents of Pleadings, 13<sup>th</sup> Edition at page 427, which states: -

“Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged (Wallingford v Mutual Society (1880) 5 App. Cas. 685). The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (Lawrence v Lord Norreys (1888) 15 App. Cas. 210). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (Davy v Garrett (1878) 7 Ch.D. 473). General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice.”

522. This authoritative passage was cited with approval by the Court of Appeal in the case of:- “Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 others [2015] eKLR”, where the Court emphasized that:-

“It is common ground that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt.”

523. It underscored the legal requirement that fraud could not be inferred or implied, it must be pleaded with precision and supported by cogent evidence. In the present case, the Plaintiff’s generalized allegations, unsupported by specific facts or credible documentation, fall far short of this threshold. The Court was therefore invited to find that no fraud has been established either in law or in fact.

524. Similarly, in the High Court decision in the appeal “Muruka ((Suing as the Administratrix of the Estate of Amondi Chwala - Deceased)) – Versus - Awange [2024] KEELC 1516 (KLR)”, Hon. A.Y. Koross, J. held that:

“It is trite law fraud must be proved on parameters beyond a balance of probabilities but below reasonable doubt...The evidence adduced by the appellant to prove her allegations of fraud fell far short of what was required... and it appears she was on a fishing expedition.”



525. This reinforced that the burden of proof lies with the party alleging fraud, in this case, the Plaintiff, who had failed to tender credible evidence or documentary proof to support its claims. Indeed, the Plaintiff failed to tender any original documents, title, or registration instruments linking them as proprietor of the mother title. The entries in the Presentation Book cited by the Plaintiff were discredited by Land Registrar Edward Marwanga, who confirmed that no transfer to the Plaintiff was effected on the green card.
526. Thirdly, on whether the Plaintiff had come to court with clean hands. The Learned Counsel asserted that the Plaintiff had also misrepresented its own evidence. During cross examination, the Plaintiff's witness, Mr. Vijay Lakhani, candidly admitted that he had never seen nor possessed the title to Kwale/Diani Beach Block/203. He further acknowledged that, although a balance of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13, 500, 000/=) was allegedly paid into an escrow account, no bank statements or supporting documents have been produced to verify this claim.
527. Additionally, the Plaintiff offered no credible explanation as to how the purported title was processed or why it continued to transact on the property despite there being no corresponding entry in the green card to reflect its ownership. The Plaintiff relied heavily on the actions of Advocate Stephen Oddiaga, yet distances itself from him when confronted with his admissions that he held the title and facilitated the sub - divisions as early as year 2008.
528. In the High Court decision in the appeal "Standard Limited – Versus - Alfred Mincha Ndubi [2018] KEHC 7675 (KLR)", the court refused equitable relief to a party found guilty of material non-disclosure and manipulation of the court process. It stated: -
- ‘In this case, I find that the applicant is guilty of material non disclosure and abuse of the court process. It has not approached the Court in good faith and appears to be playing a cat and mouse game with the court process. Such conduct cannot be countenanced by this court and the court cannot exercise its discretion in favor of such a party.’
529. Fourthly, on whether the Plaintiff was entitled to the reliefs sought in the Plaintiff. The Learned Counsel submitted the Plaintiff's claim ought to be dismissed in its entirety on both legal and factual grounds. First, the suit property Kwale/Diani Beach Block/203 was lawfully sub - divided in the year 2006. Upon registration of the resulting parcels (Kwale/Diani Beach Block/1536 to 1543), the mother title ceased to exist. As held in the case of: - "Benja Properties Limited – Versus - Syedna Mohammed Burhannudin Sahed & 4 Others [2015] eKLR (Supra)", a transaction could not attach to non - existent land. The sub - division was duly supported by consents from the District Land Officer, authenticated amendments to the Registry Index Map (RIM), and documentation from the Director of Surveys, all of which confirm compliance with the law. The Plaintiff had not adduced any credible evidence to disprove this.
530. Secondly, evidence from trial undermined the Plaintiff's alleged claim of ownership. Mr. Vijay Lakhani, the Plaintiff's witness, admitted in cross - examination that he had never seen or possessed the original title to Kwale/Diani Beach Block/203. This casts serious doubt on the Plaintiff's position that it holds valid title. In fact, it emerged that the original title had been voluntarily surrendered by the 1<sup>st</sup> Defendant to Oddiaga & Company Advocates for purposes of sub - division. The Plaintiff was aware of this fact but failed to disclose it fully, choosing instead to claim ownership through a process it knew was incomplete.
531. Mr. Marwanga, who served as the Land Registrar at the material time, confirmed in his testimony that he personally issued the leases for the sub - divided parcels. He further affirmed that all procedural and legal requirements for registration had been duly complied with. Crucially, he stated that no valid transfer had ever been effected to the Plaintiff in the registry records.



532. Finally, the Learned Counsel submitted, the Plaintiff's own sale agreement never provide for a transfer of the entire Kwale/Diani Beach Block/203. Rather, it contemplated that sub - division would precede any transfer, confirming that Block No. 203 was never meant to be transferred as a whole. The Plaintiff's claim to the entire parcel was therefore not only legally baseless, but contractually dishonest.
533. In conclusion, in light of the foregoing, the Plaintiff had failed to demonstrate that it holds a valid and enforceable title to the suit property. It had further failed to establish that the sub - division of Kwale/Diani Beach Block/203 was in any way unlawful or procedurally defective. The Plaintiff had neither produced proof of payment of the full purchase price nor furnished the Court with any credible evidence of an escrow arrangement. Additionally, it had not displaced the 1<sup>st</sup> Defendant's documentary evidence confirming the lawfulness of the sub - division process undertaken in the year 2006.
534. In the circumstances, the 1<sup>st</sup> Defendant respectfully prayed that this Honourable Court dismisses the Plaintiff's suit in its entirety, upholds the validity of the sub - division of Kwale/Diani Beach Block/203, declared that the Plaintiff had no registrable interest in the property, and awards costs of the suit to the 1<sup>st</sup> Defendant.

### **C. The Written Submissions by the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants**

535. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants through the Law firm of Messrs. Wanjiku Mohamed Advocates LLP filed their written submissions dated 1<sup>st</sup> October, 2025 wherein. Mr. Karega Advocate submitted that the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants were the registered proprietors of title Kwale/Diani Beach Block/1542 which was one of the contested sub - divisions of Kwale/Diani Beach Block/203. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants were joined as parties to this Suit through an order made on 05<sup>th</sup> May 2022. The 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants filed their Statement of Defence (9<sup>th</sup> to 11<sup>th</sup> Defendants' Defence) on 16<sup>th</sup> June 2022 in response to the Further Re - Amended Plaint (Further Re-Amended Plaint) dated 19<sup>th</sup> May 2022.
536. At the trial, the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants called two (2) witnesses. Joseph Kamau Mwaura, a contractor who testified on 28<sup>th</sup> July 2023 and the 10<sup>th</sup> Defendant who testified on 24<sup>th</sup> October 2023. On 29<sup>th</sup> June 2024, still in the course of the trial and taking note of the contradictory nature of the evidence being adduced by the current and former holders of the office of the 7<sup>th</sup> Defendant, the 9<sup>th</sup> to 11<sup>th</sup> Defendants issued a Notice to the 7<sup>th</sup> and 8<sup>th</sup> Defendants dated 28<sup>th</sup> June 2024 (9<sup>th</sup> to 11<sup>th</sup> Defendants' Notice to Co-Defendant), claiming indemnity from them, but without prejudice to the 9<sup>th</sup> to 11<sup>th</sup> Defendants' defence to the Plaintiff's Suit.
537. The Learned Counsel averred that the 8<sup>th</sup> Defendant filed a Defence to the Notice on 20<sup>th</sup> September 2024. According to the Learned Counsel these were the 9<sup>th</sup> to 11<sup>th</sup> Defendants submissions in regard to:-
- i. the Main Suit; and
  - ii. their Notice to Co-Defendant
538. The issues for determination according to the Learned Counsel were in relation to the Main Suit and the 9<sup>th</sup> to 11<sup>th</sup> Defendants' Defence as follows:-
- i. Whether the Plaintiff has pleaded or otherwise proved any fraud against the 9<sup>th</sup> to 11<sup>th</sup> Defendants;



- ii. Whether the 9<sup>th</sup> to 11<sup>th</sup> Defendants are innocent purchasers of Kwale/Diani Beach Block/1542 for valuable consideration and without any notice of any of the particulars of fraud pleaded in the Further Re-Amended Plaint;
  - iii. Whether the Plaintiff was guilty of laches and/or indolence in the manner pleaded at paragraphs 6 and 7 of the 9<sup>th</sup> to 11<sup>th</sup> Defendants' Defence and whether such laches or indolence creates an equitable estoppel stopping the Plaintiff from alleging fraudulent acquisition of Kwale/ Diani Beach Block/ 1542 by the 9<sup>th</sup> to 11<sup>th</sup> Defendants; and
  - iv. Whether the claim by the Plaintiff as against the 9<sup>th</sup> to 11<sup>th</sup> Defendants ought to be dismissed and if so, whether the Plaintiff ought to be ordered to meet the 9<sup>th</sup> to 11<sup>th</sup> Defendants' costs.
539. In relation to the 9<sup>th</sup> to 11<sup>th</sup> Defendants' Notice to the 7<sup>th</sup> to 8<sup>th</sup> Defendants, the Learned Counsel submitted that the following issues fall for determination, only if the court finds for the Plaintiff as against the 9<sup>th</sup> to 11<sup>th</sup> Defendants and orders the cancellation of the title Kwale/Diani Beach Block/1542:
- a. Whether the evidence on record establishes that the office of the 7<sup>th</sup> Defendant, regardless of the identities of its various holders, actively abused their powers and/or were otherwise complacent in the creation of the illegal subdivisions of Kwale/Diani Beach Block/203 and by effect and by their actions, deprived the 9<sup>th</sup> to 11<sup>th</sup> Defendants of their interest in Kwale/Diani Beach Block/1542; and
  - b. Whether the Government of the Republic of Kenya, represented in these proceedings by the 8<sup>th</sup> Defendant is liable to indemnify the 9<sup>th</sup> to 11<sup>th</sup> Defendants for any losses caused by the actions of the office of the 7<sup>th</sup> Defendant, regardless of the identities of its various holders and if so, to what extent, should the Government of the Republic of Kenya indemnify the 9<sup>th</sup> to 11<sup>th</sup> Defendants?
540. On the relevant legal provisions, principles and case laws, the Learned Counsel submitted that the provision of Article 40 (1) of *the Constitution* of Kenya protects the right to acquire and own property of any description and in any part of Kenya and protects citizens from deprivation of their property by the state. The provision of Article 260 of *the Constitution* of Kenya defines a public officer as inter alia any state officer, defines a state officer as any person holding a state office and defines a state office as inter alia an office established and designated as a State office by national legislation.
541. The Section 12 of the *Land Registration Act*, No. 3 of 2012 provides that there shall be appointed by the Public Service Commission, a Chief Land Registrar, a Deputy Chief Land Registrar, County Land Registrars, Land Registrars, and such other officers who shall be public officers as may be considered necessary for the effective discharge of functions under this Act.
542. The provision of Section 24 (b) of the *Land Registration Act* provides that the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease. The provision of Section 25 of the *Land Registration Act* provides that the rights of a proprietor (of a lease or of land), even if acquired subsequently for valuable consideration, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, subject only to:
- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and



- b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
543. The provision of Section 3 (3) of the *Law of Contract Act*, Cap. 23 provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded is in writing, is signed by all the parties thereto and the signature of each party signing has been attested by a witness who was present when the contract was signed by such party.
544. In the case of: “Speedex Logistics Limited – Versus - Orbit Chemical Industries Limited & 2 others (Civil Appeal E1485 of 2023) [2025] KEHC 12745 (KLR) (Civ) (18 September 2025) (Judgment)”, the High Court held as follows in relation to documentary evidence and the parole evidence rule:-
- “..... However, documents still speak for themselves. The observation of documents is the same as the lower court as parties cannot read into those documents matters extrinsic to them. In *Fidelity & Commercial Bank Limited – Versus - Kenya Grange Vehicle Industries Ltd* (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as follows:-
- “Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract.
- This is what sometimes is called the principle of four corners of an instrument, which insists that a document’s meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.
- .....In *Prudential Assurance Company of Kenya Limited – Versus - Sukhwender Singh Jutney and Another*, Civil Appeal No. 23 of 2005 the Court citing a passage in *Odgers Construction of Deeds and Statutes* (5<sup>th</sup> edn.) at p.106 emphasized that in construing the terms of a written contract;
- “It is a familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence.” .....
545. In case of:- “Mahdi – Versus - Bamahriz & 2 others; Law Society of Kenya - Mombasa Branch & another (Interested Parties) (Environment and Land Case 380 of 2016) [2025] KEELC 6415 (KLR) (26 September 2025) (Judgment)”, this Honourable Court held that: -
- “.....The Land Registrar enjoys a presumption of regularity in the performance of official duties. The Land Registrar’s office can be liable if it is shown to have been a willing party to the fraud or if it acted so negligently that it facilitated the fraud..”
546. In the case of:- “Peter – Versus - Masai Carriers Limited (Civil Appeal E044 of 2024) [2025] KEHC 11179 (KLR) (29 July 2025) (Judgment)”, the High Court discussed the doctrine of vicarious liability as follows: -
- “....What then is vicarious liability? It is a legal principle that makes one party responsible for the actions of another, even if the first party didn’t directly cause the harm. It is essentially



a form of secondary liability, where a person or entity is held liable for the wrongful acts of another due to their relationship such as employer – employee or principal agent....”

547. In the case of:- “Dakianga Distributors (K) Limited – Versus - Kenya Seed Company Limited [2015] eKLR”, the Court of Appeal held as follows on parties being bound by their pleadings: -

“.....A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12<sup>th</sup> Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-

“The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

Sir Jack Jacob in an article entitled “The Present Importance of Pleadings” published in (1960) Current Legal Problems and which article was quoted with approval by the Supreme Court of Malawi in Malawi Railways Limited – Versus - Nyasulu [1998] MWSC 3 states of the importance of pleadings:

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice...

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”



In Libyan Arab Uganda Bank for Foreign Trade and Development & Anor – Versus - Adam Vassiliadis [1986] UGCA 6 the Court of Appeal of Uganda cited with approval the dictum of Lord Denning in Jones – Versus - National Coal Board [1957] 2 QB 55 that:

“In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.”

548. This Court in “Independent Electoral and Boundaries Commission & Anor – Versus - Stephen Mutinda Mule & 3 others (Supra)” cited with approval the decision of the Supreme Court of Nigeria in the case of:- “Adetoun Oladeji (NIG) Limited – Versus - Nigeria Breweries PLC SC 91/2002” where Pius Adereji, JSC expressed himself thus on the importance and place of pleadings: -

“..... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

The judges in that case also stated:

“In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”....”

549. On whether the Plaintiff has pleaded or otherwise proved any fraud against the 9<sup>th</sup> to 11<sup>th</sup> Defendants. The Learned Counsel submitted that a review of the particulars of fraud as set out in Paragraph 13 of the Further Re-Amended Plaintiff would show that there was no fraud pleaded against the 9<sup>th</sup> to 11<sup>th</sup> Defendants. In fact the 9<sup>th</sup> to 11<sup>th</sup> Defendants are only mentioned cursorily in that paragraph where at 13(h), it is stated that “purporting to sell and transfer to the 9<sup>th</sup> to 11<sup>th</sup> Defendants Kwale/Diani Beach Block/1542 when there were orders in force restraining him to do so”. This pleading clearly relates to the actions of the 1<sup>st</sup> Defendant.
550. The Learned Counsel relied on the decision of the Court of Appeal in the case of:- “Dakianga Distributors (K) Limited – Versus - Kenya Seed Company Limited (supra)” and the legal principle that parties was bound by their pleadings. The evidence led by the Plaintiff at the trial never point out to any fraud on the part of the 9<sup>th</sup> to 11<sup>th</sup> Defendants. The Learned Counsel submitted that no fraud was either pleaded or proved against the 9<sup>th</sup> to 11<sup>th</sup> Defendants.
551. On whether the 9<sup>th</sup> to 11<sup>th</sup> Defendants were innocent purchasers of Kwale/Diani Beach Block/1542 for valuable consideration and without any notice of any of the particulars of fraud pleaded in the Further Re-Amended Plaintiff, the Learned Counsel reiterated that the 9<sup>th</sup> to 11<sup>th</sup> Defendants pleaded at paragraph 5 of their statement of defence that they are innocent purchasers of Kwale/Diani Beach Block/1542 for valuable consideration and without any notice of any fraud. The 9<sup>th</sup> to 11<sup>th</sup> Defendants proved that they paid a sum of Kenya Shillings Ten Million (Kshs.10,000,000/-) to the 1<sup>st</sup> Defendant for the purchase of Kwale/Diani Beach Block/1542 in the year 2016. At the trial, the 9<sup>th</sup> to 11<sup>th</sup> Defendants produced a copy of the instrument of transfer of lease (see pages 1 to 3 of the 9<sup>th</sup> to 11<sup>th</sup> Defendants’ List of Documents dated 28<sup>th</sup> February, 2023). The said instrument was signed by the 1<sup>st</sup>



Defendant and clearly indicated thereon: “...in consideration of TEN MILLION (Kshs.10,000,000/-) (the receipt of which is hereby acknowledged) ...” Emphasis theirs

552. That aside, the 1<sup>st</sup> Defendant’s testimony on 8<sup>th</sup> March 2023 was clear that he sold Kwale/Diani Beach Block/1542 to Mohamed Abdulle and was paid in full. There was no debt owed to him. The 9<sup>th</sup> to 11<sup>th</sup> Defendants also produced an official search (see page 40 of the 9<sup>th</sup> to 11<sup>th</sup> Defendants’ List of Documents dated 28<sup>th</sup> February, 2023 issued by the 7<sup>th</sup> Defendant on 14<sup>th</sup> May 2015 confirming that the 1<sup>st</sup> Defendant was the registered proprietor of the leasehold interest in Kwale/Diani Beach Block/1542 and that there were no encumbrances. Indeed, in the set of green cards brought to court by one Evans Marwanga, who was at one point an office holder of the 7<sup>th</sup> Defendant, there were no encumbrances on the register for Kwale/Diani Beach Block/1542 at the point of transfer to the 9<sup>th</sup> to 11<sup>th</sup> Defendants.
553. The Learned Counsel opined that the 9<sup>th</sup> to 11<sup>th</sup> Defendants also produced a copy of their certificate of lease which was issued to them by the 7<sup>th</sup> Defendant on 12<sup>th</sup> February, 2016 (see pages 29 to 32 of the 9<sup>th</sup> to 11<sup>th</sup> Defendants’ List of Documents dated 28<sup>th</sup> February, 2023) and gave evidence through Joseph K. Mwaura (testified on 28<sup>th</sup> July 2023) as well as through the 10<sup>th</sup> Defendant in regard to their possession and construction of a mosque on Kwale/Diani Beach Block/1542. The mosque constructed on Kwale/Diani Beach Block/1542 was also sighted by this court when it carried out a visit to the locus in quo before the 9<sup>th</sup> to 11<sup>th</sup> Defendants were joined as parties to this suit.
554. The Learned Counsel submitted that in totality, all the evidence adduced establishes that the 9<sup>th</sup> to 11<sup>th</sup> Defendants were truly innocent purchasers and had no notice or knowledge of any of the allegations made by the Plaintiff against the 1<sup>st</sup> Defendant.
555. On whether the Plaintiff was guilty of laches and/or indolence in the manner pleaded at paragraphs 6 and 7 of the 9<sup>th</sup> to 11<sup>th</sup> Defendants’ Defence and whether such laches or indolence creates an equitable estoppel stopping the Plaintiff from alleging fraudulent acquisition of Kwale/Diani Beach Block/1542 by the 9<sup>th</sup> to 11<sup>th</sup> Defendants. The Learned Counsel submitted that at paragraph 6 of the 9<sup>th</sup> to 11<sup>th</sup> Defendants’ defence, they have pleaded in the alternative and without prejudice to the contents of their defence, that the Plaintiff was guilty of laches and indolence.
556. As discernible from the certified copies of the green card (register) for Kwale/ Diani Beach Block/1542 brought to court by Evans Marwanga, the same was opened on 3<sup>rd</sup> October 2011, which was more than four (4) years prior to the acquisition of the same by the 9<sup>th</sup> to 11<sup>th</sup> Defendants. As at 10<sup>th</sup> July 2012 when it filed this Suit, the Plaintiff was aware of the issuance of the title for Kwale/Diani Beach Block/ 1542 because in the original plaint dated evenly, the Plaintiff had pleaded the allegation of illegal subdivision of Kwale/Diani Beach Block/203 into inter alia Kwale/Diani Beach Block/1542.
557. The 9<sup>th</sup> to 11<sup>th</sup> Defendants pleaded that the Plaintiff, despite urging its own case in court, did not take any steps to protect members of the public from dealing with the subdivisions of Kwale/Diani Beach Block/203 by placing a Caveat Emptor notice or sign board physically on the property or by placing a caution on the registers for the sub - divisions or by having its employees or agents physically on the ground to warn off prospective purchasers or developers such as the 9<sup>th</sup> to 11<sup>th</sup> Defendants. The Plaintiff did not disprove this allegation and did not lead any evidence to show that it took such steps as are reasonably necessary to protect members of the public, including the 9<sup>th</sup> to 11<sup>th</sup> Defendants, from being defrauded.



558. The Learned Counsel therefore submitted that the Plaintiff by its own actions as set out above, was estopped from alleging that Kwale/ Diani Beach Block/1542 was acquired by the 9<sup>th</sup> to 11<sup>th</sup> Defendants illegally or fraudulently yet the Plaintiff sat back and allowed such alleged illegality and fraud to occur.
559. On whether the claim by the Plaintiff as against the 9<sup>th</sup> to 11<sup>th</sup> Defendants ought to be dismissed and if so, whether the Plaintiff ought to be ordered to meet the 9<sup>th</sup> to 11<sup>th</sup> Defendants' costs. The Learned Counsel argued that the Plaintiff had failed to plead any fraud against the 9<sup>th</sup> to 11<sup>th</sup> Defendants. To that extent, the suit filed against the 9<sup>th</sup> to 11<sup>th</sup> Defendants cannot be sustained and must fail.
560. The Learned Counsel urged this Honourable Court to apply correctly the provisions of section 24(b) and 25 of the Land Registration Act and to hold that no sufficient evidence had been presented before this Honourable Court so as to defeat the rights and interests of the 9<sup>th</sup> to 11<sup>th</sup> Defendants to Kwale/ Diani Beach Block/1542. That aside, the Plaintiff pleaded at paragraph 5 of the Further Re – Amended Plaintiff that the agreement for sale dated 21<sup>st</sup> December 2007 between Vipin Maganlal Shah and Vijay Lakhani was in respect to all that land known as Kwale/Diani Beach Block/203. In paragraph 8, the Plaintiff pleaded that the said Vipin Maganlal Shah and Vijay Lakhani transferred their rights in the said property to the Plaintiff. In paragraph 3 of the 9<sup>th</sup> to 11<sup>th</sup> Defendant's defence, the 9<sup>th</sup> to 11<sup>th</sup> Defendants pleaded that they were strangers to inter alia paragraphs 5 and 8 of the Further Re-Amended Plaintiff but nonetheless they denied the same in toto and put the Plaintiff to strict proof of the content thereof.
561. On whether the contents of paragraphs 5 and 8 were strictly proved or not, comes down to the evidence adduced and as was held by the “High Court in Speedex Logistics Limited – Versus - Orbit Chemical Industries Limited & 2 others (supra)”, documents do sometimes speak for themselves. Taking into account section 3(3) of the Law of Contract Act, what Vipin Maganlal Shah and Vijay Lakhani purchased from the 1<sup>st</sup> Defendant was not “all that” land known as Kwale/Diani Beach Block/203. The evidence as borne out of the sale agreement dated 21<sup>st</sup> December 2007 (the Sale Agreement) is that the 1<sup>st</sup> Defendant had agreed (see clause 1) to sell the property know as Kwale/Diani Beach Block/203 comprising of 4.538 hectares less all that back portion which has been sold by the Vendor to a third party but no such transfer has been registered against the title.
562. If this was not enough, the Learned Counsel urged the court to review clause 9 of the Sale Agreement which established that the sale of Kwale/Diani Beach Block/203 was to be subject to sub - division of that property into at least two (2) portions. No other Sale Agreement or deed of variation of the terms of the aforesaid agreement was tabled before the court. In any event, the Learned Counsel submitted that any other such evidence, if any exists, would be extrinsic evidence.
563. This Honourable Court did visit the site and it was beyond argument that the mosque constructed on Kwale/Diani Beach Block/1542 fell at the back of the property Kwale/Diani Beach Block/203 which was outside the bounds of what the 1<sup>st</sup> Defendant sold to Vipin Maganlal Shah and Vijay Lakhani. They urged the Court to dismiss the suit was filed against the 9<sup>th</sup> to 11<sup>th</sup> Defendants.
564. On the notice to Co – Defendant issued to the 7<sup>th</sup> and 8<sup>th</sup> Defendants. Whether the evidence on record established that the office of the 7<sup>th</sup> Defendant, regardless of the identities of its various holders, actively abused their powers and/or were otherwise complacent in the creation of the illegal subdivisions of Kwale/Diani Beach Block/203 and by effect and by their actions, deprived the 9<sup>th</sup> to 11<sup>th</sup> Defendants of their interest in Kwale/Diani Beach Block/1542. The Learned Counsel submitted that they made these submissions in the alternative and only if this Honourable Court allowed the Plaintiff's suit as against the 9<sup>th</sup> to 11<sup>th</sup> Defendants and/or orders the cancellation of the register or certificate of lease for Kwale/Diani Beach Block/1542.



565. On or about 25<sup>th</sup> October 2023, when the Suit came up for hearing, the office of the 8<sup>th</sup> Defendant placed one Mr. Teddy Mulusa, a Surveyor from the Department of Surveys of the Government of Kenya, on the witness stand. He produced the Registry Index Map for the area in question and his testimony was that according to that state office, Kwale/Diani Beach Block/1542 was a sub - division of the Kwale/Diani Beach Block/203 and the Kwale/Diani Beach Block/203 ceased to exist after the sub - division was carried out.
566. When Mr. Evans Marwanga – former Land Registrar Kwale testified on 3<sup>rd</sup> April 2024, he testified that the register for Kwale/Diani Beach Block/203 was closed on subdivision. When Mr. Stephen Mokaya – Land Registrar Kwale testified on 20 June 2024, he confirmed explicitly during cross examination by the 9<sup>th</sup> to 11<sup>th</sup> Defendants’ counsel that the register for Kwale/Diani Beach Block/1542 was opened by a land registrar, one Mr. Evans Marwanga.
567. Mr. Mokaya testified, in addition, that the current registered owners of Kwale/Diani Beach Block/1542 are the 9<sup>th</sup> to 11<sup>th</sup> Defendants as trustees and that if one were to carry out an official search, it (the search) would give this information. However, Mr. Mokaya disavowed the closure of the register for Kwale/Diani Beach Block/203, disavowed the subdivisions of Kwale/Diani Beach Block/203 including Kwale/Diani Beach Block/1542 and stated that according to him, the titles for inter alia Kwale/Diani Beach Block/1542 were not valid.
568. The Learned Counsel further submitted that while these were the testimonies of two (2) separate witnesses, the two witnesses were at different points in time, the holders of the same office, that is, the office of the 7<sup>th</sup> Defendant. As already submitted, the office of the 7<sup>th</sup> Defendant, pursuant to Section 12 of the *Land Registration Act* was a public office. It was unbelievable that the survey department would confirm that Kwale/Diani Beach Block/203 was sub - divided, one holder of the office of the 7<sup>th</sup> Defendant would also confirm as much, but another holder of the office of the 7<sup>th</sup> Defendant contradicts the fact of a sub - division having taken place. The evidence adduced was clear that the office that created the register for Kwale/Diani Beach Block/1542 was that of the 7<sup>th</sup> Defendant and if the Judgment was that the said register ought not to have been created, then the office of the 7<sup>th</sup> Defendant must have abused its powers or have been complacent.
569. On whether the Government of the Republic of Kenya, represented in these proceedings by the 8<sup>th</sup> Defendant, was liable to indemnify the 9<sup>th</sup> to 11<sup>th</sup> Defendants for any losses caused by the actions of the office of the 7<sup>th</sup> Defendant, regardless of the identities of its various holders and if so, to what extent, should the Government of the Republic of Kenya indemnify the 9<sup>th</sup> to 11<sup>th</sup> Defendants, the Learned Counsel submitted that as was held in the case of:- “Mahdi – Versus - Bamahriz & 2 others (Supra)”, the office of the 7<sup>th</sup> Defendant can be held liable for either actively participating in fraud or for acting so negligently that it facilitated the fraud.
570. They submitted that the existence of two (2) sets of green cards in respect of competing interests in circumstances that cannot be explained by two (2) different holders of the same public office is clear evidence of either wilful participation in fraud or extreme negligence. The office bearers of the 7<sup>th</sup> Defendant are public officers (see the provision of Section 12(1) of the *Land Registration Act*) and therefore the doctrine of vicarious liability as was described in the case of:- “Peter – Versus - Masai Carriers Limited (supra)”, applies to impose secondary liability on the Government of the Republic of Kenya for the actions of its employees where such actions as already submitted, show willful participation in fraud or show extreme negligence so as to facilitate fraud.



571. To this issue they submitted in the affirmative, urged the court to find as much and to issue a declaration that the 9<sup>th</sup> to 11<sup>th</sup> Defendants are entitled to a full and complete indemnity from the Government of the Republic of Kenya should the title to Kwale/Diani Beach Block/1542 be cancelled.
572. In conclusion, the Learned Counsel submitted in relation to the main suit that the Plaintiff neither pleaded nor proved any fraud against the 9<sup>th</sup> to 11<sup>th</sup> Defendants in the Further Re-Amended Plaintiff. The 9<sup>th</sup> to 11<sup>th</sup> Defendants are innocent purchasers of Kwale/Diani Beach Block/1542 for valuable consideration and without any notice of any of the particulars of fraud pleaded in the Further Re Amended Plaintiff, which fraud they never participated in. The Plaintiff was otherwise guilty of laches and/or indolence in the manner pleaded at paragraphs 6 and 7 of the 9<sup>th</sup> to 11<sup>th</sup> Defendants' Defence and such laches or indolence creates an equitable estoppel stopping the Plaintiff from alleging fraudulent acquisition of Kwale/Diani Beach Block/1542 by the 9<sup>th</sup> to 11<sup>th</sup> Defendants. The claim by the Plaintiff as against the 9<sup>th</sup> to 11<sup>th</sup> Defendants is unsustainable in law as the Plaintiff never in fact purchased the back section where Kwale/Diani Beach Block/1542 is located and the claim ought to be dismissed and the Plaintiff ought to be ordered to meet the 9<sup>th</sup> to 11<sup>th</sup> Defendants' costs.
573. In relation to the 9<sup>th</sup> to 11<sup>th</sup> Defendants' Notice to the 7<sup>th</sup> to 8<sup>th</sup> Defendants and strictly in the alternative and without prejudice:
574. The evidence on record establishes that the office of the 7<sup>th</sup> Defendant, regardless of the identities of its various holders, actively abused their powers and/or were otherwise complacent in the creation of the illegal subdivisions of Kwale/Diani Beach Block/203 and by effect and by their actions, deprived the 9<sup>th</sup> to 11<sup>th</sup> Defendants of their interest in Kwale/Diani Beach Block/1542; and the Government of the Republic of Kenya, represented in these proceedings by the 8<sup>th</sup> Defendant and being the employer of the office of the 7<sup>th</sup> Defendant, is vicariously liable to indemnify the 9<sup>th</sup> to 11<sup>th</sup> Defendants for any losses caused by the actions of the office of the 7<sup>th</sup> Defendant, regardless of the identities of its various holders and the extent of such indemnity is that it should be a full and complete indemnity.

#### IV. Analysis and Determination

- a. I have carefully considered the parties' pleadings, testimonies, all oral & documentary evidence, the written submissions, myriad of cited authorities by parties, relevant provision of *the Constitution* of 2010, the applicable statutory and case law, including the guiding precedents of: "Arthi Highway Developers Limited – Versus - West End Butchery Limited & 6 others", "Munyu Maina – Versus - Hiram Gathiha Maina", and "Katende – Versus - Haridar & Co Limited". I shall address the issues sequentially as guided by their legal and factual complexity.**
575. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) salient issues for its determination. These are: -
- a. Whether the Plaintiff holds a valid and indefeasible title to the suit property;
  - b. Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants were passed a good title;
  - c. Whether the parties are entitled to be granted any reliefs;
  - d. Who shall bear the costs of the suit.
576. Nonetheless, before proceeding with the analysis of the issues for determination, I would like to highlight the procedure and statutory framework. On the jurisdiction and functions of the Environment and Land Court. This Court is clothed with jurisdiction under the provision of Article 162 (2)(b) of *the Constitution* of Kenya, 2010 and the *Environment and Land Court Act*, No. 19 of



- 2011, to determine all disputes relating to environment, use and occupation, and title to land. The provision of Section 13 of the ELC Act provides the Court with original and appellate jurisdiction to hear and determine all such matters, including questions of title, double allocation, validity of registration, and redress for historical land injustices.
577. The ELC operates within the parameters of *the Constitution*, the *Land Registration Act*, No. 3 of 2012; the *Land Act*, No.6 of 2012; the *Civil Procedure Act*, Cap. 21 and the *Evidence Act*, Cap 80 all of the Laws of Kenya. Under the provision of Sections 1, 1A, 3, 3A of the *Civil Procedure Act*, cap 21 and Section 3 of the ELC, Act, and Article 159 ( 1 ) & ( 2) of *the Constitution* of Kenya, 2010, Courts derive its authority and granted inherent powers whereby all proceedings, it is guided by the overriding objective to facilitate just, expeditious, and proportionate dispute resolution.
578. On the role of the Land registries and the Land Registrar, established under Section 12 of the *Land Registration Act* and Section 9 of the *Environment and Land Court Act*, is statutorily mandated to keep and maintain the land register, ensure accurate documentary records, facilitate registrations, and correct any errors in the register that arise due to fraud, mistake, or irregularity.
579. When confronted with suspected double allocation or claims of fraudulent or mistaken registrations, the Land Registrar is expected to undertake investigations, summon parties, refuse suspicious registrations, and, upon order of the court, rectify the register as provided by under the provisions of Sections 79 and 80 of the *Land Registration Act*. The Registrar is not personally liable for good faith action or acts performed within the law.
580. On admissibility of evidence, the provision of Sections 35, 65, 68, and 69 of the *Evidence Act*, Cap. 80 provide for the production and admissibility of documentary evidence. These require parties to produce primary evidence—the original documents—unless exceptions are invoked, and to give notice before introducing secondary evidence. The best evidence rule is enforced to prevent the admission of unreliable or incomplete copies, particularly in land disputes where title documents are central. Additionally, the provision of Sections 107, 108 and 109 of the *Evidence Act*, deliberates on the principle of “the Burden of Proof” which has already been elaborately submitted on by the Learned Counsels for the Plaintiff, 1<sup>st</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants whereby it’s the one one who alleges has to prove its allegation.

**Issue No. a). Whether the Plaintiff holds valid and indefeasible title to the suit property.**

581. Site Visit
582. As already indicated, the Honourable Court conducted a site visit (“Locus in Quo”) on the suit property on 12<sup>th</sup> November, 2021 and a report was prepared. It is re – produced verbatim as hereinbelow:-

Republic of Kenya  
 In the Environment and Land Court  
 at Mombasa  
 ELC. Civil Suit No. 134 of 2012  
 Aniket Property & Investments Limited..... Plaintiff  
 - Versus -  
 1.Hamadi Juma Mwakibibo  
 2.Venture Holdings Limited



3. David K. Kandie
4. Driedrick Alfons Josey Brinkman
5. Amana Abdalla Ng'ang'a
6. Khalfan Mlai
7. The Land Registrar Kwale
8. The Attorney General .....defendants

## **A Site Visit Report onto the Suit Land on 12<sup>th</sup> November, 2021**

### **I. Introduction**

Upon arrival at the site at 1.30pm, the Honourable court formally called the session to order. It introduced its team and the security operatives. All the parties present were introduced by their Advocates as follows:-

- (a) The Plaintiffs:- Mr. Sanjev Khagram Advocate
  - (i) Mr. Dilpun Shah – Director Aniket Property Investment Limited.
  - (ii) Mr. Nakyen Kavil – Representative Aniket Property Investment Limited.
  - (iii) Mr. Nicholas Ngugi - Representative Aniket Property Investment Limited.
  - (iv) M/s. Irene Njagi – Legal Officer Aniket Property Investment Limited.
  - (v) Solomon Wague – Representative Aniket Property Investment Limited.
  - (vi) Mr. Mohamed – Representative Aniket Property Investment Limited.
- (b) The 1<sup>st</sup> Defendant :- Mr. Kounah Advocate.
  - (i) Mr. Hamadi Juma Mwakibibo
- (c) The 2<sup>nd</sup> & 4<sup>th</sup> Defendants :- Mr. Alfred Ndambiri Advocate.
  - (i) Kwame Kariuki - Director Venture Holdings Limited.
  - (ii) M/s. Esther Kariuki – Representative Venture Holdings Limited.
  - (iii) M/s. Driedrick Alfons Josey Brinkman.
- (e) The 3<sup>rd</sup> Defendants :- Mr. Ondabu Advocate.
  - (i) M/s. Amama Abdalla – Owner to Plot No. 1539.
  - (ii) Mr. David Kandie – Owner to Plot No. 1540.
  - (iii) Mr. Lumumba Hamisi – brother to the 3<sup>rd</sup> Defendants



- (f) The 6<sup>th</sup> Defendant :- Mr. Simiyu Advocate.
- (i) Mr. Omar Nzani – Representative to the 6<sup>th</sup> Defendant – Mr. Khaffan Mlai who is abroad at Dubai owner of Plot nos. 1541, 1542 & 1536.
- (g) The 7<sup>th</sup> & 8<sup>th</sup> Defendants :- Mr. Kounah Advocate.
- (i) Mr. Emmanuel Makuto Advocate.
- (i) Mr. Simon Kihara – Land Surveyor Kwale

## II. The Purpose

The purpose of the site visit was explained. It was stated that pursuant to a court directive made on 12<sup>th</sup> October, 2021 and in view of the numerous activities reported to be taking place on the suit property particularly the ongoing constructions it became imperative to conduct the site visit. The court is empowered at any stage to inspect the property or thus concerning which a question may arise – in this case the ongoing construction and settlement into the suit land. In the given circumstance, Court invoked the provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-

Power to court to inspect;

“The court may at any stage of a suit inspect any property or thing concerning which any question may arise”

And order 40 Rule 10 (1) (a) of the Civil Procedure Rules, to wit:-

- 40 “The Court may, on the application if any party to a suit, and on such terms
- (10) as it thinks fit:-
- (1) a. Make an order for .....Inspection of any property which is the subject matter to which any question may arise therein.

Ideally the site visit – the Locus in quo was with a view of gathering further evidence on the above stated arising two (2) issues – of the alleged constructions and the settlements onto the suit land to assist it in its decision making functions and/or process.

Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred. The report has endeavored to make some salient findings and perhaps make recommendations in order to expedite the hearing and final determination of the case.

## II. The Procedure

It was explained that the team would commence by fully guided by the maps available – and under the guidance of the Land Surveyor. The team would then move from one plot



to the other in sequential manner accompanied by the Security operatives. The said maps are attached hereof for ease of reference.

At each plot, the team led by court would primarily be verifying, examining and inspecting the following parameters.

- a. The acreage and size of the plot and the surroundings.
- b. Any existing development in form of structures.
- c. The occupying land owners and their contacts.
- d. The existence of any new constructions and development and when it was commenced and estimated completion period.
- e. Any other observation that may be of value to the evidence and the ongoing constructions.

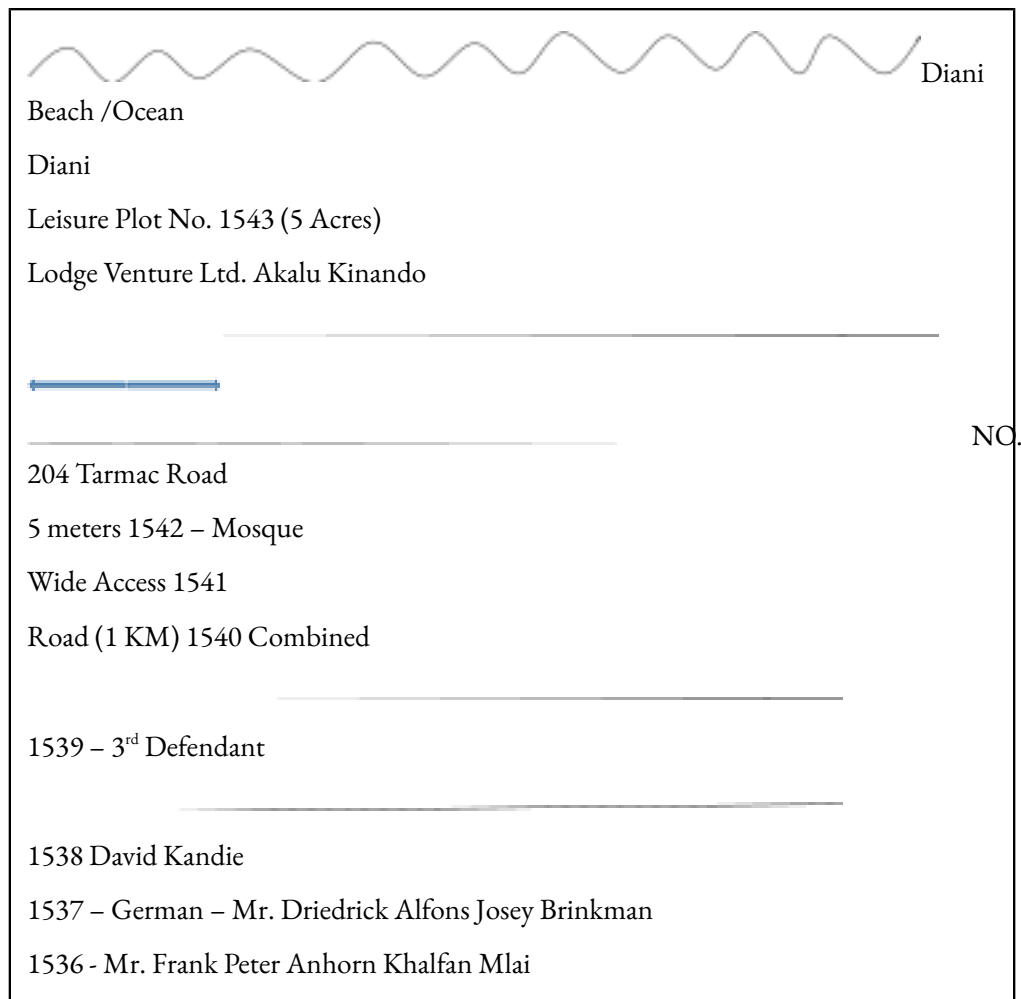
### **III. The Process, the Insepction and the Findings**

The team conducted an intense physical inspection. They moved from the plot by lot spot check and inspection by all the team present these were the findings:-

- a. The Original Plot was land Ref. No. Kwale/Diani/beach block/203. It was registered in the names of the 1<sup>st</sup> Defendant - Mr. Hemedi Mwakibibo.
- b. From the amended Registered Index Map (RIM) done on 29.8.2016 bears Reference numbers no. 458/35. It indicates that the above parcel was sub - divided into eight (8) parcels being L.R. No. 1536, 1538, 1538, 1539, 1540, 1541, 1542 & 1543 respectively.

The Diani – Kalu Kinando road leading to Tanga, in Tanzania was constructed onto the land was constructed on the suit land based on the compulsory acquisition bases pursuant to the provision of Article 40 (3) of *the Constitution* of Kenya.. The sketch map is as attached:-





**(a) Plot No. 1543**

It is a 5 acre plot. It is well partially fenced with the chicken wire and concrete posts – replica of the ones used by the Military Camps but only on the upper side. The lower side has posts but no wire. There are some unkempt shrubs scattered all over. There are four (4) old concrete while pointed structures. We were informed that they were built and left behind by the former proprietor of Mugoya Company – Mr. James Isabinye. There seem to be people mainly guards manning the property who live under these structures as there were a few old beddings and some utensils scattered all over. The plot is adjacent to a very severe beach with tides reaching at. There are a few temporary Makuti Swahili shelters on it where we noticed some tourists visit for causal relaxation including body massage and sand walking along the beach. There were no construction taking place at all. The owners of the plot were present and were very cooperative. They are the 2<sup>nd</sup> Defendants.

**(b) Plot No. 1542.**

This is approximately 1.0 acres Plot or thereabout. We found two care takers/assistant artisans namely Mr. Kelvin Otieno and Khalid Rimo. They were very co - operative and shared information freely. There was an already and almost completed construction. From external observation and features, it appears to be an ultra-modern story Mosque on the left hand side corner of the land.



It was not clear whether it is for the Shia or Suni religious sect. The newly constructed building can accommodate approximately five (500) worshippers. It has a wide Parking Bay. There were huge wooden timber and poles used for shutter construction. There was a large perimeter wall all-round the land with gates. There are two sites houses and their families. The owner was stated to be one Mr. Amedo Noor. We learned that he died approximately two weeks ago from the time of his demise the construction works stopped to allow the mourning take place. Thereafter it would resume. There was no Mosque within the nearby vicinity. Hence, for this reason, this newly built Mosque would attract many worshippers.

The construction commenced in February, 2021 and was planned in being complete by January 2022. He intended to build more structures on it.

Upon his demise the deceased's children have taken over the management of the site and its development. They were Mr. Mohamed Noor and M/s. Fardos. There is a being the Diani – Kalu Kinando road that was constructed onto the land Consultant called Mr. Amer Ali who was on the cell phone No. 0715 800900.

The caretaker admitted they were served with the July 2021 court order but indicated they thought the process server had mistaken the identity as they were not mentioned anywhere on the order. Mr. Otieno held that he did not know from whom the owner had bought the plot from. He is not party to the suit.

**(c) Plot No. 1541 & 40**

This appears to be a combination of two (2) plots summoned with a well done 5 -6 feet concrete perimeter wall. The compound is cleared and with a few palm and coconut trees planted recently. There were no construction taking place on the plots. They are manned by a Samburu caretaker – One Mr. Milton Lekalesoi – who had been there for a month having been brought there by the owner of the land from Naivasha. He informed us the owners a company operating in the name and style of “Daylun Company Limited”. He was paid through his bank account with cooperative bank. The owner of the land had other 4 story buildings within the area. The caretaker had no much information to offer. He is not party to the suit.

**(d) PLOT NO. 1539**

Alleged to belong to the 3<sup>rd</sup> Defendant. She was present but held she was not aware who had taken over and even caused massive development on it. On arrival the guard a young lady behaved in a funny manner. She appeared rather apprehensive. She refused to open the gate but the security team assisted in getting smooth access. The caretaker – one young man Mr. Patrick Kihara married with a one year child was at first extremely uncooperative. He attempted to run away using his motor cycle but was apprehended by the security officers. He at first lied being a tenant. Its later on being arrested for a while that he relaxed and became cooperative. He was remorseful and confessed on having been ignorant and feared the large crowd.

We learnt that the 1 acre compound had a 4 story 3 flats. It was a resort called “Horizon Star Beach Resort” and a swimming pool. The owner is called Kabiru Ndiritu on cell Nos. 0721996480 who was never present to the place from the time of Corona/Covid – 19 Pandemic. He was based at Mwambungo and Nairobi. They had to change the name of the place three times. He did not know who sold the plot to the owner.

He is not party to the suit.



**(e) Plot No. 1537 & 1538:-**

There is a 5 1/2 meter access road to this plot. Mr. Mwakibibo indicated he sold it to Mr. Brinkman. Coincidentally, we met the wife of Mr. Brinkman. A very kind, humble and cooperative lady. She took us through to her two plots. There existed two old residential houses. The compound was well kept with several mango, Tamarind, and other fruit trees. It was well fenced with a perimeter wall. He is the 4<sup>th</sup> Defendant.

**(f) Plot No. 1540**

Meant to belong to Mr. David Kandie. He was present. It has a perimeter wall and a gate with a large rock inserted at the lock to enable us from accessing it. We managed to enter from the Plot No. 1540. There is nothing on it apart from a cleared environment. Mr. Kandie denied being the one behind the development there we could not get to know the owner. Mr. Mwakibibo got rather emotional as he even denied knowing and having dealt with Mr. Kandie at all.

**(g) Plot No. 1536**

There was a caretaker Mr. Francis Ora Charo. The workers were jovial and very cooperative. They freely mingled with us. There is a large compound on a 1 acre with severe atmosphere. There is a huge “L” shaped bungalow and a swimming pool, we learned it was residential but later on turned into a resort place for tourists. It has a well raised 4 story tower which enables one to see the whole vicinity so clearly. It was later on that the wife to the owner – Mr. Frank Peter Anhorn of the Germany nationality who stated to have seen us through the Closed Circuit Television (the CCTV) cameras arrived.

**IV. The Conclusion**

From the site visit, the following issues emerged. These were:-

- a. Its apparent that the original title deed numbers 203 belonged to the 1<sup>st</sup> Defendant, Mr. Mwakibibo.
- b. Where is the original Certificate of title deed – Numbers 203?
- c. It was from this parcel that all the sub – divisions were derived from.
- d. The sub – divided parcels have been taken over and development taken place on the said parcels;
- e. There would be need to establish these owners of the sub – divided parcels from the records kept at the Land Registry, Kwale.
- f. Need to establish how these new owners acquired these parcels – the root of the titles – was it through the innocent purchasers for value or fraud, mistake and/or omission.
- g. What is the claim by the Plaintiff to the suit land? Was it before or after the sub – division took place or not?

It was agreed that the matter will proceed on 19<sup>th</sup> and 20<sup>th</sup> January, 2022 without failure. The following witnesses will testify – the 1<sup>st</sup> Defendant, the Land Registrar, the Land Surveyor, the 2<sup>nd</sup> & 4<sup>th</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants in that order. The site visit was concluded at 3.45 p.m.

Hon. Justice L. Naikuni



Judge

ELC, Mombasa

19. 1.2022

In the presence of:-

- a. M/s. Yumna Hassan – the Court Assistant.
- b. Mr. Sanjiv Khaghram Advocate for the Plaintiff/Applicant.
- c. Mr. Kounah Advocate for the 1<sup>st</sup> Defendant.
- d. Mr. Ndambiri Advocate for the 2<sup>nd</sup> and 4<sup>th</sup> Defendants.
- e. Mr. Ondabu Advocate for the 3<sup>rd</sup> & 5<sup>th</sup> Defendants.
- f. Mr. Siminyu Advocate for the 5<sup>th</sup> Defendant
- g. Mr. Makuto Advocate for the 7<sup>th</sup> & 8<sup>th</sup> Defendants.

583. Under this Sub – heading, and as already indicated, this is a rather complex matter where the main substratum of it is on the legal ownership to the suit property and compensation of the parties herein. From the very onset, the Honourable Court wishes not to extrapolate on the brief facts of the case as that task has been ably executed by all the Learned Counsels for the Plaintiff and Defendants herein save to summarize it from the fundamental information obtained from the Land Registry and evidence adduced as follows:-The Land registered under the Registered *Land Act*, Cap. 300 (Now Repealed) was originally parcel numbers Land Reference No. 25 sub – divided into two (2) – creating Parcel no. 203 and 204. Parcel No. 204 was set aside for the Diani Beach road. The Lease was forwarded for all that parcel of Land Known as Land Reference Numbers Kwale/Diani Beach Block/203 measuring 4.538 Hectares was forwarded to Kwale Lands Registry vide a letter Reference Numbers 46594 TC ( 19 ) on 9<sup>th</sup> November, 2006. The Lease was registered on 18<sup>th</sup> October, 2007 and a Certificate of Lease was issued in favour of Mr. Hamadi Juma Mwakibibo. The Certificate of Lease was for Leasehold (and not Freehold) under the Registered *Land Act*, Cap. 300 (Now Repealed). It was for a term of 50 years from 1<sup>st</sup> August, 2006 – hence to lapse in the year 2056. Its annual rent was Kenya Shillings Seventy Seven Thousand (Kshs. 77, 000/=) (Revisable) w.e.f 1<sup>st</sup> August, 2006. Under Clause 5 of the special condition of the Lease provides that the land and building was to be used for residential purposes. a letter entitled “Letter of Consent” to transfer dated 4<sup>th</sup> September, 2008 by the District Land Officer, Mombasa/ Kwale one Mr. PN. Mutwiwa. Vide a Presentation Book Numbers 0033 of 3<sup>rd</sup> March, 2009, a Transfer document dated 28<sup>th</sup> February, 2009 duly executed by Mr. Hamadi Juma Mwakibibo as the Vendor and Shah Dilpun Govindji & Shah Dulpun Govindji Lakhshi was lodged at the Land registry. The sub – division of the parcel No. 203 into eight parcels being 1536 to 1542. A letter dated 30<sup>th</sup> May, 2022 from the Director Land Administration informing the Land registrar Kwale that his office had never received the Consent to sub – divide the parcel of land Plot No 203 and no consent to sub – divide had been obtained. The issuance of the Certificate of Leases of the Sub – divided parcels to the Defendants.
584. Nonetheless, the Honourable Court will then just proceed on analysis of the framed issues under this sub – heading. But before that, the Honourable Court wishes underscores the fact that land in Kenya is a very emotive and sensitive matter. It is the source of livelihood to many and hence was relied on immensely thus any land dispute has to be handled with vast circumspect to avert creating any chaos or disarray situation arising. Under the provision of Article 61 of *the Constitution* of Kenya, land has been classified into three (3) categories. These are Public, Community or Private land. First and foremost there is need to appreciate the legal framework on land in Kenya. From the time of attaining



independence of the Country, there has been very clear methods and procedures of the acquisition of land to public, individual and community categories.

585. Section 26 of the [Land Registration Act](#) reads thus;

“The certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except:-

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party: or
- b. Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme.”

586. The provision of Section 26 (1) of the [Land Registration Act](#) stipulates that a certificate of title issued by the Registrar should be taken by all courts as “prima facie” evidence of absolute and indefeasible ownership; but this is subject to challenge on grounds of: Fraud or misrepresentation involving the proprietor, Illegality, irregularity, or corrupt scheme in acquisition of the title.

587. An absolute proprietor, such right attaching to it can only be defeated by operation of the law as provided by the provision of Section 25(1) of the [Land Registration Act](#) which reads thus:-

(1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.”

588. A certificate of title issued by the Registrar upon registration under the [Land Registration Act](#) is conclusive evidence that the person named is proprietor of the land, subject only to two statutory exceptions: (a) where the title was acquired through fraud or misrepresentation to which the proprietor is proved to be a party, or (b) where it was acquired illegally, unprocedurally or through a corrupt scheme. Outside those grounds, the registered proprietor obtains absolute and indefeasible title, protected against claims even if prior irregularities occurred. This rule is grounded in Section 26 of the [Land Registration Act](#), 2012.

### **The doctrine of indefeasibility of Title and its limits**

589. The doctrine of indefeasibility provides that a registered proprietor holds the land absolutely and cannot be ousted except in special circumstances. This principle is repeatedly affirmed by Kenyan courts. The leading decision is “Joseph N.K. Arap Ng'ok – Versus - Moiyo Ole Keiwua & 4 others [1997] KECA 1 (KLR)”, where the Court of Appeal held that the register is everything and title is only challengeable on limited grounds. The Environment and Land Court has consistently reinforced this, requiring anyone alleging fraud, illegality, or misrepresentation to prove it strictly; otherwise, the holder's title remains indefeasible

590. However, as emphasized in the case of “Dina Management Limited (Supra)” and “Selmi & Another – Versus – Tarabana Company Limited & 5 Others [2025] KESC 21 (KLR)”, the sanctity of title under



the Torrens system is not absolute. A title obtained through fraud or illegality cannot be shielded by indefeasibility; the burden lies on the registered proprietor to demonstrate that the title was acquired through a lawful process from its very root.

591. Practical consequences:

- (1) A Plaintiff with valid title is presumed the lawful owner with indefeasible rights, title and interest over the land vested in him/her by law and can recover possession or restrain interference unless the defendant can bring themselves within the exceptions;
- (2) Mere allegations of improper process or defects in prior transactions do not defeat the registered proprietor's rights;
- (3) Any challenge must plead and prove fraud, illegality, or improper acquisition, with particulars.

592. The provision of Section 26 (1) of the *Land Registration Act* cements this position as does the Supreme Court's recent reaffirmation that court must look beyond the title to the entire chain of allocation from the very first allotment to the present registration. A certificate of title is only prima facie evidence, not conclusive proof of title.

593. Typically, the instant case is one competing titles. It is one whereby all the parties being the Plaintiff and 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10, and 11<sup>th</sup> Defendants respectively claim to be the owners of some of these Certificate of titles/leases to the suit property. Therefore, as King Solomon did in the case of the two harlots claiming the living child in the Holy scriptures 1 Kings 3:16 to 28 (what has now come to be known as "the Solomonic wisdom"), this Honourable Court has the same daunting legal task to make a determination on the legitimacy and legality on the indefeasible ownership, rights and interest over all these parcels herein. That is the pith and substance of this Judgement. To do so, the Honourable Court is guided by the Court of appeal in the case of: "Munyu Maina – Versus - Hiram Gathiha Maina (Supra)", the Appeal Court held that:-

"We have stated that when a registered proprietor root of title is challenged, it is not sufficient to dangle the instrument of title as proof of ownership. It is that instrument of title that is challenged and the registered proprietor must go beyond the instrument to prove the legality of how he acquired the title to show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register."

594. In order to move forward, there will be need to appreciate a few fundamental underlying issues with regard to this matter. To proceed smoothly on this dispute, the Honourable Court wishes to pose more intricate queries. These are:

- a. Whether the Plaintiff proved purchase of the suit properties from the 1<sup>st</sup> Defendant?
- b. Whether the resulting outcome to the said execution granted or took away the title to the suit property from the Plaintiff.

595. Whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Sections 3 (3) of the Law of contract, Cap, 23 and 38 (1) & ( 2) of the *Land Act*, No. 6 of 2012. The provision of Section 3 (3) of the Law of Contract reads as follows:-

"No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) The contract upon which the suit is founded:



- (i) is in writing;
  - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”

596. The provision of Section 38 (1) & ( 2 ) of the *Land Act*, No. 6 of 2012 provides as follows:-

- “(1) No suit shall be brought upon a contract for the disposition of an interest in land unless—
- (a) the contract upon which the suit is founded—
    - (i) is in writing;
    - (ii) is signed by all the parties thereto; and
  - (b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
- (2) Subsection (1) shall not apply to –
- (a) a contract made in the course of a public auction.
  - (b) the creation or operation of a resulting, implied or a constructive trust; or
  - (c) any agreement or contract made or entered into before the commencement of this Act, provided that-
    - (i) the verbal contracts shall be reduced to writing within two years from the date of the enactment of this Act; and
    - (ii) the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing in a newspaper of nationwide circulation.”.

597. The Court has perused the agreement for sale duly executed between the directors of the Plaintiff’s company and the 1<sup>st</sup> Defendant dated 21<sup>st</sup> December, 2007 terms and conditions stipulated thereof. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price for a sum of Kenya Shillings Thirty Three Million (Kshs. 33, 000, 000/=) and the conditions thereto. The evidence tendered and extensively relied on by the Plaintiff showed and relied upon was that on the decree in Mombasa HCCC No. 315 of 2008, which ordered specific performance. The Plaintiff elaborately asserted that transfer was effected and certificate of lease issued in its favour. The Plaintiff also categorically and emphatically with graphic particulars claimed that subsequent sub - divisions by the 1<sup>st</sup> Defendant were undertaken through fraudulent schemes and conniving and collusion with the 7<sup>th</sup> Defendant. The Defendants’ position on the other hand was that the agreement of sale was



frustrated by pending litigation in Mombasa HCCC No. 211 of 2006 (Seaview Investments Ltd v. Mwakibibo & AG), which restrained dealings in the property. The Defendants pointed out that the sale transaction was incomplete taking that a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13, 500, 000.00/=) remained in the joint escrow bank account held by the Advocates for the vendor and Purchaser to date and was never released, meaning the consideration as required by law was incomplete. The Defendants asserted that frustration discharged the contract, making specific performance impossible and maintained that he remained the lawful proprietor, and any purported transfer to the Plaintiff was void.

598. The Plaintiff relied on the decree in HCCC No. 315 of 2008, asserting specific performance and transfer of title. The Plaintiff showed the Court an original Certificate of Lease allegedly issued in its favour. However, the 1<sup>st</sup> Defendant argued that despite of the Plaintiff merely showing the original Certificate of Title to Court, the Plaintiff never produced it as evidence to enable Court verify its authenticity. Further, the Plaintiff never demonstrated the actual amount it paid to the 1<sup>st</sup> Defendant as consideration and the admission of the outstanding balance for a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13, 500, 000/=) remained unpaid and held in joint bank escrow account, meaning consideration was incomplete. The 1<sup>st</sup> Defendant further pointed to the Civil Case of “HCCC No. 211 of 2006 (Seaview Investments Limited – Versus - Mwakibibo & AG)”, which restrained dealings in the property, frustrating completion. The Defendants argued that without full payment and surrender of the original title, no lawful transfer could occur.

In the case of:-

“Kihuba Holdings Limited – Versus - Charo Karisa Ngulu [2021] eKLR”, the Court faulted a purchaser for failing to complete payment of the purchase price, holding that non-payment rendered the contract unenforceable. The Court held:-

“I do not see why the Plaintiff is alleging that the Defendant breached the contract. It is the Plaintiff who failed to make available the balance of the purchase price within the time and she cannot complain. She was accommodated by the Defendant in order to salvage the sale transaction, albeit out of time but the Plaintiff refused to tender a Professional undertaking. In fact, I wonder why the Plaintiff came to court. If she was willing to proceed with the sale then all she needed to do was make the money available to the Defendant and/or issue professional undertaking. The Defendant did not appear to have any problem with the completion so long as he was guaranteed payment of the balance.....”

605. Furthermore, under the provision of Section 48 ( 1 ) & ( 2 ) of the [Land Registration Act](#), No. 3 of 2012 provides:-

Section 48 – Terms and Conditions of sale -

1. “Unless the parties to a contract expressly provide otherwise, the Law Society Conditions of Sale shall apply to contract for sale of an interest in land.

Despite paragraph ( 1 ), a contract for sale of an interest in land shall be subject to the provisions of any Act, any other applicable law and to any modification or any stipulation of any intention to the contrary which is expressed in the contract”.

In light of the foregoing, therefore, the Court finds that the Plaintiff failed to prove purchase of the suit properties from the 1<sup>st</sup> Defendant. I reiterate that the alleged sale agreement did



not comply with the mandatory requirements of law being the provisions of Section 3 (3) of the Law of Contract Act, Cap. 23, Sections 38 (1) (2) and 48 of the Land Act, No. 6 of 2012.

The Vendor – the 1<sup>st</sup> Defendant and the Purchaser – the Plaintiff herein duly executed 2<sup>nd</sup> December, 2007, term and conditions stipulated thereof. As already indicated, parties are bound by the terms of the contract. The following terms of the agreement are essential.

Clause 5 – the sale is subject to the Law Society condition of Sale (1989) Edition which shall be deemed to be incorporated herein in extension save in so far as the said conditions of sale are not consistent with the other provisions of this agreement. Clause 6 – The contractual completion date is fifteen days after the Vendor has received title deed duly registered with extension of lease stated in the Commissioner of Land's letter dated 10<sup>th</sup> August, 2006. Special Conditions SUBPARA - b)

The balance of the purchase price of Kenya Shillings Thirty One Million Five Hundred Thousand (Kshs. 31, 500, 000.00/=) shall be paid to the Vendor after the transfer has been registered in favour of the Purchaser and new title deed issued in their names.”

Based on this and the Law, I emphasize that a sale agreement for land is completed upon payment of the full purchase price, execution of transfer, and registration. Here, although a transfer was duly executed, it is evident that the outstanding balance for a sum of a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13, 500, 000/=) was never released to the vendor. Mr. Oddiaga's testimony confirms that the funds remain in the joint escrow bank account of the Bank of India. The Plaintiff holds that they were not able to make this payments due to two reasons. Firstly, the Court order in the matter of HCC 211 of 2015 and Secondly, the 1<sup>st</sup> Defendant purported sub – division of the suit land Plot No. 203 into eight parcels. However, it has been adduced that this suit was eventually withdrawn and hence wonder what was the effect to that move. Legally speaking, this means consideration was incomplete, and the contract was not fully performed. Outrightly, the Plaintiff's claim of purchase therefore collapses at the threshold of making the consideration for the sale of land. On the issue of time and contract of sale of land, this is what the Court of Appeal held in the case of “Civil Appeal (Eldoret) No. 6 of 2018 – Pius Francis Omweri Nyaberi – Versus – Shadrack K. Kiptugen” and while quoting “Simpson – Versus – Connolly ( 4 ) ( 1983) 2ALL 474, where Finnermore J stated at Page 476:-

“The purchaser or Vendor cannot just say “The time has gone and the contract is at the end”. Some kind of notice must be given or what has been called in this case an ultimatum to say that: After a Certain time, if you do not complete the contract we shall treat the contract as at an end”. No such ultimatum was given in this case and therefore it is argued that when the Plaintiff said to the Defendant in July that he was no longer bound by this agreement, whatever it was, he was acting wrongly because he had not power to do so”.

599. An escrow account is a conditional deposit, released only upon satisfaction of agreed terms. Since the conditions were never met, the funds were not released. The Plaintiff cannot claim completion while the vendor remains unpaid. Since the contract was not completed, the Plaintiff acquired no enforceable interest, rights and title over the Plot No. 203. It follows therefore, that the Certificate of Lease issued in its favour was irregular, as the vendor had not received full consideration. Therefore, the 1<sup>st</sup> Defendant remains the lawful proprietor of Kwale/Diani Beach Block/203.

600. I want to point out that an agreement for sale of land in Kenya is not treated like any other commercial agreement due to specific statutory and constitutional requirements. The Land Act and Land



Registration Act govern the creation, execution, and effect of such agreements, requiring compliance with formalities such as proper documentation, execution, and where applicable, registration. Section 13 of the Environment and Land Court Act expressly grants the ELC jurisdiction to hear and determine all disputes relating to land, including those arising from contracts for the sale of land, rights, interests, and title.

601. The High Court (as established under Article 165 of the Constitution) no longer has general original jurisdiction over such disputes; instead, disputes regarding agreements for the sale of land must be filed and determined before the Environment and Land Court.

602. It is therefore my finding that the sale agreement dated 21<sup>st</sup> December, 2007 was not completed as the balance of consideration remained in escrow and was never released. The escrow arrangement, confirmed by Mr. Stephen Oddiaga, demonstrates that the vendor was never paid in full. It is therefore my finding that there was no valid contract of sale for land in accordance with the applicable Law of Contract at that time, between the parties herein.

603. On whether the Plaintiff was entitled to the order for specific performance issued by the High Court? The Court of Appeal in the case of “Gharib Suleman Gharib – Versus - Abdulrahman Mohamed Agil LLR No. 750 (CAK) Civil Appeal No. 112 of 1998” held that:

“The jurisdiction to order specific performance is based on the existence of a valid and enforceable contract and being an equitable relief, such relief is more often than not granted where the party seeking it cannot obtain sufficient remedy by an award of damages the focus being whether or not specific performance will do more perfect and complete justice than an award of damages.”

604. In the case of:- “Godfrey Ngatia Njoroge – Versus - James Ndungu Mungai [2019] eKLR”, Justice L. Gacheru while granting an order for Specific Performance stated as follows: -

“Granting of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative”.

605. The Learned Judge further relied on the Case of “Reliable Electrical Engineers Limited – Versus - Mantrac Kenya Limited (2006) eKLR”, wherein Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”

606. Having already found that there was no valid contract for sale of land existing between the Plaintiff and the 1<sup>st</sup> Defendant pegged on breach and an incomplete transaction being that the 1<sup>st</sup> Defendant



did not receive to full agreed consideration; the Court is of the view that the granting of these orders by the High Court was premature and therefore vacates the same.

607. The question that arises therefore is then did the Plaintiff obtain an indefeasible title? Under the provision of Section 24(a) and Section 25(1) of the Land Registration Act, registration confers upon a proprietor absolute ownership together with all rights and privileges appurtenant thereto, subject only to the encumbrances and conditions noted in the register. Further, Section 26(1) of the Act provides that a certificate of title shall be taken by the courts as prima facie evidence that the person named therein is the absolute and indefeasible owner, unless the title is shown to have been acquired through fraud, misrepresentation, illegality or a corrupt scheme.
608. The title to Kwale/Diani Beach Block/203 did not lawfully pass to the Plaintiff - Aniket Property & Investment Limited. The suit property was leasehold land, having been originally granted by the Government of Kenya. The transfer of such property required:
- a. Consent of the Commissioner of Lands (now National Land Commission): This was a statutory prerequisite under the leasehold agreement and the governing land regime. The evidence adduced by the DW - 7 (the Land Registrar, Mr. Steve Mokaya) and DW - 8 (the former Land Registrar, Mr. Evans Marwanga) was consistent that no consent from the Commissioner of Lands was ever obtained or presented for the transfer to the Plaintiff. PW - 1 (Vijay Lakhani) himself admitted under cross-examination that he did not know if this crucial consent had been obtained (referencing Clause 9(e) of the sale agreement).
  - b. Lack of Leases: - For this transaction a Lease ought to be prepared from the Office of the Land Administration. The testimony by the DW - 3, the Land Surveyor was clear that no such a Lease was ever obtained. Instead the Court was subjected to a letter entitled "Letter of Consent" to transfer dated 4<sup>th</sup> September, 2008 by the District Land Officer, Mombasa/Kwale one Mr. PN. Mutwiwa.
  - c. Land Control Board Consent: While the Plaintiff produced a Letter of Consent (Page 22 of Exhibit 3), the evidence revealed fatal irregularities:
    - i. The consent was from the Msambweni Land Control Board, which may not have had jurisdiction over this specific category of leasehold beach land. The nature of the suit land was Leasehold and not Freehold under the Registered Land Act, Cap. 300 (Now Repealed). It did not fall under the purview of the Land Control Act, Cap. 302. Hence, the Letter of Consent from the Land Control Board was irrelevant and unnecessary.
    - ii. PW -1 admitted he never attended the Land Control Board meeting, nor did he know if the directors of the Plaintiff company attended. He stated the document "must have been the consent given to the Land Registrar."
    - iii. Further the 1<sup>st</sup> Defendant (DW - 1) denied signing the application seeking for this consent. From the evidence, Mr. Odiagga Advocate informed Court having been the one who personally undertook this process on behalf of his client – the 1<sup>st</sup> Defendant. This was irregular. The legitimacy of the consent process was therefore not verified by the active participation of the parties.
609. Without these mandatory statutory Leases and consents, the transaction remained incomplete in the eyes of the law, regardless of any private agreement or court decree between the parties.
610. Further on the Court decree in HCCC 315 of 2008, while the same was for specific performance ordered to the 1<sup>st</sup> Defendant to complete the sale, it could not waive or bypass the mandatory statutory



requirements for the lawful transfer of leasehold land. The Court has taken cognizance to the fact that the Plaintiff overlied on the defence that it could not make the payment of the outstanding balance due to the Court order in HCC. No. 211 of 2006. I dare to differ. A court order cannot compel what the law prohibits or renders void. The decree created a personal obligation, but the proprietary transfer required compliance with land law formalities, which were not met.

611. Over the years and since the establishment of the Land Act and the Land Registration Act, the principle that registration is everything has been emphasized and as clearly seen it is subject to statutory compliance. The maxim that registration confers indefeasible title, rights and interest on land (under the Registered Land Act, Cap. 300 (Now Repealed)) is predicated on the lawfulness of the instrument leading to registration.
612. Similarly, I reiterate that the failure to obtain the Lessor's (Commissioner of Lands) consent as required by the lease covenant and Section 58 of the Registration of Land Act, Cap. 300 rendered the transaction ineffective. The Certificate of Lease issued to the Plaintiff was, therefore, founded on a flawed and incomplete process.
613. I have stated before in this judgment that the behavior of the parties indicated an incomplete transaction in that the purchase price was not fully paid. A substantial portion (Kshs. 13,500,000) remained in a joint account, contingent on the outcome of another case (HCCC 211 of 2006). This is indicative of a conditional completion, not a final and concluded sale. The Plaintiff's own agent (PW - 1) displayed a lack of knowledge of key steps (Land Control Board attendance, Commissioner's consent), suggesting the process was driven by advocates without ensuring all legal pillars were in place.
614. On the conclusion of the transfer of title, while the Plaintiff may have had an equitable claim based on the sale agreement and the Decree for specific performance, the legal title did not validly pass. The failure to secure the mandatory consents of the Commissioner of Lands rendered the transfer process fatally defective and the subsequent registration vulnerable.
615. The title held by the Plaintiff was, therefore, improperly obtained as it was not supported by the full suite of documents the law requires for a lawful transfer of leasehold property. The subsequent fraudulent subdivision by the 1<sup>st</sup> Defendant does not retroactively validate the Plaintiff's defective title.
616. This finding does not absolve the 1<sup>st</sup> Defendant of fraud in his subsequent dealings. It does, however, mean the Plaintiff's claim must be founded on its equitable rights under the decree and sale agreement, rather than on the strength of an indefeasible registered title obtained in 2009.
617. In light of the foregoing, the Court finds that the transfer instrument registered on 3<sup>rd</sup> March 2009 was ineffective to lawfully convey absolute title to the Plaintiff due to non-compliance with mandatory provisions of the Registration of Land Act, Cap. 300.

**Issue No. b). Whether the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants were passed a good title;**

618. Under this sub title, the Honourable Court shall examine the doctrine of innocent purchaser for value without notice which is well settled in Kenyan Law and commonwealth jurisprudence. The suit property was registered under the Registration of Land Act, Chapter 300 Laws of Kenya (now repealed). The Registration of Land Act was repealed by the Land Registration Act, 2012. Sections 27 and 28 of the Registration of Land Act, Chapter 300 Laws of Kenya (now repealed), provide as follows: -

“ 27. Subject to this Act-



- a. the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;
  - b. the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.
28. The rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –
- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - b. unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register:

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

619. The two sections have been reproduced under the provision of Sections 24 and 25 of the [Land Registration Act](#), No. 3 of 2012 as follows:

“24. Subject to this Act—

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

25.

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



- a. to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - b. to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

620. The provision of Section 26(1) of the [Land Registration Act](#), 2012 provides as follows: -

“26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

621. In the case of:- “Nairobi Civil Appeal No. E789 of 2023, Mas Construction Limited – Versus - Abdul Waheed Sheik & 6 others”, the Court of Appeal stated as follows:

“68. It is an indisputable fact that the appellant and the Abduls claim ownership and/or title to the same parcel of land. This Court in Presbyterian Foundation – Versus - Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment) stated as follows regarding a claim over the existence of two titles in respect of the same parcel land:

“The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title, starting with a “good root of title.” A good root of title and an unbroken chain of



ownership is required. To be a good root of title, a document must satisfy each of the following requirements:

- (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question;
- (b) it must contain a recognizable description of the property;
- (c) it must not contain anything that casts any doubt on the title.”

69. In the same vein, this Court in *Munyu Maina – Versus - Hiram Gathiha Maina* [2013] eKLR held that: We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances, including any and all interests which need not be noted on the register.”

622. In the case of:- “Supreme Court Petition No. E033 of 2023, *Harcharan Singh Sehmi & another – Versus - Tarabana Co. Limited & 5 others*”, the court stated as follows:

(ii) Whether the doctrine of Innocent Purchaser for value Without Notice protects a purchaser of an illegally/irregularly allocated title over public land

(66) This issue persistently continues to rear its head whenever the legality of a subsequent title over land following a purchase is called into question. The main bone of contention, has always revolved around the concept of “indefeasibility of title” where holders of such titles under challenge, not only erect the latter as a shield, but also tend to fall back upon the doctrine of innocent purchaser for value without notice. This Court has since pronounced itself authoritatively and with finality on the question of indefeasibility of title in circumstances where a title is called into question regarding its legality. Holders of impugned titles, especially those acquired before the promulgation of the 2010 Constitution always call into service the provisions of Section 23 of the Registration of Titles Act Cap 281 (now repealed).

(67) Pursuant to Section 23 of the repealed Act, a certificate of title was held as conclusive evidence of proprietorship. It read:

“23.

- (1) The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”



(68) Upon repeal (of the Registration of Titles Act), the effects of registration are now governed by Section 26 of the [Land Registration Act](#) No. 3 of 2012 which provides; SUBPARA “26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”

This draws from Article 40 that the right to property does not extend to any “property that has been found to have been unlawfully acquired.” See Article 40(1) and (6) of [the Constitution](#).

- (69) It is important to take note of the critical shift in terminology from the repealed Act to the current statute. Under the Registration of Titles Act, a certificate of title was to be regarded by courts as conclusive evidence that the person named therein was the absolute and indefeasible owner of the land. However, under current legislation, a certificate of title is to be regarded by courts as prima facie evidence that the person named therein is the absolute and indefeasible owner of the land. It is therefore no longer possible for a title holder to erect the certificate of title as a barrier to an inquiry into its legality or otherwise.
- (70) In *Dina Management Limited – Versus - County Government of Mombasa & 5 Others* (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR), this Court held that to determine whether a party is a bona fide purchaser for value, a court must first go to the root of the title, we stated:

“94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment, as this is the bone of contention in this matter.”

623. Before analyzing whether or not the Defendants save for the 1<sup>st</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants were innocent purchasers for value without notice, this Honourable has the obligation to examine whether the sub - division that gave rise to the said titles was regular, valid and legal. Under paragraph 13 of the Re - Amended Plaintiff, the Plaintiff had pleaded fraud and gave graphic and solid particulars that the 1<sup>st</sup> and 7<sup>th</sup> Defendants had purported to issue alleged Certificates of Lease in respect of the alleged eight (8) Sub - divisions of the property comprised in Kwale/Diani Beach Block/203 namely Kwale/Diani Beach Blocks/1536, 1537, 1538, 1539, 1540, 1541, 1542 and 1543 despite the 1<sup>st</sup> Defendant having disposed of his right, title and interest in Kwale/Diani Beach Block/203 to the Plaintiff herein who was



duly registered as proprietor on 3<sup>rd</sup> March 2009 as per the records founded in the Presentation Book kept by the Land Registry.

624. Given that the claim was one of fraud, a fundamental principle is that the same must be specifically pleaded and proved. This was aptly expressed in “Vijay Morjaria (Supra)”, where Tunoi, JA (as he then was) stated as follows:-

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course, be set out and then it should be stated that these acts were done fraudulently.”

625. Indeed fraud cannot be inferred from the facts. In the case of:- “Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) – Versus – Stephen Njoroge Macharia [2020] eKLR”, the Court of Appeal observed as follows: -

“In this instant case, the Appellants needed to not only plead and particularize the fraud, but also lay a basis by way of credible evidence upon which the Court would make a finding that indeed there was fraud...”

626. In this instant case, the Certificate of Leases/Titles the Defendants purport to hold for Plots Nos. 1536–1543 derive from the sub - division of the mother title, Plot No. 203, which was effected by the 1<sup>st</sup> and 7<sup>th</sup> Defendants in the year 2011. Fraud, in this context, means actual fraud or intentional dishonesty. It involves conduct meant to deceive, deprive a rightful owner of their property, or bypass legal safeguards for personal gain. The Honourable Court, wholeheartedly concur with the Plaintiff to the effect that the particulars of fraud pleaded by it have been adequately substantiated on a balance of probabilities, to a standard higher than mere negligence but not necessarily beyond reasonable doubt.

627. In saying so, the Honourable Court hold as follows. Firstly, the alleged sub - division was done after the Plaintiff had also allegedly attained ownership of the suit property and according to the Plaintiff it was not notified of the same. Secondly, the Honourable Court wonders where the 1<sup>st</sup> Defendant obtained the original Certificate of Title for Plot No. 203 having already caused it to be transferred to the Plaintiff. Thirdly, at the time of the sub - division, there were extant court orders and cautions registered against the title from HCCC No. 211 of 2006 and HCCC No. 315 of 2008. At the time of the sub - division, there were extant court orders and cautions registered against the title from HCCC No. 211 of 2006 and HCCC No. 315 of 2008.

628. Fourthly, for a lawful sub - division, the original title (in the Plaintiff’s possession) must be surrendered for cancellation. This never happened. The 7<sup>th</sup> Defendant proceeded to close the register and open new ones without this fundamental document. DW - 7 further testified that the original green card for Plot 203 had been tampered with. The entry showing the Plaintiff’s ownership (Entry No. 9) appeared to have been altered or a page removed to facilitate the fraudulent closure of the title. This is a hallmark of institutional fraud.

629. Fifthly, it is evident that the Land Registry had no jurisdiction to deal on matters of Sub – divisions of Leases. This was a domain of the Director of Land Administration based at Nairobi. The 1<sup>st</sup> Defendant could not have single-handedly closed a registered title and obtained new lease documents. This required the active complicity and execution of duties by the Land Registry. The 7<sup>th</sup> Defendant’s officers (including DW - 8, Mr. Marwanga, who signed the new green cards) not only acted ultra vires but also failed in their statutory duty to verify the propriety of the sub - division, ignored court orders, and bypassed mandatory consent procedures. This was not mere oversight; it was collusive action that enabled the fraud. Mr. Marwanga ought who ought to have guided this process professionally being



an experienced Land Registrar. On the contrary, he deliberately breached all the ethics and etiquette, Core Values of at public office vested by Law under the provisions of Article 232 ( 1 ), (2) & (3) of *the Constitution* of Kenya, 2010 and Sections 7, 12, 13 and 14 of the *Land registration Act*, 2012. Resultantly, he ought to be held personally liable for acts of malfeasance and not acting in good faith to say the least. He cannot escape a severe penalty in order for it to serve as a pragmatic lessons to other officers who may be harbouring such trends all intended for unlawful self enrichment.

630. According to this Honourable Court the 1<sup>st</sup> Defendant’s entire course of conduct was dishonest. He sold the property to the Plaintiff in the years 2007/2009 and received substantial payment of the purchase price. He later pretended the sale was casually “cancelled” while simultaneously executing a secret sub – division into eight (8) parcels. Subsequently, he then sold the fraudulent sub - divisions to some of the Defendants – who were multiple innocent parties, knowing he had already divested himself of the property. By and large, I found the 1<sup>st</sup> Defendant’s testimony in court to be evasive and contradictory, further evidencing a guilty mind (*mala fides*).
631. Be that as it may, the Honourable Court holds that the purported sub - division of Plot No. 203 into eight (8) plots was not a mere irregularity; it was a deliberate, coordinated fraud. The 1<sup>st</sup> Defendant provided the dishonest intent and initiative, while the 7<sup>th</sup> Defendant, through its officers, provided the unlawful official execution necessary to give the scheme a façade of legitimacy.
632. This Court has found that sub - division to be fraudulent, unlawful, and undertaken in violation of existing court orders. It was done without the consent of the registered proprietor (the Plaintiff), as per the 2009 register and the Presentation Book of 3<sup>rd</sup> March, 2009) and without following lawful procedure.
633. I have considered the proceeding and the evidence on record the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants claim to be innocent purchasers for value without notice. The definition of bona fide purchaser for value without notice is:-
- “ that buyer who has paid a stated price for the property without knowledge of existing or prior claims or prior equitable interest.”
634. Bona fide is a Latin word meaning good faith, without fraud, sincere, genuine. See (Black’s Law Dictionary 9<sup>th</sup> Edn Page 199) A bona fide purchaser is a buyer who acquires a commodity without constructive or actual notice of any defects or infirmities against the seller’s title. See (page 1355 Black’s Law Dictionary 9<sup>th</sup> Edn.
635. It is trite law that a person who relies on the defence of bona fide purchaser for value without notice has the burden to prove that he or she acted in good faith. The purchaser must have given due consideration and purchased the land without notice of the fraud. Such notice covers both actual and constructive notice of fraud. In the case of “Jones – Versus - Smith (1841) 1 Hare 43”, the Chancery Court held;
- “ a purchaser has constructive notice of fraud if he had actual notice, that there was some encumbrance and a proper inquiry would have revealed what it was (but if) it abstained either deliberately, carelessly from making those inquiries which a prudent purchaser would have made...then the defence cannot be available to him or her.”



636. This position is supported further in the case of:- “Yakobo M. N Senkungu & Others – Versus - Cresencio Mukasa Civil Appeal No 17 of 2014”. The court reaffirmed the law regarding the importance of “due diligence” in land transactions holding that:-

“.....Lands are not vegetables which are bought from unknown sellers. Lands are very valuable properties and buyers are expected to make thorough investigations not only on land but also of the owner before the purchase.”

637. As already alluded to by the Learned Counsel for the Plaintiff while submitting, the provision of Section 109 of the Evidence Act Cap 80 is clear that:-

“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

638. The well-known mantra “he who asserts must prove.” Was well pointed out by the Court of Appeal in the case of:- “Jennifer Nyambura Kamau – Versus - Humphrey Mbaka Nandi (2013) eKLR” as follows:-

“We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that “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.” Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side.”

639. Fundamentally, this is the core reason the defense by the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10 & 11<sup>th</sup> Defendants outrightly fails. “Notice” includes what a purchaser ought reasonably to have discovered through diligent inquiry (constructive notice). A constructive notice via the Land Register entails that a proper investigation of the history of Kwale/Diani Beach Block/203 (the mother title) was a mandatory component of due diligence before buying a purported sub - division from it. Such an inquiry would have inevitably revealed:

- a. The alleged Plaintiff's registration and reflected from the contents of the Presentation Book and the Certificate of Official searches as proprietor on 3<sup>rd</sup> March 2009.
- b. Multiple cautions, prohibitory orders, and court injunctions orders registered against the title from the year 2008 - 2009 (HCCC 211/2006, HCCC 315/2008).
- c. The suspicious timeline: the mother title being closed and sub - divided in the year 2011, just two years after a major transfer. This alone was a red flag demanding explanation.

640. Further, the PW – 1 and 2<sup>nd</sup> Defendant (DW - 2) admission that he was did not see the Lease and the Commissioner of Lands' consent or the root lease supporting his vendor's title. The witness testified having heard of a Lease for the first time here in Court. He stated he “relied on his Advocate”, which does not absolve a purchaser of the duty to ensure the vendor's capacity to sell. The 5<sup>th</sup> Defendant (DW - 5) gave crucial testimony that she never conducted an official search on the property before purchasing.



She left the entire transaction to her husband. This is a direct admission of failure to exercise due diligence.

641. On the case of the 9<sup>th</sup> to 11<sup>th</sup> Defendants, while they claimed to have conducted a search that showed a clean title, this search was on a register that had already been fraudulently manipulated by the 1<sup>st</sup> and 7<sup>th</sup> Defendants. Their search did not extend to the historical records of the mother title, which was the necessary inquiry. Their witness held that all these transactions were being undertaken by his father who was now deceased and their Advocate, Mr. Balala.
642. The prior interest of the Plaintiff was discoverable. The Defendants' failure to discover it through a competent investigation means they are fixed with constructive notice. They cannot claim the protection of being "without notice." The principle protecting a bona fide purchaser presupposes a valid instrument from the Vendor. Here, the vendors (the 1<sup>st</sup> Defendant and his successors) were selling titles derived from a fraudulent and void subdivision.
643. A purchaser cannot be "in good faith" when buying into a transaction chain that is manifestly suspicious (recent subdivision of a leasehold property without clear provenance). Good faith requires a degree of vigilance, which was absent. The court accepts that these Defendants likely paid some money for the transaction and as was seen from the site visit conducted by Court most of them had taken physical possessions and undertaken extensive development on the suit property. However, payment of value is only one element. Without satisfying the "without notice" and "good faith" elements, payment alone confers no protective equity.
644. Thus, I discern that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants are not bona fide purchasers for value without notice. They are, at best, negligent purchasers who failed to conduct the due diligence required by law when purchasing landed property. They are, more accurately, victims of the fraud perpetrated by the 1<sup>st</sup> and 7<sup>th</sup> Defendants. Their legal remedy lies elsewhere vide a personal claim for restitution of their purchase price and undertaken development on the suit land against the 1<sup>st</sup> Defendant (and potentially the 7<sup>th</sup> Defendant), not in a proprietary claim to the land against the rightful owner.
645. Based on the evidence and applicable principles of property law, these Defendants were not passed a good title to the sub - divided portions of Kwale/Diani Beach Block/203. Consequently, their titles are liable to be cancelled, and certainly they cannot resist the Plaintiff's claim on this basis.

**Issue No. c). Whether the parties are entitled to any reliefs, if any, should be granted;**

646. Under this sub – heading, the Honourable Court has to deciphered the validity and indefeasibility of the competition titles under the *Land Registration Act*, 2012. The central factual question to resolve is whether the Plaintiff's or Defendants' titles and whether either party has satisfied the legal standards for "first in time" title and/or bona fide purchase.
647. The title cannot pass where consideration was incomplete so regardless of whether or not the contract might have been frustrated by the actions of the 1<sup>st</sup> Defendant, there was no agreement in the first place as the said agreement between the 1<sup>st</sup> Defendant and the Plaintiff defied statutory provisions under the provision of Section 3 of the Law of Contracts Act and Section 38 of the *Land Act*. Mr. Stephen Oddiaga's very valuable testimony confirms the outstanding balance of the purchase price was never released, meaning the vendor was unpaid. Pending litigation and injunctive orders made completion impossible. While the Plaintiff cannot claim ownership, the Court may protect its financial interests by ensuring escrow funds are not unfairly lost. The Plaintiff is entitled to all that monies being its own as they endeavor to recover the finances already advanced to the 1<sup>st</sup> Defendant. Perhaps they may re –



consider entering into a fresh contractual agreement with the 1<sup>st</sup> Defendant over the suit land which I highly doubt it will possibly fathom given the current prevailing circumstances whatsoever.

648. Indeed, the Defendants' chain of title appears to suffer from procedural irregularities and lack of a lawful root—there were gaps in notices, the transferor's identity was questionable, and ownership by the Plaintiff was not inquired into. Likewise, the Defendants may re – consider engaging the 1<sup>st</sup> Defendant for a new contractual agreement over the suit land or merely recover their expended expenses from him or the 7<sup>th</sup> Defendant for putting them into this untoward mess.
649. The Land Registrar failed to adduce evidence of having conducted the statutory investigations, made appropriate entries in the land register, or consulted the records prior to approving the subsequent transfer, thereby abdicating the duties imposed by the provision of Sections 7, 10, 14, and 80 of the *Land Registration Act*. There is no evidence that the Land Registrar notified the Plaintiff nor the Defendants of the impending adverse allocation, and no record of the cancellation of the 1<sup>st</sup> Defendant's or the Plaintiff's title before the issuance of the competing title. These omissions amount to administrative failure and, in some respects, negligence as envisioned by the law. Pursuant to Section 80(1) LRA, the Court has jurisdiction to order rectification of the register by directing cancellation of such entries. This rectification shall be effected within 30 days of the date of this Judgment.
650. In summary and conclusion, the only available legal remedy in the prevailing circumstances, is for the land to revert back to the 1<sup>st</sup> Defendant, the rectification of the land register, the cancellation of all the fraudulent eight sub - divisions and the costs of this suit to be bore by each party individually. I reiterate that the parties in this suit can pursue other means of getting their compensations without prejudice.

#### **Issue No. d). Who will bear the costs of the Plaintiff**

651. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
652. In “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus -Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;
- “It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
653. In the present case, each party shall bear their own costs.



## I. Conclusion and Disposition

654. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience of the Plaintiff's and the Defendants' claims. Thus, for avoidance of doubt, the Honourable Court proceeds to make the following specific orders:-
- a. That Judgment be and is hereby entered in favour of the 1<sup>st</sup> Defendant in respect to the Amended Defence dated 12<sup>th</sup> September, 2013 and filed on 13<sup>th</sup> September, 2013 in its entirety with no orders as to costs.
  - b. That a declaration do and is hereby made that the 1<sup>st</sup> Defendant (Hamadi Juma Mwakibibo) remains the lawful registered proprietor of Kwale/Diani Beach Block/203, since the sale agreement was not completed and consideration was not fully paid.
  - c. That an order do and is hereby issued directing the Kwale Land Registrar to forthwith cancel any entries purporting to transfer the Suit Property to the Plaintiff or its nominees under the provision of Sections 79 ( 1 ) & ( 2 ) and 80 ( 1 ) & ( 2 ) of the Land registration Act, No. 3 of 2012 and to forthwith restore the register in the name of the 1<sup>st</sup> Defendant.
  - d. That pursuant to the provision of Sections 79 ( 1 ) & ( 2 ) and 80 (1) & ( 2 ) of the Land Registration Act, No. 3 of 2012, a mandatory injunction do and is hereby issued compelling the Land Registrar, Kwale to:
    - i. Cancel the entries in the register relating to the Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants;
    - ii. Reinstate the 1<sup>st</sup> Defendant as the sole registered proprietor of Kwale/Diani Beach Block/203;
    - iii. Issue a fresh certificate of title in the 1<sup>st</sup> Defendant's name Within 30 Days of the delivery of this Judgment.
  - e. That a declaration do and is hereby made that any certificates of lease issued to the Plaintiff or subsequent purchasers based on the incomplete transaction are null and void.
  - f. That an order of permanent injunction do and is hereby issued restraining the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants, their agents, or assigns from interfering with the 1<sup>st</sup> Defendant's quiet possession, occupation, and use of the Suit Property.
  - g. That the outstanding balance of a sum of Kenya Shillings Thirteen Million Five Hundred Thousand (Kshs. 13, 500, 000.00/= and the accrued interest which was deposited in the escrow bank account held in the names of Messers A.B Patel & Company Advocates and Messrs. Stephen Odiagga Advocates at the commercial Bank of India and never released, to be returned to the Plaintiff (or remain in escrow) to prevent unjust enrichment of the 1<sup>st</sup> Defendant
  - h. That the Plaintiff and the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10 and 11<sup>th</sup> Defendants to consider initiating other appropriate legal mechanisms and/or explore Alternative Dispute Resolutions (ADR/AJS) under the provision of Article 159 ( 2 ) ( c ) of the Constitution of Kenya, 2010 and Section 20 ( 1 ) & ( 2 ) of the Environment & Land Court Act, No. 19 of 2011 with the 1<sup>st</sup> Defendant for the re – fund of the monies already paid to the 1<sup>st</sup> Defendant and expenses incurred while undertaking any development onto the suit land.



- i. That the Honourable Court awards the Government being the Republic of Kenya exemplary aggravated damages emerging from acts Misfeasance in Public Office to the tune of a sum of Kenya Shillings Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000/=) to be paid personally by the former Land Registrar Kwale, one Mr. Evans Nyatigo Marwanga, Within the Next 30 Day of the delivery of this Judgement to the Mombasa Law Courts for the his acts of omission and commission of and acting in bad faith as a Public Officer in undertaking and causing the unlawful, wrongful and illegal the sub – division of all that parcel of land known as Land Reference Numbers Kwale/Diani beach Block/203 into eight (8) parcels known as Land Reference Numbers Kwale/Diani Beach Block/1536 to 1543 and further closing the title for sub - division.
- j. That each party shall bear their own costs of the suit.

It is so ordered accordingly

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 30<sup>TH</sup> DAY OF JANUARY 2026.**

.....

**HON. MR. JUSTICE L.L. NAIKUNI**  
**ENVIRONMENT AND LAND COURT**  
**AT MOMBASA**

Judgement delivered in the presence of: -

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. Mr. Sanjiv Khagram Advocate for the Plaintiff.
- c. Mr. Kounah Advocate for the 1<sup>st</sup> Defendant.
- d. Mr. P. C Onduso Advocate for the 2<sup>nd</sup> and 4<sup>th</sup> Defendants.
- e. No appearance for the 3<sup>rd</sup> , 4, 5<sup>th</sup> and 6<sup>th</sup> Defendants.
- f. Mr. Makuto Advocate for the 7<sup>th</sup> and 8<sup>th</sup> Defendants.
- g. M/s Ongeso Advocate holding brief for Mr. Karega Advocate for the 9<sup>th</sup>, 10<sup>th</sup> and 11<sup>th</sup> Defendants.

